JUDGMENT No. 677 / 94

**CATCHWORDS**

CUSTOMS - construction of ss. 269TAC and 269TG *Customs Act 1901* - whether Anti-Dumping Authority erred in ascertaining the "normal value" within the meaning of s269TAC of sodium cyanide exported to Australia from the Federal Republic of Germany - whether Authority failed to consider relevant information in making its recommendations.

*Administrative Decisions Judicial Review Act 1977*

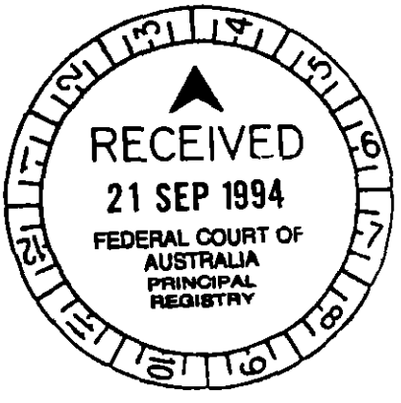
*Customs Act 1901: ss. 42, 269TAB, 269TAC, 269TG*

*Customs Tariff (Anti-Dumping) Act 1975, ss8*

ANTI-DUMPING AUTHORITY, MINISTER FOR SMALL BUSINESS AND CUSTOMS v DEGUSSA AG, DEGUSSA AUSTRALIA PTY LTD

VG 323 of 1993

**LOCKHART, SHEPPARD and OLNEY JJ**
Melbourne
16 September 1994.



IN THE FEDERAL COURT OF AUSTRALIA )
)
VICTORIAN DISTRICT REGISTRY ) No VG 323 of 1993
)
GENERAL DIVISION )

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: ANTI-DUMPING AUTHORITY
First Appellant

MINISTER FOR SMALL BUSINESS AND CUSTOMS
Second Appellant

AND: DEGUSSA AG
First Respondent

DEGUSSA AUSTRALIA PTY LTD
Second Respondent

COURT: Lockhart, Sheppard and Olney JJ.
PLACE: Melbourne
DATE: 16 September 1994

MINUTE OF ORDER

THE COURT ORDERS THAT:

1. The appeal be dismissed;

2. The appellant pay the respondents' costs of the appeal.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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REASONS FOR JUDGMENT

LOCKHART J.

This is an appeal from the judgment of a judge of this Court (Ryan J.) whereby his Honour set aside certain decisions of the Anti-Dumping Authority (the ADA) and the Minister for Small Business and Customs (the Minister). The decisions of the ADA were in the form of recommendations made by it to the Minister, to impose anti-dumping measures in respect of sodium cyanide exported to Australia from the Federal Republic of Germany. The Minister's decisions were to impose those measures.

The first respondent, Degussa AG, is the German supplier of sodium cyanide and the second respondent, Degussa Australia Pty Ltd, is the Australian importer of that substance. I shall refer to both respondents as Degussa as nothing turns on

their separate corporate identity for present purposes.

Application was made to the Court by Degussa under the *Administrative Decisions Judicial Review Act* 1977 (the *ADJR Act*) for orders of review of the decisions of the ADA and the Minister previously mentioned, which arose out of Report 40 of the ADA. Report 40 was related to the alleged dumping in Australia of sodium cyanide from Germany, Italy, Japan, the Republic of Korea, the United Kingdom and the United States of America.

The decisions challenged in this proceeding were not the first decisions connected with Report 40 challenged in the Court. The path leading to these decisions had been paved by earlier decisions to institute the relevant inquiry by the Australian Customs Service (the ACS) and to implement recommendations contained in Report 40. See *Enichem Anic v Anti-Dumping Authority*, (unreported, 9 April 1992) per Davies J.; *Enichem Anic v Anti-Dumping Authority* (1992) 39 FCR 458 (Full Court); *ICI Australia Operations Pty Limited v Anti-Dumping Authority* (1991) 104 ALR 474, per Gummow J.; *Du Pont (Australia) Limited v Comptroller-General of Customs* (1993) 30 ALD 829 per Heerey J.

It is necessary to refer to some of the history of the matter.

Following the lodgement in 1990 of applications by three Australian producers of sodium cyanide for the publication of dumping duty notices, the ACS commenced investigations, in the course of which an officer of the ACS, Mr Sundstrom, produced a "normal value report". That report adopted as the domestic German price for sodium cyanide, the price at which Degussa had sold 10,000 tonnes of the substance to Bayer AG (Bayer) on 4 April 1990.

On 22 January 1991, Degussa made a further sale to Bayer at a new and reduced price ("the new German price"). That price reduction had been foreshadowed in an internal memorandum of Degussa, dated 18 January 1991, the translation from German to English of which is in these terms:

> *"As you are aware we have been reviewing our long standing domestic and European pricing strategy on sodium cyanide.*
>
> *The review is prompted by the recent Australian anti-dumping case but there are also other compelling reasons:*
>
> - *significant increases in world capacity and the likelihood that our major competitors will turn their attention to our domestic and European markets.*
>
> - *the possibility that the Australian action will become a precedent in other gold producing markets and Degussa AG will again be disadvantaged.*
>
> *No change to our existing policy will apply to NaCN sales in liquid form or to sales of solid to the electroplating industry. Our liquid pricing is already determined by strong competitive pressures*

*and our position in the electroplating industry is not at risk due to the very small quantities in the importance of technical and after sales service.*

*We have concluded that it is in sales to major chemical industry customers, actual or potential, that we are most at risk. They are the natural targets for import competition and we have decided to realign prices to more closely reflect the levels applying in sales on the world market to the gold mining industry.*

*The threshold level for this realignment has been set for the moment at 1000 tonnes p.a. and will be kept under review as the strategy of importers emerges. At present BAYER is our only existing customer who will qualify for price reductions, but any potential customer meeting the threshold can be approached on the same basis.*

*Details of the new price level for BAYER will be communicated to you within next few days."*

Late in January 1991, Mr John Cosgrave, an Australian consultant to Degussa, informed the ACS of the sale to Bayer at the new German price. On 30 January 1991, Mr Kevin Reilly of the ACS, informed Mr Cosgrave that account could not be taken of the new German price in the preliminary report of the ACS, as there was insufficient time to verify the information provided by Degussa. Mr Reilly informed Mr Cosgrave that, if necessary, verification would take place as soon as possible after the ACS inquiry.

On 7 February 1991, the ACS published its report and made preliminary findings of dumping (Report number 91/2). It

recommended the taking of securities under s. 42 of the *Customs Act* 1901 (the *Customs Act*). The learned primary Judge set out relevant passages from the report, which I do not find necessary to repeat.

During February 1991, Mr Cosgrave spoke to officers of the ACS on a number of occasions to establish when the ACS would verify the new German prices of sodium cyanide. On 22 February 1991 the dumping investigation was referred by the ACS to the ADA and Mr Cosgrove was told that verification of the normal value for Degussa's product would occur during the period leading up to the final findings by the ADA.

During March 1991, officers of the ACS gave assurances to Mr Cosgrave that verification of the normal value for its product would occur by May or June 1991. At a meeting on 30 May 1991 between representatives of Degussa and a Mr Evans of ADA, Mr Cosgrave asked Mr Evans about the progress of the review of the normal German value. Mr Evans indicated that events occurring after the public announcement of the complaint by the three Australian producers of sodium cyanide might not be relevant to deliberations of the ADA.

At a further meeting on 4 June 1991, Mr Fraser of the ADA, similarly indicated that it might be argued that any reduction in prices in overseas markets, occurring after the announcement of an anti-dumping inquiry, should not be taken

into account by the ADA in its assessment of normal values.

This prompted Mr Cosgrave to write a letter to Mr Fraser of the ADA, on 7 June 1991, admitting that the German domestic market was not "suitable" for comparison with the Australian market, because of significant differences in infrastructure, suppliers/purchaser relationship, end-use and volume. The submission was made in the letter that normal value should be ascertained by reference to s. 269TAC (2)(c) or (d) of the *Customs Act*, not s. 269TAC (1), and should not ignore "the latest available evidence" of a change in the normal value.

On 18 June 1991 Mr Andrew Purtell, an officer of the ADA, asserted, over Mr Cosgrave's objections, that he (Purtell) had been instructed to base all normal value calculations on sales occurring before the public announcement of the dumping complaint.

On 18 June 1991 Degussa delivered a further quantity of sodium cyanide to Bayer at the same price that it had been sold on 22 January 1991; and on 20 June 1991 a further quantity was delivered by Degussa to Bayer at that same price.

On 21 June 1991 there was a meeting between Mr Cosgrave and others from Degussa and Mr Fraser and others of the ADA. Mr Cosgrave claimed that the ADA should assess normal values by using prices reviewed by Degussa in early 1991. Mr Fraser

would neither confirm nor deny that the ADA was restricting its investigation of normal values to the period before the public announcement of the dumping complaint, or that it was prepared to take into account recent sales.

Mr Cosgrave asked if the ADA had any misgivings about the reduction in price to Bayer. Mr Fraser replied that the price change might have been an attempt to circumvent Australian anti-dumping legislation and that he "did not get excited about large overseas chemical companies attempting to destroy Australian industry." Degussa strongly protested that this was not the situation and outlined a range of factors that led to the price change. Mr Evans and other officers of the ADA replied that "some people might argue" that the sales to Bayer at the new German price were not in the ordinary course of trade.

On 24 June 1991, Degussa wrote to the Minister, submitting that there were two fundamental issues to which it wished to draw the Minister's attention. First, that the Minister could not determine normal value based on domestic sales in Germany because there were no sales in that market which were suitable for use in determining such a value. Secondly, even if the Minister did proceed to ascertain a normal value based on domestic sales in Germany, both the GATT Anti-Dumping Code and the Anti-Dumping Legislation compelled the Minister to proceed on the most recent evidence available

of prices in the German market. The letter stated that such evidence had been available to the ACS since 24 January 1991 and remained unchallenged.

Also, on 24 June 1991 the ADA completed its inquiries and presented its report to the Minister (Report 40). The primary Judge set out, or summarised, only those parts of Report 40, which in his opinion, bore directly on the present application.

As Report 40 is an important document in this case, I shall set out the parts of it which bear directly on the present issues:

> *"4.2 The Sodium Cyanide Market*
>
> *In 1990, the Australian market for sodium cyanide was about 78000 tonnes. Over 70000 tonnes was used in the gold mining industry, with the balance of 8000 tonnes consumed by the pesticides, metal pickling and electroplating industries in Australia.*
>
> *Australia accounts for about 20 per cent of the world usage of sodium cyanide.*
>
> *With improved exploration methods and the introduction of new gold mining techniques - enabling the development of large open-cut gold mine projects with short pay-back times - global and Australian demand for sodium cyanide grew rapidly in the early 1980s. As a result, global supply of sodium cyanide was unable to meet demand during some years in the mid 1980s.*
>
> *Some parties to the inquiry expressed the view that since AGR began operation a number of overseas companies have expanded or are about to expand production capacity. As a result, the world supply of sodium cyanide may soon exceed demand.*

*Until late 1988, all sodium cyanide used in Australia was that imported in a solid form.*

*Sodium cyanide is now supplied to gold mines as a liquid by the three Australian producers and as a solid by imports and by two Australian producers, ICI and Minproc.*

*Because of the high freight costs and hazards associated with the transport of sodium cyanide in liquid form, some mines only purchase solid sodium cyanide. Thus, AGR is not able economically to supply some gold mines in Western Australia, nor any gold mines in other States and Territories, with liquid sodium cyanide.*

*With the establishment of ICI and Minproc in late 1990 and an increase in AGR's capacity, Australian producers now have the capacity to supply about 80 percent of the Australian market.*

*Sodium cyanide is generally sold through a tendering process. A gold miner calls for bids for the supply of a quantity of sodium cyanide for a specific period. The miner then select one or more suppliers to fulfil its sodium cyanide requirements.*

***4.3 Like Goods***

*In the context of a dumping inquiry, section 269T(1) of the Customs Act defines 'like goods' as follows:*

> *like goods, in relation to goods under consideration, means goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.*

*During its inquiry, Customs considered whether the liquid sodium cyanide manufactured by AGR, ICI and Minproc should be assessed as like goods to the solid form exported to Australia.*

*In its preliminary finding report, Customs stated, inter alia, that*

> *for the purposes of this inquiry Customs considers the liquid sodium cyanide manufactured by AGR to be like goods to the sodium cyanide exported from the seven nominated countries.*
>
> *The Authority has given further consideration to this issue. It notes that solid sodium cyanide is converted into a liquid solution before it is used to recover gold from gold bearing ores. Therefore the products possess similar characteristics during usage.*
>
> *The Authority notes that the imported solid sodium cyanide and locally produced solid sodium cyanide are identical.*
>
> *Accordingly, the Authority is satisfied that imported sodium cyanide and the sodium cyanide manufactured in Australia in both solid and liquid form are 'like goods'."*

In section 5 of Report 40, the ADA set out the facts and circumstances under the heading "Determination of Normal Values", and it stated the question to be determined, and referred to the relevant facts and sections of the *Customs Act*.

> ***"5.2 Determination of Normal Values***
>
> *During the Authority's inquiry, many importers and exporters expressed the view that normal values should take account of the changes in price in overseas markets since the inquiry was initiated by Customs on 10 October 1990.*
>
> *The Authority notes that normal values are assessed for two purposes and that different issues apply in each case.*
>
> *The first purpose of normal values is to provide a comparison with export prices so that a determination can be made on whether goods have been dumped.*
>
> *A key question is the time period from which to*

*select normal values and export prices.*

*The Authority notes that the initiation of an inquiry may influence the normal value or export price (or both). So a comparison of these prices after the initiation of an inquiry may give a distorted answer.*

*The time period would therefore normally be before the initiation of the inquiry.*

*It is also important that the question of dumping is examined in the same period that the applicant claimed to suffer injury. As this is normally immediately before the lodgement of the application, a time period close to this event is clearly preferable.*

*The second purpose of normal values can be to act as a basis for anti-dumping measures.*

*If dumping is established, and this dumping is found to have caused material injury, then the Minister may decide to publish a dumping duty notice.*

*This notice may specify that where the export price of the goods is below the normal value then a duty equivalent to the lower of the normal value or the non-injurious free-on-board (NIFOB) must be paid.*

*Where the price of the goods is subject to large variations over a short period of time (and goods produced by the chemicals industry typically behave in this manner) then a normal value relating to a period some nine to ten months before the Minister signs a notice may bear little relationship to current prices.*

*In the present case, the Authority is concerned that normal values may indeed have been influenced by the initiation of the inquiry. The Australian market is a significant proportion of the global sodium cyanide market, and developments in Australia could reasonably be expected to have some influence in other markets. In support of this view, the Authority was provided with information that suggested that domestic prices in some overseas markets were being reviewed, in part, as a result of the dumping inquiry.*

*The Authority has therefore confined its*

*examination of normal values to the period before the initiation of the inquiry by Customs."*

The view is expressed in para 5.3 of Report 40 that by virtue of s. 269 TAC(1) of the *Customs Act*:

*"... subject to certain conditions, the normal value is the price paid for goods in the domestic market of the country of export.*

*Adjustments may need to be made to a normal value to ensure that it is comparable to the export price. These adjustments, called 'due allowances', can, for example, be made for differences in the terms and conditions of sale, in technical specification, and in taxation. Adjustments to normal values are made under subsection 269TAC(8) and (9) of the Act."*

In para 5.4. the ADA indicated its approach to the assessment of normal values in these terms:

*"Except in the case of the USA, sodium cyanide is not sold in domestic markets of the countries under inquiry for use in gold extraction. In these countries, sodium cyanide is mainly used in the chemicals industry and electroplating.*

*Some parties suggested that such sales are not relevant for the purposes of subsection 269TAC(1) and that other approaches to assessing normal values should be used.*

*The Authority notes that subsection 269TAC(1) does not include a test concerning differences in the domestic and export marketing of the product. Rather the tests focus on whether sales are in the ordinary course of trade and*

*at arms length.*

*Where the terms and circumstances of domestic and export sales differ and prices are affected, subsection 269TAC(8) requires adjustments to be made to account for these differences.*

*Therefore, where the Authority is satisfied that domestic sales meet the tests imposed in subsection 269TAC(1), it has used this subsection together with adjustments under subsection 269TAC(8) to assess normal values.*

*Sodium cyanide is exported to Australia from the countries under inquiry by Degussa AG (Germany), Enimont Anic SRL (Italy), Tong Suh Petrochemicals Corp. Ltd. (Korea), Mitsui & Co (Japan), ICI C&P (UK) and E.I. Du Pont De Nemours & Co (Inc) USA.*

*Customs conducted inquiries at the premises of each exporter to verify information contained in submissions. Customs considered all the normal values should be assessed under subsection 269TAC(1) - with adjustments, where appropriate, made under subsection 269TAC(8).*

*The Authority received further submissions from the exporters. It agrees with Customs' determination that for all the countries under inquiry, subsection 269TAC(1) was appropriate to assess normal values with the relevant adjustments made to domestic selling prices under subsection 269TAC(8) to enable comparison with export prices.*

*The Authority made the following adjustments to normal values using subsection 269TAC(8):*

*Germany: differences in freight, delivery charges, packing, credit terms; and additional costs incurred in making domestic sales in Germany."*

The report said that, amongst other things, the purchases by Degussa could be treated as arms length transactions and that accordingly, invoice prices could be used to assess export prices under s. 269TAB(1)(a) of the Customs Act.

*"5.7 Dumping Margins*

*A dumping margin measures how far the export price lies below the normal value, expressed as a value or as a percentage of the normal value. Thus if goods whose normal value is $10 are exported at $8, the dumping margin is $2 or 20 per cent. When the export price is equal to or higher than the normal value, there is no dumping and hence no dumping margin.*

*The Authority found dumping margins for all countries under review. Dumping margins established by the Authority are listed below:*

| | |
|---|---|
| *Germany* | *25 - 34 per cent* |
| *Italy* | *34 - 54 per cent* |
| *Korea* | *20 - 34 per cent* |
| *Japan* | *26 - 29 per cent* |
| *UK* | *25 per cent* |
| *USA* | *0 - 2 per cent* |

*The Authority compared normal values and export prices for more shipments than Customs. For the USA, goods were only found to be dumped during one month in 1990."*

The ADA then considered whether dumped imports of sodium cyanide were causing or threatening material injury to the Australian industry. It examined various indicators, including levels of sales by local producers compared with imports, market size and market share and concluded at 6.3.4:

*"The Authority examined AGR's market growth by quarter since the commencement of operations in November 1988 to the end of 1990. It notes that AGR's market share grew steadily from 3 per cent to nearly 20 per cent. Sodium cyanide produced in Australia by ICI and Minproc held about 4 per cent of the market in 1990 as a whole.*

*In 1989 imports from all sources held 88 per cent of the Australian market. In 1990, the market share of imports dropped to 76 per cent.*

*Imports from the countries under inquiry held about 80 per cent of the market in 1989. In 1990, their market share fell to about 72 per cent.*

*Confidential Attachment 7 sets out the details of market supplies."*

Later in its Report the ADA expressed the following conclusions on the question of material injury in these terms (para 6.7):

*"The Authority notes that:*

- *Sales by AGR have grown steadily since it commenced production;*
- *AGR's share of the Australian market grew by 17 percentage points from 1989 to 1990;*
- *AGR's prices were depressed and suppressed and were undercut by imports in 1990; and*
- *AGR suffered a fall in profits and profitability in 1990.*

*The Authority notes that prices in 1988 and 1989 were unusually high both in Australia and internationally and that the industry was profitable during that time.*

*While prices were lower in 1990, (again both in Australia and internationally) the industry did manage to increase sales and remain profitable, albeit less so.*

*The Authority finds it difficult to conclude that the industry suffered material injury in 1990."*

In paragraph 7.1 and 7.2 the ADA stated:

> *"7.1 Introduction*
>
> *Australia's anti-dumping legislation does not differentiate between the tests to be applied in determining the presence of material injury on the one hand, and on the threat of material injury on the other hand - either in terms of the type of issues to be addressed or in terms of the degree of proof or level of confidence required.*
>
> *Section 269TAE sets out a number of factors which 'the Minister may, without limiting the generality of [the] section have regard to' when considering whether an Australian industry is threatened with material injury.*
>
> *This section specifies that the 'likely' change in or effect on these factors may be examined.*
>
> *In assessing threat to an Australian industry, the Authority therefore examines whether material injury will be caused by dumped imports given the likely trends in relevant factors.*
>
> *7.2 The Authority's Assessment*
>
> *As mentioned earlier, the Australian sodium cyanide industry has expanded since the inquiry began, with both ICI and Minproc starting to supply the domestic and export markets. The industry now has the capacity to supply a significant portion of the Australian market (around 80 per cent).*
>
> *In examining threat [sic], the Authority has considered the domestic sodium cyanide industry as composed of all three companies.*
>
> *The Authority has assessed the implications of the continued presence of dumped imports for the performance of the industry in the likely future Australian sodium cyanide market.*
>
> *Until early 1991, a number of factors restricted the ability of local producers to supply some segments of the domestic market. For example, it was necessary to install liquid receiving facilities at mine sites before*

*miners could purchase sodium cyanide in liquid form; and both ICI and Minproc experienced commissioning difficulties. These restrictions have now been overcome and the local industry is capable of supplying any Australian mine with sodium cyanide.*

*As the Australian industry has the capacity to supply approximately 80 per cent of the market, it might be expected that the market share of imports would decline in the near future from the 76 per cent held in 1990.*

*Long term estimates, by the industry, of the Australian sodium cyanide market suggest that the market size will continue to fall, consistent with lower gold production. The amount of the gap between the size of the sodium cyanide market and the production capacity of the local industry may therefore reduce in the longer term.*

*Competition for sales is therefore likely to increase in intensity.*

*The Authority found that dumping margins for the countries under inquiry ranged from zero per cent to 54 per cent.*

*Du Pont is the largest exporter of sodium cyanide to Australia.*

*The prices and market share of sodium cyanide imported from Du Pont have been stable since 1988. A dumping margin of 2 per cent was found to have applied during one month in 1990. However, there is no evidence that dumping by Du Pont will occur again.*

*Further Du Pont has assured the Authority that its future exports will not be at dumped prices.*

*While imports from other sources were individually smaller, the Authority notes that collectively they held a large part of the market in 1990. ...*

*The Authority notes that the dumping margins assessed for imports from these sources are significant. The Authority also notes that the prices of the dumped imports from these sources undercut industry prices in 1990 and that the industry's prices were suppressed and depressed*

*in 1990.*

*The Authority is aware that the price of sodium cyanide in some overseas markets has fallen and that dumping margins may now be lower.*

*However, as noted earlier, the Authority is concerned that recent reductions in normal values in some overseas markets may reflect the fact that an anti-dumping inquiry was in process in Australia. The Authority is therefore concerned that in the absence of anti-dumping action significant dumping margins may continue or recur.*

*The Authority considers that imports with significant dumping margins could be expected to have a major influence on the future performance of the Australian industry.*

*This influence is most likely to be apparent in the Australian prices of sodium cyanide.*

*If dumped imports from these sources continue to depress and suppress prices, as occurred in 1990, then it is likely that the Australian industry will record substantial losses.*

*The Authority is thus satisfied that there is a threat of material injury from dumped imports of sodium cyanide.*

*The Authority will therefore recommend to the Minister that anti-dumping action be taken against exporters of sodium cyanide from all the countries under inquiry, with the exception of the USA."*

As the primary Judge noted, in relation to non-injurious free-on-board prices (NIFOB's), the ADA indicated its general approach in these terms at para 8.1 of its Report:

*"As anti-dumping duties are based on free-on-board (FOB) prices from the country of export, a non-injurious free-on-board (NIFOB) price is calculated for each country of export. The usual method is first to determine an 'unsuppressed selling price' (USP) for the*

> *goods in Australia - i.e. an estimate of what the price of the goods would be in the absence of dumping - and then to work back to a FOB price by deducting all relevant costs which would be incurred by an importer.*
>
> *To determine an USP, the Authority's first preference is to look to the market place for guidance. Initially, the Authority will look for prices of the locally produced product at a time when the market was not affected by dumping. If this avenue cannot be used, the Authority will instead look at the Australian industry's cost to make and sell (CTMS), and add an estimate of the profit (if any) which could be achieved by the industry in a market not affected by dumping. In estimating this profit the Authority will again look to the market for guidance."*

The primary Judge found that this general approach was applied to sodium cyanide in the following terms in para 8.2:

> *"To establish the USP, the Authority first sought advice from the industry. However, as the industry had only recently commenced operation, the Authority could not identify an established industry price.*
>
> *The Authority therefore constructed an USP using normalised values for cost to make and sell and an amount for profit.*
>
> *To determine an appropriate level of profit for the industry, the Authority analysed Australian stock exchange data and the results of surveys on profitability of relevant manufacturing activities, such as chemicals, as a guide to the profit the industry could reasonably expect to earn in a sodium cyanide market unaffected by dumping.*
>
> *Having established an USP, the Authority then deducted costs incurred by importers to derive a NIFOB. These costs included: selling and administration, freight, insurance, port handling charges, agent and statutory government fees, and cartage.*

*The Authority considered that a profit for importers should also be deducted from the USP. As profits achieved by importers may have been distorted by dumping, the Authority examined the results of surveys of companies and other data to determine the amount of profit to be ascribed to importers.*

*The Authority's consideration of NIFOBs is set out at Confidential Attachment 10.*

*Confidential Attachment 11 sets out the comparison between NIFOBs and normal values, as calculated by the Authority. The comparison indicates that NIFOBs were substantially lower than the normal values except for the USA where the NIFOB was above the normal value."*

A NIFOB for each of the exporters to Australia was calculated using the uniform USP and margin of profit, from which were deducted differential costs incurred by the exporters, including selling and administration costs, "on costs" (which the primary Judge said were apparently agents' and statutory government fees), overseas freight and insurance.

The NIFOB calculated for Degussa was then deducted from the normal value imputed to that company, based on the price charged by it to German domestic users before the institution of the anti-dumping inquiry, to arrive at a dumping margin of between 25 and 34% as indicated in para 5.7 of the ADA's report. That range was said to be attributable to the adoption of two different invoice prices, the lower of which was charged to Bayer, on 4 April 1990, and the higher of which was charged to another German domestic purchaser, Knoll, on 21

September 1990.

The ADA recommended to the Minister in Report 40 that the Minister:

(i) Publish a dumping duty legal instrument under s. 269TG(2) of the Customs Act;

(2) Publish a legal instrument to call up securities under s. 269TG(1);

(3) Publish a legal instrument under s. 269TAC(8) to make certain adjustments;

(4) Publish a legal instrument in relation to the amount of dumping duty payable pursuant to s. 8(5) of the *Customs Tariff (Anti-Dumping) Act* 1975.

The Minister adopted the recommendations of the ADA on 8 July 1991 and published legal instruments under s. 269TAC(8) and s. 269TG(1) and (2) applying to Degussa. The instrument pursuant to s. 269TAC(8) of the *Customs* Act directed that:

> *"...in respect of sodium cyanide shown in Column 1 of the Table attached, hereinafter referred to as the "goods", exported from Degussa AG of the Federal Republic of Germany, the price paid in Deutsch marks shown in Column 2 of the Table attached, opposite the*

*description of the goods shown in Column 1 of the Table, is to be adjusted to ensure that it is properly comparable with the export price of the goods, by:*

- *the addition of the amounts shown in Columns 6, 7 and 8 of the Table being an adjustment for credit terms, export packing and export inland freight and handling charges; and*

- *the subtraction of the amounts shown in Columns 3, 4 and 5 of the Table being an adjustment for domestic inland freight, environmental laboratory costs and level of trade."*

The instrument pursuant to s. 269TG(1) stated that:

*"I, .... am satisfied in respect of sodium cyanide, hereinafter referred to as the "goods", exported from Degussa A.G. of the Federal Republic of Germany, Enimont Anic SRL of Italy, Mitsui & Co Ltd of Japan, Tong Suh Petrochemical Corp Ltd from the Republic of Korea and ICI Chemicals & Polymers Ltd of the United Kingdom:*

*(a) the amount of the export price of the goods is less than the amount of the normal value of those goods; and*

*(b) by reason thereof:*

*material injury to an Australian industry would or might have been caused if the security had not been taken under section 42 of the Customs Act 1901 in respect of any duty that may become payable on those goods,*

*and therefore, hereby DECLARE that section 8 of the Customs Tariff (Anti-Dumping) Act 1975 applies to those goods."*

The instrument pursuant to s. 269TG(2) stated that:

> *"I, .... am satisfied in respect of sodium cyanide, hereinafter referred to as the "goods", exported from Degussa A.G. of the Federal Republic of Germany, Enimont Anic SRL of Italy, Mitsui & Co Ltd of Japan, Tong Suh Petrochemical Corp Ltd from the Republic of Korea and ICI Chemicals & Polymers Ltd of the United Kingdom:*
>
> *(a) the amount of the export price of the goods is less than the amount of the normal value of those goods; and*
>
> *(b) because of that material injury to an Australian industry producing like goods is being caused*
>
> *and therefore, hereby DECLARE that section 8 of the Customs Tariff (Anti-Dumping) Act 1975 applies to like goods*
>
> *(c) that are exported to Australia after the date of publication of this Notice; and*
>
> *(d) the amount of the export price of which is less than the amount of their normal value."*

The instrument pursuant to s. 8(5) of the *Customs Tariff (Anti-Dumping)* Act 1975 ("the Anti-Dumping Act") directed that:

> *"...in respect of sodium cyanide shown in Column 1 of the Table attached, exported from Degussa A.G. of the Federal Republic of Germany, Enimont Anic SRL of Italy, Mitsui & Co Ltd of Japan, Tong Suh Petrochemical Corp Ltd from the Republic of Korea and ICI Chemicals & Polymers Ltd of the United Kingdom [the interim dumping duty] is the amount, if any, by which the export price is less than the amount per kilogram FOB, port of shipment, packed, cash, as set out in Column 3 of the Table attached, less the amount, if any, by which the amount in Column 3 exceeds the dumping duty that would be payable in respect of the goods under subsection 8(4)*

*of the Act."*

Degussa attacked the decisions which led to the publication of the instruments and directions mentioned above, on various grounds before the primary Judge. The first attack was that they proceeded from an erroneous interpretation of certain provisions of the *Customs Act*. It is necessary to set out those provisions.

Section 269TG of the *Customs Act* provides as follows:

> *"(1) Subject to section 269TN, where the Minister is satisfied, as to any goods that have been exported to Australia, that:*
>
> *(a) the amount of the export price of the goods is less than the amount of the normal value of those goods; and*
> *(b) because of that:*
> *(i) material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered; or*
> *(ii) in a case where security has been taken under section 42 in respect of any interim duty that may become payable on the goods under section 8 of the Anti-Dumping Act - material injury to an Australian industry producing like goods would or might have been caused if the security had not been taken;*
>
> *the Minister may, by notice published in the Gazette, declare that section 8 of that Act applies to those goods.*

*(2) Where the Minister is satisfied, as to goods of any kind, that:*

*(a) the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods; and*

*(b) because of that, material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered;*

*the Minister may, by notice published in the Gazette (whether or not he or she has made, or proposes to make, a declaration under subsection (1) in respect of like goods that have been exported to Australia), declare that section 8 of the Anti-Dumping Act applies to like goods:*

*(c) that are exported to Australia after the date of publication of the notice or such later date as is specified in the notice; and*

*(d) the amount of the export price of which is less than tne amount of their normal value.*

*(3) Where:*

*(a) a notice under subsection (1) declares particular goods to be goods to which section 8 of the Anti-Dumping Act applies; or*

*(b) a notice under subsection (2) declares like goods in relation to goods of a particular kind to be goods to which that section applies;*

*the notice shall include a statement of the amount that the Minister has ascertained is or would be the normal value of the goods to which the declaration relates at the time of publication of the notice unless, in the opinion of the Minister, the inclusion of that statement would adversely affect the business or commercial interests of any person."*

Subsections 269TAC(1) and (2) of the *Customs Act* provide the relevant formula for determining the "normal value of goods" for the purposes of Part XVB of the *Customs Act*. Those provisions are in the following terms:

> "*(1) Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.*
>
> *(2) Subject to this section, where the Minister:*
>
> *(a) is satisfied that:*
>
> *(i) by reason of the absence of sales that would be relevant for the purpose of determining a price under subsection (1); or*
>
> *(ii) by reason that the situation in the relevant market is such that sales in that market that would otherwise be relevant for the purpose of determining a price under subsection (1) are not suitable for use in determining such a price;*
>
> *the normal value of goods exported to Australia cannot be ascertained under subsection (1); or*
>
> *(b) is satisfied, in a case where like goods are not sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter, that it is not practicable to obtain, within a reasonable time, information in relation to sales by other sellers of like goods that would be relevant for the purpose of determining a price*

*under subsection (1);*

*the normal value of the goods for the purposes of this Para is:*

*(c) except where paragraph (d) applies, the sum of:*

*(i) such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export; and*

*(ii) on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export:*

*(A) such amounts as the Minister determines would be the delivery charges and other costs necessarily incurred in that sale; and*

*(B) subject to subsection (13), an amount calculated in accordance with such rate, if any, as the Minister determines would be the rate of profit on that sale; or*

*(d) where the Minister so directs, the price determined by the Minister to be representative of the price paid for like goods sold in the ordinary course of trade in the country of export for export to a third country, being sales that are arms length transactions."*

Various submissions were made to the primary Judge, but he found it unnecessary to deal with certain of them because in his Honour's opinion the relevant decisions of the ADA and the Minister were flawed by certain basic misunderstandings of

the processes of evaluation and determination prescribed by s. 269TAC to ascertain a "normal value" for the purposes of s. 269TG.

His Honour found that the ADA and the Minister had determined the price for German sodium cyanide under s. 269TAC(1) after excluding from consideration sales made on and after 19 January 1991, notwithstanding that they were conceded to be "relevant" in the sense that they were made "in the ordinary course of trade for home consumption" and were "arm's length transactions". His Honour noted that the ADA "confined its examination of normal value to the period before the initiation of the enquiry by Customs".

It was conceded that, if the sales of the relevant goods on and after 19 January 1991 answered the description for the purposes of s. 269TAC(1) of "goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arm's length transactions by the exporter", then it was impossible not to have regard to those sales for the purposes of determining the normal value of goods in accordance with the formula provided by subsection 269TAC(1). In the result, the relevant decisions made under s. 269TG(1) must be flawed. His Honour's reason for holding that the relevant decisions made under s. 269TG(2) were bad in law was that the terms of subsection (2) required the Minister to have regard to the sales of goods as close as practicable to the

date of publication of the Minister's declaration envisaged by that subsection, namely, sales between 1 January 1991 and 8 July 1991, the latter being the date of the declaration. Yet this had not been done and the sales occurring between those dates had been deliberately excluded.

In the result, his Honour set aside the recommendations of the ADA and the decisions of the Minister and the relevant instruments in which they found expression and ordered that the appellant pay the costs of the application.

It was submitted on behalf of the appellants that it is apparent from the structure of para 5.2 of the ADA Report, that the ADA recognised and addressed as separate issues: (a) the determination of normal values for the purposes of s. 269TG(1), namely, to provide a comparison with export prices, so that a determination could be made on whether the goods had been dumped; and (b) the determination of normal values for the purposes of s. 269TG(2), namely, to act as a basis for anti-dumping measures.

It was submitted on behalf of the appellants that the ADA recognised the need generally to have regard to contemporaneous prices; but it expressed its concern that domestic prices may have been influenced by the existence of the Anti-Dumping Inquiry and it was for that reason that it confined its examination to the period before the initiation

of the Inquiry.

The basis of the ADA's concern was that the domestic prices were unlikely to be sustained in the absence of anti-dumping measures. It was submitted that there was ample evidence before the ADA to support that view. It was submitted also, on behalf of the appellants, that they did not fail to have regard to domestic sales after January 1991, but considered those sales and rejected them as unreliable.

Degussa supported the findings of his Honour and submitted that there was ample evidence to support his finding that the ADA and the Minister failed to take into account the change in normal value in the German domestic price of sodium cyanide in January 1991.

It is plain enough that the ADA was aware of the domestic sales that occurred after January 1991, but it considered them as unreliable as they may have been influenced by the existence of the Anti-Dumping Inquiry, and rejected them in determining the normal value of sodium cyanide for the purposes of s. 269TAC(1). The question is whether it was entitled to do this.

As a matter of commonsense it is obvious that when the ADA conducts investigations under s. 269TAC(1), it must have regard to domestic sales within some defined period. Section

269TAC(1) is the mechanism which the Act provides for determining "the normal value" of goods exported to Australia for the purposes of part XVB of the *Customs Act*. The section which is particularly relevant in this connection is s. 269TG. Subsection (1) of s. 269TG, relates to goods "that have been exported to Australia". It provides for the criteria which must be met before the Minister may declare that s. 8 of the *Anti-Dumping Act* applies to the goods.

Subsection (2) of s. 269TG is directed to "goods of any kind" where the amount of the export price of "like goods" that have already been exported to Australia, is less than the amount of the normal value of those goods and certain other matters. Subsection (2) is directed to, amongst other classes of goods, goods that have not yet been exported to Australia.

In my opinion, as subsection (1) applies to goods that in fact have been exported to Australia, the exercise of ascertaining the normal value of those goods, calls for the quantification of the normal value of domestic sales of the goods by reference to prices for domestic sales reasonably proximate in time to the sales of the very goods that have been exported. The primary Judge adopted basically that approach and I agree with him. Under subsection (1) of s. 269TG, the comparison must be between the export price of the goods that have actually been exported to Australia and the

normal value of those goods.

The problem with the course of conduct followed by the appellants here is that although aware of the German domestic sales that occurred after January 1991, they were in fact deliberately not taken into account for the reason previously given. But subsection (1) of s. 269TAC provides as the formula for "determining the normal value" of goods exported to Australia as the price paid for like goods "sold in the ordinary course of trade for home consumption in the country of export in sales that are at arm's length transactions by the exporter", and it was conceded in this case that the sales made on and after 19 January 1991 answered that description. In other words, the sales which the appellants regarded as unreliable because they may have been influenced by the existence of the Anti-Dumping Inquiry nevertheless were sales of goods that occurred in the ordinary course of trade for home consumption in Germany and the sales were arm's length transactions by the exporter. Hence, in my view, a view shared by the primary Judge, application of subsection (1) of s. 269TAC would necessarily prevent the sales made on and after 19 January 1991 from being excluded. In the result, an error of law was committed by the decision makers and it must vitiate the decisions that are based upon this fundamental misconception of subsection (1) of s. 269TAC. Hence, the relevant decisions which were made pursuant to s. 269TG(1) are bad in law.

I agree also with the primary Judge that a different approach is required with respect to the application of subsection (2) of s. 269TG, namely to goods that may be exported here in the future. This seems to me to require that the ADA have regard to the relevant domestic sales which have taken place at the time when the ADA forms its opinion as to the export price of like goods to be exported to Australia in the future. The relevant time must be the time at which the judgment is formed.

The comparison for the purposes of subsection (2) of s. 269TG is a little more sophisticated than it is under subsection (1). Subsection (2) deals with the prospective exports of goods. Nevertheless, the comparison is between the export price of like goods that have already been exported to Australia and the amount of the normal value of those goods, if the former is less than the latter. The second part of the exercise required by s. 269TG(2)(a) is to determine if the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods.

This latter exercise is necessarily prospective in the sense that it must necessarily follow the export of the goods to Australia that are the basis of the measure of comparison. The very notion of determining the normal value of goods that may be exported to Australia in the future requires, to a degree, a hypothetical exercise which can only sensibly be

determined by reference to relevant domestic sales, made at or about the time when the determination is made as to the export price of like goods that may be exported in the future.

Section 269TG(3) supports this interpretation of the section, because the Minister is required to specify at the time of publication of the requisite notice, an existing normal value, if the notice is given under subsection (1) or a future normal value if the notice is given under subsection (2). The ADA (and the Minister) must ascertain normal value if this exercise is to be engaged in under subsection (2), having regard to domestic sales available as close as practicable to the time of publication of the notice.

Plainly, the ADA confined its examination of normal values to the period before the initiation of the inquiry by the ACS. This constituted an error by the ADA, and therefore by the Minister in adopting the relevant recommendations, which vitiated the relevant recommendations and decisions.

The relevant findings about future threat of material injury to the Australian industry are based upon sales information which was over twelve months old and did not represent the true position at the time the findings were made. The ADA thus ascertained a single normal value of the product without having regard to domestic sales available at or about the time when the judgment was formed as to the

export price of like goods that may be exported in the future.

Before leaving the point, I should mention that the case was never argued below, or on appeal, by the appellants, on the footing that the ADA and the Minister acted under subsection (2) of s. 269TAC in concluding that the evidence of the prices paid in sales occurring after the initiation of the Inquiry by the ACS was unreliable.

Indeed, any such submission could not have succeeded, because it is clear on the facts, that the task in which the ADA and the Minister engaged, was one of determining normal value under subsection (1) of s. 269TAC, not subsection (2).

Subject to one matter that is sufficient to dispose of the appeal and the grounds advanced by Degussa in support of the notice of contention.

The remaining question arises from a ground of appeal which was added at the hearing of the appeal by leave of the Court and without opposition of counsel for Degussa, namely, ground 5A in these terms:

> *"5A. His Honour erred in failing to hold that if there was any failure by the First Appellant properly to ascertain a normal value, for the purposes of s. 269TG(2) of the Customs Act 1901 (which is denied), that failure did not affect the validity of the decision of the second appellant (the Minister) to make a declaration under*

*s. 269TG(1).*"

I shall deal shortly with this point. It was conceded by counsel for the appellants that ground 5A raised matter different from any other ground of appeal. Further, the case was not conducted before the primary Judge on the basis that the instrument published at the direction of the Minister pursuant to s. 269TG(1) might stand, if the instrument pursuant to s. 269TG(2) did not. The two instruments were treated as standing or falling together. This is reflected in the reasons for judgment of the primary Judge and in the declarations and orders which he made.

If the appellants were to succeed on this point, the practical effect would be that the first order of his Honour made on 16 July 1993, would be confined so far as the setting aside of the relevant decisions of the ADA are concerned, to setting aside its recommendation that anti-dumping action be taken pursuant to s. 269TG(2) of the *Customs Act*.

This ground of appeal cannot succeed. First, it rests on a premise that was never agitated at the trial, namely, that there was a difference drawn between decisions or recommendations made with respect to subsection (1) or (2) of s. 269TG. They were treated as standing or falling together.

Secondly, the instrument pursuant to s. 269TG(1) has significance only to imports between 6/7 February 1991 and 30 June 1991, because it was only in respect of imports during that period that securities were taken. It seems plain to me, that that instrument could have no other relevant effect (see s. 269TN of the *Customs Act*). Nor do the relevant reports in evidence, in particular, Report 40, deal with this period as a discrete period at all.

For these reasons, in my opinion, this additional ground of appeal could not succeed.

It is unnecessary to consider the other arguments advanced on the appeal, including those put in support of the notice of contention.

There was some suggestion in argument by Degussa that if the appeal is dismissed, the ACS would not repay to Degussa the dumping duties which have been imposed and paid and that the Court should lend its aid to their payment. In my opinion, it is clear from the discussion that ensued between counsel and the Court, that this question raises issues of fact and law, which are not strictly before us and therefore we should not intervene in this further aspect of the matter.

I would dismiss the appeal with costs.

I certify that this and the preceding thirty-seven (37) pages are a true copy of the reasons for judgment herein of the Honourable Mr. Justice Lockhart.

Associate Elizabeth Peden

Dated: 16 September 1994

IN THE FEDERAL COURT OF AUSTRALIA )
)
VICTORIAN DISTRICT REGISTRY ) No VG 323 of 1993
)
GENERAL DIVISION )

On appeal from a Judge of the Federal Court of Australia

BETWEEN: ANTI-DUMPING AUTHORITY
First Appellant

MINISTER FOR SMALL BUSINESS AND CUSTOMS
Second Appellant

AND: DEGUSSA AG
First Respondent

DEGUSSA AUSTRALIA PTY LTD
Second Respondent

COURT: Lockhart, Sheppard and Olney JJ.
PLACE: Melbourne
DATE: 16 September 1994

REASONS FOR JUDGMENT

SHEPPARD J: In this matter I have had the benefit of reading the reasons for judgment to be delivered by Lockhart J. I am in agreement with them and with his Honour's conclusions that the appeal in this matter should be dismissed. There are, however, some matters which I would wish to add.

The critical legislative provision is subsec. 269TAC(1) of the Customs Act 1901. Essentially this subsection provides that the normal value of any goods exported to Australia is the price paid for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like

goods are not so sold by the exporter, by other sellers of like goods.

Subsection 269TAC(1) is applied by the provisions of subsec. 269TG(2). That subsection provides:

> "(2) Where the Minister is satisfied, as to goods of any kind, that:
> (a) the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods; and
> (b) because of that, material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered;
>
> the Minister may, by notice published in the *Gazette* (whether or not he or she has made, or proposes to make, a declaration under subsection (1) in respect of like goods that have been exported to Australia), declare that section 8 of the Anti-Dumping Act applies to like goods:
> (c) that are exported to Australia after the date of publication of the notice or such later date as is specified in the notice; and
> (d) the amount of the export price of which is less than the amount of their normal value."

It is necessary to mention also s. 269TAA which defines arms length transactions. Essentially the section provides that a purchase or sale of goods shall not be treated as an arms length transaction if there is any consideration payable for or in respect of the goods other than their price; the price is influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the

seller, or an associate of the seller; or, in the opinion of the Minister, the buyer, or an associate of the buyer, will, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price.

The essential facts of this matter may be briefly stated. On 17 August 1990 a number of Australian companies alleged that sodium cyanide was being dumped on the Australian market. The Australian Customs Service began an investigation of the matter on 10 October 1990. Inquiries were made in Frankfurt, Germany, in December 1990. There were a number of sales of sodium cyanide in Germany in January 1991. On 18 January 1991 the first respondent reduced its sale price for volume purchases of sodium cyanide in Germany to DM 1900 per tonne. On 22 January 1991 the first respondent sold sodium cyanide to Bayer AG at the new price of DM 1900 per tonne. On 6 February 1991 the Australian Customs Service released its preliminary finding that dumped exports of sodium cyanide from Germany had caused material injury to Australian industry and was threatening material injury to the Australian industry. The Customs found that there were sufficient grounds for publication of a dumping notice against the first respondent and that it was appropriate to take securities under s. 42 of the Customs Act.

On 22 February 1991 the Customs referred the dumping investigation to the Anti-Dumping Authority. On 24 June 1991

the Authority completed its review and reported to the Minister. It recommended that the Minister publish a dumping duty instrument against exports of sodium cyanide by the first respondent and call up securities required since the imposition of provisional measures. On 8 July 1991, the Minister accepted the recommendations of the Authority and published notices pursuant to subsecs. 269TG(1) and (2) of the Customs Act.

The Authority's report to the Minister of 24 June 1991 is extensively referred to in the judgment of Lockhart J and I do not set it out again. I need to refer, however, to part of para. 5.2 which carries the heading "Determination of Normal Values". Paragraph 5.2 contains the following paragraphs:

> "In the present case, the Authority is concerned that normal values may indeed have been influenced by the initiation of the inquiry. The Australian market is a significant proportion of the global sodium cyanide market, and developments in Australia could reasonably be expected to have some influence in other markets. In support of this view, the Authority was provided with information that suggested that domestic prices in some overseas markets were being reviewed, in part, as a result of the dumping inquiry.
>
> The Authority has therefore confined its examination of normal values to the period before the initiation of the inquiry by Customs."

The principal challenge made by the respondents to the lawfulness of the decision pursuant to which the duties were imposed was based on the Authority's failure to take into account the transactions which had occurred in Germany in January 1991. The primary Judge upheld this submission and

ordered that a number of decisions made by the Authority and the Minister be set aside. The issue in the appeal is whether his Honour was correct in taking this course.

In their submissions in support of the Appeal, Counsel for the Appellants, i.e. the Authority and the Minister, said that the structure of para. 5.2 of the Authority's report showed that it recognised and addressed as separate issues the determination of normal values for the purposes of subsec. 269TG(1) and the determination of normal values for the purposes of subsec. 269TG(2). The submission contrasted the two subsections by attributing to the first the purpose of providing a comparison with export prices so that a determination could be made on whether goods had been dumped and the purpose of providing a basis for anti-dumping measures. It was submitted that, in relation to the determination of normal values for the purposes of subsec. 269TG(2), the Authority recognised the need generally to have regard to contemporaneous prices. It expressed its concern, however, that "in the present case" domestic prices may have been influenced by the existence of the anti-dumping inquiry. It was for that reason, so it was submitted, that the Authority confined its examination to the period before the initiation of the inquiry. It was said that para. 7.2 of the report showed that the basis of the Authority's concern was that the domestic prices were unlikely to be sustained in the absence of anti-dumping measures.

Counsel said that there was ample evidence before the Authority to support that view. The evidence was that the domestic price of sodium cyanide in Germany had remained relatively constant in the twelve months before January 1991 but that the first respondent had lowered its price to one significant customer in that month partly in response to the inquiry instituted in Australia. The evidence referred to is to be found in the affidavit of Mr. P.H.J. Evans who is a Project Manager of the Authority.

In the course of their submissions, Counsel said that the decision of the Authority to reject sales which had occurred after the commencement of the inquiry because they were unreliable for the purposes of the ascertainment of normal value under subsec. 269TG(2) on the basis that they were unlikely to be sustained, and therefore unreliable, was one of fact for the Authority as the decision-maker to determine. Reference was made to a number of authorities including Minister for Small Business, Construction and Customs v. La Doria di Diodata (Federal Court of Australia, Full Court, 10 February 1994, per Black CJ and Lockhart J at 23-25).

Counsel also emphasised that the role of the Court in an application for review was strictly limited to determining whether some error of law or principle was to be found in the decision. It was not for the Court itself to embark upon a review of the merits of the Minister's decision, nor to re-assess the weight to be given to the various considerations

taken into account by the Authority or the Minister. Nor was it to express a second and favourable opinion on matters of fact found against the applicant. These were essentially matters for the decision-maker. Reference was made, inter alia, to Minister for Aboriginal Affairs v. Peko-Wallsend Ltd. (1986) 162 CLR 24 per Mason J at 39-41. It followed that the conclusion that the evidence of the January sales was unreliable was not subject to judicial review.

The submissions make it clear that there is no issue concerning the relevance of sales which occurred after initial anti-dumping action was taken, i.e. after securities were required. Nor is there any issue between the parties as to the relevance of sales occurring after an inquiry commences. The Authority discounted the sales simply because it thought that the prices were influenced by the very existence of the anti-dumping action which had been taken in Australia where a not insignificant percentage of the world market for sodium cyanide was to be found. But it is to the words of subsec. 269TAC(1) to which regard must be had. The essential words of the subsection are, "the price paid for like goods in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions either by the exporter or by other sellers of like goods". It is not suggested, as I understand the submissions, that these sales do not fall within those words. The transactions are arms length transactions. They involve the sale of like goods in the ordinary course of trade for home consumption in the

country of export. Why, in those circumstances were they not relevant to be taken into account?

In my opinion, the appellants' submissions do not provide any reason why the answer to that question should be one favourable to their case. That is particularly so when one considers the provisions of s. 269TAA previously referred to. That deals with arms length transactions. None of the transactions that occurred in January 1991 is a transaction of the kind specified in the section. There may be a question whether s. 269TAA spells out comprehensively the entirety of the circumstances which, if present, will warrant the conclusion that a transaction is not an arms length transaction. I do not recall the matter being argued. My tentative view is that the section is comprehensive. It is unnecessary to determine that matter because the transactions are not within the section and there is no evidence to which we were referred which would provide any basis for concluding that they were not arms length transactions because of circumstances other than those specified in s. 269TAA. The fact that the Authority thought that the market generally had been influenced by the existence of the anti-dumping action which was being taken in Australia was not of relevance.

Accordingly, it is not correct to say, as the submissions of the appellants suggest, that the decision of the Authority to reject sales which had occurred after the commencement of the inquiry as unreliable was one of fact for the Authority to

determine. It was required by law to act within the confines of the provisions of subsec. 269TAC(1). In my opinion it did not do so. It took into account an irrelevant consideration. Another way of putting the matter is to say that it misconstrued the subsection with the consequence that there was an error of law.

Essentially those are my reasons for concluding that the learned primary Judge was correct in the conclusion to which he came.

There were some other matters argued. These are referred to and dealt with in the judgment of Lockhart J. I respectfully agree with what His Honour has said and I have nothing to add in relation to them.

In the result I agree that the appeal should be dismissed with costs.

I certify that this and the 8 preceding pages are a true copy of the reasons for judgment herein of The Honourable Mr Justice Sheppard.

Associate

16/9/94

Dated

**IN THE FEDERAL COURT OF AUSTRALIA** )
**VICTORIA DISTRICT REGISTRY** )
**GENERAL DIVISION** ) No. VG 323 of 1993

On appeal from a Judge of the Federal Court of Australia

B E T W E E N:

**ANTI-DUMPING AUTHORITY**

First Appellant

**MINISTER FOR SMALL BUSINESS AND CUSTOMS**

Second Appellant

- and -

**DEGUSSA AG**

First Respondent

**DEGUSSA AUSTRALIA PTY LTD**

Second Respondent

**Coram**: Lockhart, Sheppard and Olney JJ

**Place**: Melbourne

**Date**: 16 September 1994

**REASONS FOR JUDGMENT**

**OLNEY J**: I have had the benefit of reading in draft the reasons for judgment delivered by Lockhart J.

I am in agreement with his Honour's conclusions and his reasons and have nothing to add.

I certify that this and the preceding page is a true copy of the Reasons for Judgment of the Honourable Mr Justice Olney

Associate: Caroline Trevorrow

Dated: 16 September 1994

**Heard**: 10 and 11 March 1994

**Place**: Melbourne

**Judgment**: 16 September 1994

**Appearances**:

Mr H. Jolson QC and Mr S. Gageler (instructed by the Australian Government Solicitor) appeared for the appellants.

Mr B. Shaw QC and Mr P. Cosgrave (instructed by Arthur Robinson & Hedderwicks) appeared for the respondents.