

C A T C H W O R D S

CUSTOMS AND EXCISE - application for imposition of countervailing duty - what constitutes countervailable subsidy

Anti-Dumping Authority Act 1988
Customs Act 1901 (Cth), s269TJ(1), "other financial assistance"

D & R Henderson (Mfg) Pty Ltd v Collector of Customs for the State of New South Wales (1974) 48 ALJR 132
Atlas Air Australia Pty Ltd v Anti-Dumping Authority (1990) 26 FCR 456
Swan Portland Cement Ltd v Minister for Small Business and Customs (1991) 28 FCR 135
Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1
ICI Australia Operations Pty Ltd v Frazer (1992) 34 FCR 564
EEC Seed Crushers' and Oil Processors' Federation v Commission of the European Communities (1988) ECR 4155
The Vacuum Oil Company Pty Ltd v The State of Queensland (1934) 51 CLR 18
Seamen's Union of Australia and Utah Development Co (1978) 144 CLR 120
The Squatting Investment Company Ltd v Federal Commissioner of Taxation (1953) 86 CLR 571
Reckitt & Colman Pty Ltd v Federal Commissioner of Taxation (1974) 3 ALR 381
Cachia v Haynes (1994) 120 ALR 385

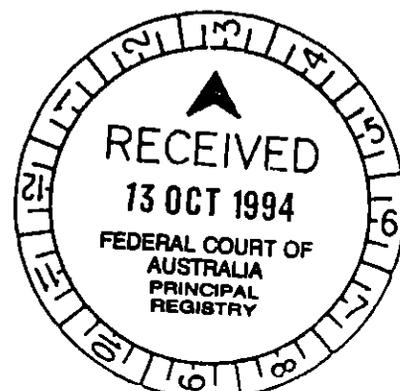
No. NG 800 of 1993

ROCKLEA SPINNING MILLS PTY LIMITED v THE ANTI-DUMPING AUTHORITY and anor

MOORE J

SYDNEY

12 OCTOBER 1994



IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY)
)
GENERAL DIVISION)

No. NG 800 of 1993

BETWEEN: ROCKLEA SPINNING MILLS PTY LIMITED

Applicant

AND: THE ANTI-DUMPING AUTHORITY

First Respondent

D J FRASER

Second Respondent

JUDGE: Moore J

PLACE: Sydney

DATE: 12 October 1994

ORDER OF THE COURT

THE COURT ORDERS THAT:

1. The application is dismissed.
2. The costs of the application are reserved with liberty to apply on 7 days notice.

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

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REASONS FOR JUDGMENT

This is an application under s5 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("ADJR Act") for an order of review of a decision of the Anti-Dumping Authority ("the Authority"). The decision was made under the Anti-Dumping Authority Act 1988 by reference to the Customs Act 1901 (Cth) ("the Act"). It concerned an application lodged in December 1992 by Rocklea Spinning Mills Pty Ltd under s269TB of the Act seeking the imposition of a dumping duty on certain cotton yarn from Brazil and seeking a countervailing duty on similar yarn from Pakistan. The decision of the Authority

dealt only with the application as it related to the Pakistani yarn.

The application was first considered by a delegate of the Comptroller-General of Customs ("ACS") who published a report in May 1993. ACS concluded that there were not sufficient grounds for the publication of a countervailing duty notice in respect of the Pakistani yarn. The publication of the notice would have resulted in the imposition of a countervailing duty on the goods. A review by the Authority of this decision was sought and it published a report, No 106, in August 1993 in which it confirmed the negative preliminary finding of ACS. It is this decision which is the subject of this application of judicial review.

The legislation

Section 269TB of the Act enables a person to lodge an application requesting the Minister to publish a notice in respect of goods that have been or are likely to be imported into Australia and which are alleged to be dumped or subsidised. The Minister may publish the notice but is not obliged to do so. A notice concerning subsidised goods is published under s269TJ of the Act and by operation of s10 of the Customs Tariff (Anti-Dumping) Act 1975 (Cth) ("Anti-Dumping Act") a countervailing duty is imposed. The countervailing duty is intended to offset the effect of the subsidy. Though lengthy, it is desirable to set out much of

s269TJ as I later refer to various parts of it in detail. It provides:

"269TJ (1) Subject to section 269TN, where the Minister is satisfied, as to any goods that have been exported to Australia, that:

- (a) in the country of origin or the country of export of the goods, there has been paid or granted, directly or indirectly, upon the production, manufacture, carriage or export of those goods a subsidy, bounty, reduction or remission of freight or other financial assistance; 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 10 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 10 of that Act applies to those goods.

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

- (a) there has been paid or granted, directly or indirectly upon the production, manufacture, carriage or export of like goods that have already been exported to Australia, and there may be paid or granted, directly or indirectly, upon the production, manufacture, carriage or export of like goods that may be exported to Australia in the future, a subsidy, bounty, reduction or remission of freight or other financial assistance; and
- (b) because of that, material injury to an Australian industry producing like goods has been or is being caused or is being 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 10 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) on the production, manufacture, carriage or export of which a subsidy, bounty, reduction or remission of freight or other financial assistance is paid or granted.

(3) Where the export of a consignment of goods to Australia has been under consideration by the Minister with a view to determining whether or not a declaration should be made under this section in relation to the goods in the consignment or to like goods, the Minister may:

- (a) give notice in writing to the Government of the country of origin, or of the country of export, of the goods in the consignment or to the exporter of the goods in the consignment stating that:
 - (i) the Minister is of the opinion that it would be appropriate for the Government or exporter to whom the notice is given to give an undertaking in accordance with paragraph (b); and
 - (ii) an undertaking in the terms set out in the notice may be satisfactory to the Minister; and
- (b) whether or not a notice has been given to the Government of the country of origin, or of the country of export, or to the exporter in accordance with paragraph (a), suspend his or her consideration of the export of that consignment if he or she is given and accepts:
 - (i) an undertaking by the Government of the country of origin, or of the country of export, of the goods in the consignment, in terms that are satisfactory to the Minister that Government will, in relation to any future export trade to Australia in like goods, review any financial assistance by that Government and make any changes that may be found to be necessary to avoid causing or threatening material injury to an Australian industry producing like goods or hindering the establishment of such an Australian industry; or
 - (ii) an undertaking by the exporter of the goods in the consignment, in terms that are satisfactory to the Minister, that the exporter will so conduct his or her future export trade to Australia in like goods as to avoid causing or threatening material injury to an Australian industry producing like goods or hindering the establishment of such an Australian industry.

(3A) The suspending by the Minister of his or her consideration of the export of a consignment of goods to Australia on the acceptance of an undertaking continues only until such time as the Minister considers that such consideration should be resumed.

- (4) Where the Minister is satisfied that:
 - (a) under the law of a country other than Australia there are imposed on goods of a particular kind that are exported from Australia to that country special duties of customs in the nature of countervailing duties; and
 - (b) those duties are imposed because it is alleged that there is paid or granted, directly or indirectly, upon the production, manufacture, carriage or export of goods of that kind, a subsidy, bounty, reduction or remission of freight or other financial assistance; and
 - (c) those duties are imposed without regard to, or without proper regard to, whether or not material injury to an

industry in that country producing like goods has been or is being caused or is threatened, or the establishment of such an industry in that country has been or may be materially hindered, by reason of the payment or grant of that subsidy, bounty, reduction or remission of freight or other financial assistance;

the Minister may, by notice published in the *Gazette*, declare that section 10 of the Anti-Dumping Act applies to goods specified in the notice:

- (d) that are exported from that country to Australia after the date of publication of the notice or, if a later date is specified in the notice, that later date; and
 - (e) upon the production, manufacture, carriage or export of which there is paid or granted, directly or indirectly, a subsidy, bounty, reduction or remission of freight or other financial assistance.
- (5) Where the Minister is satisfied that:
- (a) under the law of a country other than Australia there are imposed on goods of a particular kind that are exported from Australia to that country special duties of customs in the nature of countervailing duties; and
 - (b) those duties are imposed because it is alleged that:
 - (i) prescribed assistance is paid or granted, directly or indirectly, in relation to goods of that kind that are exported from Australia to that country; and
 - (ii) material injury to an industry in that country producing like goods has been or is being caused or is threatened, or the establishment of such an industry in that country has been or may be materially hindered, by reason of the payment or grant of that prescribed assistance; and
 - (c) prescribed assistance of the same kind as, or a substantially similar kind to, the prescribed assistance by reason of which the duties referred to in paragraph (a) were imposed has been paid or granted in relation to goods exported from that country to Australia and material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of such an Australian industry has been or may be materially hindered, by reason of the payment or grant of that prescribed assistance;

the Minister may, by notice published in the *Gazette*, declare that section 10 of the Anti-Dumping Act applies to goods specified in the notice, being goods of a kind mentioned in paragraph (c):

- (d) that are exported from that country to Australia after the date of publication of the notice or, if a later date is specified in the notice, that later date; and
- (e) in relation to which there is paid or granted prescribed assistance of a kind specified in the notice, being prescribed assistance of the same kind as, or a substantially similar kind to, the prescribed assistance by reason of which the duties referred to in paragraph (a) were imposed.

- (6) Where the Minister is satisfied that:
- (a) under the law of a country other than Australia there are imposed on goods of a particular kind that are exported from Australia to that country special duties of customs in the nature of countervailing duties; and
 - (b) those duties are imposed because it is alleged that prescribed assistance is paid or granted, directly or indirectly, in relation to goods of that kind that are exported from Australia to that country; and
 - (c) those duties are imposed without regard to, or without proper regard to, whether or not material injury to an industry in that country producing like goods has been or is being caused or is threatened, or the establishment of such an industry in that country has been or may be materially hindered, by reason of the payment or grant of that prescribed assistance;

the Minister may, by notice published in the Gazette, declare that section 10 of the Anti-Dumping Act applies to goods specified in the notice:

- (d) that are exported from that country to Australia after the date of publication of the notice or, if a later date is specified in the notice, that later date; and
- (e) in relation to which there is paid or granted prescribed assistance of a kind specified in the notice, being prescribed assistance of the same kind as, or a substantially similar kind to, the prescribed assistance by reason of which the duties referred to in paragraph (a) were imposed.

(7) A reference in this section to prescribed assistance in relation to goods is a reference to any assistance, incentive, exemption, privilege or benefit (whether financial or otherwise) in relation to goods other than the payment or grant of a subsidy, bounty, reduction or remission of freight or other financial assistance on the production, manufacture, carriage or export of the goods.

(8) Where the Minister is satisfied that sufficient information has not been furnished or is not available to enable the amount of any subsidy, bounty, reduction or remission of freight or other financial assistance in relation to goods to be ascertained for the purpose of this section, that amount is to be taken to be such amount as is determined by the Minister having regard to all relevant information.

(9) If the Minister is satisfied that adequate information as to the amount, cost or value of the prescribed assistance in relation to goods cannot be obtained for the purposes of this section, the amount, cost or value of that prescribed assistance is to be taken to be such amount, cost or value as is determined, in writing, by the Minister.

(12)"

The Authority's decision

This judgment deals with a discrete issue which I shall detail shortly though I should set out part of the Authority's decision which will provide a better understanding of it. The Authority had to consider whether the goods in question were subsidised in the manner contemplated by s269TJ. The circumstances in which this came to be considered are identified in the following passage of the Authority's report:

"5.2 Relevant policies of the Government of Pakistan

From the documents before Customs, it appears that the production and export of cotton lint, yarn and fabrics in Pakistan are strongly influenced by Government policies.

The policies of prime interest to the present inquiry are those affecting the competition, in the purchase of raw cotton, between Pakistani producers of cotton yarn on the one hand and Pakistani exporters of raw cotton on the other. Without Government intervention these two groups of purchasers would presumably pay much the same prices for raw cotton; and since one of the groups (the exporters) would immediately be selling the raw cotton on the world market, the domestic prices would presumably be related to world prices. Government intervention may have allowed Pakistani producers of cotton yarn to acquire raw cotton at much less than the world price, and may thus have formed an indirect subsidy on the production of yarn.

The policies in question appear, from the documents available to Customs, to be both highly complex and constantly changing. The following description begins with an account of those policies as they applied during 1991.

Two 'policy prices' were set by the Government: a Minimum Export Price (or 'MEP') and a 'benchmark' price. Each of these varied over time: the MEP was set at 3 p.m. each day, the benchmark was changed less frequently. The MEP was always well above the benchmark.

The prime effect of these two prices was on exporters of raw cotton: an exporter was not permitted to sell cotton at less than the minimum export price; and when cotton was exported at the MEP or more, the Government collected, as an export duty, a percentage of the difference between the actual export price and the benchmark. The percentage varied between 60 and 100 per cent.

An example using hypothetical prices may make the idea clearer. Suppose the benchmark were set at 60 and the MEP at 100. Then an exporter would not be allowed to export at a price of less than 100; and if he exported at a price of 100 or more (at a price of 105, say) the Government took as duty a percentage of

the difference between that price and the benchmark - e.g., when the percentage was 100 the duty would be 45 and the exporter would receive 60.

The exporter, like the Pakistani manufacturers of cotton yarn, had to buy raw cotton in the domestic Pakistani market. The relationships between that market price and the 'policy prices' set by the Government were thus crucial to the behaviour of the exporter, and hence to the competition experienced by the yarn manufacturers. Some settings (e.g., an export duty of 100 per cent and a benchmark set below the price in the domestic market) would mean that there would be few, if any, exports: an exporter would have to pay more for raw cotton (the domestic price) than he could obtain from the export sale (the benchmark) and would thus make a loss on the transaction. Pakistani manufacturers of yarn would thus be essentially the only purchasers of raw cotton. If, in contrast, the policy settings were such that the benchmark was above the domestic price of raw cotton, exporters could enter the market: they would buy at the domestic price, get the (higher) benchmark price from the export sale (or more, if the duty rate was less than 100 per cent) and thus trade profitably.

Some of the information available to Customs suggests that Pakistani government agencies ensured that at the beginning of each season the policy prices were so set as effectively to preclude exports, thus reserving the raw cotton for the Pakistani manufacturers of yarn. Later in the season (that information suggested), when the yarn manufacturers had purchased their requirements, the policy settings would be altered and exports of raw cotton could begin.

As noted earlier, the precise form of the policy seems to change frequently. Thus between late 1991 and early 1992, the duty charged on exports of raw cotton was, it seems, reduced from the whole of the amount by which the export price exceeded the benchmark to 60 per cent of that amount.

Significant changes to the policy were announced in August 1992 for the 1992-93 crop. The benchmark was (in effect) set to a fixed amount, 45 US cents/lb. The rate of duty levied on exports became zero if the MEP (still set daily) was equal to 45 cents/lb and increased by roughly two percentage points for every cent by which the MEP exceeded 45 cents/lb. Thus if the MEP was 48, the export duty would be about 3 cents/lb: 48 minus 45 equals 3; 3 times 2 equals 6; 6 per cent of 48 equals 2.88 cents/lb, the export duty. (The scheme was, in fact, more complex than explained here: the rate of duty increased by fixed amounts which were only roughly, and not exactly, equal to two percentage points per US cent, and the resulting duty was charged in Pakistani rather than US currency).

The August 1992 changes seem to have led to a significant drop in export duties on raw cotton. One study available to Customs calculates that the duty rate under the new scheme was less than that under the old scheme whenever the MEP was equal to or less than 54 US cents/lb and that the duty fell from about 4.6 cents/lb in mid-August to less than 0.25 cents/lb in late August as a result of the changes.

From all of the above, the Authority concludes that throughout the period under inquiry the Government of Pakistan has had in place policy instruments providing a (variable) disincentive to the export of raw cotton and thus lowering the competition faced by Pakistani yarn manufacturers in purchasing raw cotton. There are conflicting accounts, in the material available to Customs, of the reasons for these policies. The Authority is

in no doubt, however, that one of their effects has been the provision of assistance to manufacturers of cotton yarn."

The Authority then went on to indicate:

"The Authority agrees with Customs that a subsidy as defined under section 269TJ of the Customs Act does not require that a payment is made from the public account to the producers concerned.

Nevertheless, the Authority has considerable reservations as to whether the effects on Pakistani yarn producers of the cotton policy of the Government of Pakistan constitute a countervailable subsidy for the purposes of section 269TJ of the Act. The section speaks of 'a subsidy, bounty or other financial assistance'; and that wording seems to make plain that assistance, to be countervailable, should take the form of financial assistance (whether or not from the public purse). It is of course possible to estimate a subsidy-equivalent of the assistance policies here under inquiry; but (from the information before Customs) the assistance does not seem to be *per se* financial. The fact that a company benefits from a particular government initiative does not of itself mean that the benefit bestowed is a countervailable subsidy.

For the purpose of this review of a preliminary finding, however, the Authority is prepared to conclude that the assistance given to Pakistani yarn exporters may constitute a countervailable subsidy."

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It can be seen that the Authority had reservations as to whether the assistance flowing from the scheme impacting on the price of the Pakistani cotton could amount to a subsidy but proceeded to consider the facts as if it did.

The issue

The application under the ADJR Act raises a number of issues that are typically raised in applications for judicial review. However at the commencement of the hearing the respondents raised as an issue whether the circumstances that were considered by the Authority could amount, in law, to the

provision of a benefit of the type referred to in s269TJ(1), that is, a countervailable subsidy. Somewhat unusually, the respondents seek to argue it could not with the consequence, they submit, that the challenge to the Authority's decision by the applicant must fail. It would fail as the consideration of the application under s269TB which resulted in the Authority confirming the negative preliminary finding of ACS proceeded on a false premise, namely the goods were subsidised. The only decision open to ACS or the Authority when dealing with the application under s269TB was a negative preliminary finding. Any reviewable error in the Authority's decision making was immaterial to that decision.

The respondents submitted this issue should be dealt with as a preliminary issue. While the applicant did not accept without qualification that this issue should be dealt with in this way it did not point to any reason of substance why it should not be. The preliminary issue raises, in substance, the proper construction of s269TJ of the Act.

The international material

In construing s269TJ the Court may, at least in cases of ambiguity or uncertainty, pay regard to the General Agreement on Tariffs and Trade ("GATT") to which Australia is a signatory and the revised Agreement on Interpretation and Application of Articles VI, XVI and XXIII of GATT to which Australia is also a signatory ("the Countervailing Code"): see

D & R Henderson (Mfg) Pty Ltd v Collector of Customs for the State of New South Wales (1974) 48 ALJR 132 at 135 per Mason J, Atlas Air Australia Pty Ltd v Anti-Dumping Authority (1990) 26 FCR 456 at 469 per Wilcox J, Swan Portland Cement Ltd v Minister for Small Business and Customs (1991) 28 FCR 135 at 146 per Lockhart J and see also Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 at 38. Both GATT and the Countervailing Code set out Australia's international obligations which limit the circumstances in which the Australian Government may subsidise goods for export and identify the nature of the action it might take in relation to goods exported to Australia which are subsidised in the country of origin or export. Extensive references were made both to GATT and the Countervailing Code though I have found many of the references of limited assistance in determining the meaning of s269TJ which forms part of PtXVB of the Act. That Part deals with the same subject matter as GATT and the Codes derived from it and reflects Australia's international rights and obligations under them: see ICI Australia Operations Pty Ltd v Frazer (1992) 34 FCR 564 at 568.

GATT is a multilateral agreement between sovereign states. Article VI:3 identifies the nature of the countervailing duty that might be imposed by a party to GATT. It provides:

"3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the

territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise."

Article XVI of GATT deals with the obligations of a party to GATT who grants or maintains any subsidy and provides:

"ARTICLE XVI

Subsidies

Section A - Subsidies in General

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any products into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect to the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary...."

Article 7 of the Countervailing Code provides:

"ARTICLE 7

Notification of subsidies (v)

1. Having regard to the provisions of Article XVI:1 of the General Agreement, any signatory may make a written request for information on the nature and extent of any subsidy granted or maintained by another signatory (including any form of income or price support) which operates directly or indirectly to increase exports of any product from or reduce imports of any products into its territory."

The footnote to this Article provides:

"(v) In this Agreement, the term "subsidies" shall be deemed to include subsidies granted by any government or any public body within the territory of a signatory.

However, it is recognized that for signatories with different federal systems of government, there are different divisions of powers. Such signatories accept nonetheless the international consequences that may arise under this Agreement as a result of the granting of subsidies within their territories."

Article 9 of the Countervailing Code provides:

"ARTICLE 9

Export subsidies on products other than certain primary products

1. Signatories shall not grant export subsidies on products other than certain primary products.
2. The practices listed in points (a) to (l) in the Annex are illustrative of export subsidies."

The annex is, by Article 19:10, to be treated as an integral part of the Countervailing Code. The examples of subsidies found in the annex to the Countervailing Code include:

"ANNEX

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

- (a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.
- (b) Currency retention schemes or any similar practices which involve a bonus on exports.
- (c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.
- (d)
- (e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.
- (f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.
- (g) The exemption or remission in respect of the production and distribution of exported products, or indirect taxes

in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

- (h)
- (1) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of the General Agreement."

I was also referred to passages in Beseler and Williams', Anti-Dumping and Anti-Subsidy Law at 123 and a decision of the European Court of Justice in Case 187/85 EEC Seed Crushers' and Oil Processors' Federation (FEDIOL) v Commission of the European Communities (1988) ECR 4155 concerning Article 3 in EEC Regulation 2176/84 which authorises the imposition of countervailing duties by members of the European Economic Community ("EEC") on subsidised goods.

The construction of s269TJ.

The starting point in the construction of s269TJ is the language of the section itself in its legislative context. Section 269TJ concerns, first the elimination of the effect of subsidies by the imposition of countervailing duties by the Australian Government on subsidised goods imported into Australia where local industry is or might be injured, second the steps that might be taken by the Australian Government to remove a subsidy and third, the steps that might be taken by the Australian Government if countervailing duties are imposed by other governments on goods exported from Australia. Whether goods exported to Australia have been subsidised is ascertained by reference to s269TJ(1) and (2). I have used

the word subsidised loosely to describe conduct comprehended by s269TJ(1) and (2). I do not, from this point, discuss separately s269TJ(2) as it is a variant of s269TJ(1) and concerns the future export of goods. Generally references in this judgment to s269TJ(1) can also be treated as a reference to s269TJ(2).

Section 269TJ(1)(a) contains a number of elements. The first is that certain conduct must occur in the country of origin or export of the goods alleged to be subsidised. That conduct takes the form of paying or granting a benefit which is described as "a subsidy, bounty, reduction or remission of freight or other financial assistance". That benefit must be paid or granted upon "the production, manufacture, carriage or export of these goods". I leave, for the moment, consideration of the effect of the words "directly or indirectly". The subsection is silent on whose conduct attracts the operation of s269TJ.

The respondents submit that the section is directed to the conduct of governments in circumstances where the government pays money or forgoes revenue and does so directly or indirectly upon the production, manufacture, carriage or export of goods. They submit the words "directly or indirectly" qualify "upon". The applicant submits that the section does not require direct government intervention by way of payment or forgoing revenue. It submits that the words

"directly or indirectly" do not qualify "upon" but rather qualify the words that precede them, "paid or granted".

In my opinion the meaning of s269TJ(1) is made apparent by the scheme created by s269TJ as a whole. Section 269TJ(1) establishes the circumstances in which a countervailing duty might be imposed on subsidised goods imported into Australia. The duty is imposed by operation of s10 of the Anti-Dumping Act when the Minister declares that s10 applies to the subsidised goods and that declaration is published.

However s269TJ(3) establishes a mechanism which enables the Minister to refrain from taking the step of imposing the countervailing duty. That mechanism involves securing from the government of the country of origin or export of the subsidised goods an undertaking by the Government "that that Government will, in relation to any future export trade to Australia in like goods, review any financial assistance by that Government and make any changes that may be found to be necessary to avoid..." injury. In the alternative the Minister may secure an undertaking directly from the exporter as to the manner of conducting its future exports so as to avoid causing or threatening material injury to Australian industry. Such an undertaking would presumably relate to matters such as the exporter altering the price or volume of the goods exported so as to avoid such injury.

It is clear that the provisions of s269TJ(3) concerning the undertaking from the government of the country of origin or export are directed only to "financial assistance" provided by that government. It is apparent from the obvious interaction between s269TJ(1) and s269TJ(3) that the use of the words "any financial assistance" in s269TJ(3) is intended to be a reference to the range of benefits referred to in s269TJ(1), namely "subsidy, bounty reduction or remission of freight or other financial assistance". The identified benefits in s269TJ(1) are all, for the purposes of s269TJ(1) and (3), to be treated as financial assistance which is consistent with the use of the expression "or other financial assistance" at the conclusion of the list of benefits in s269TJ(1).

Subsection 269TJ(4) concerns action the Minister might take in relation to goods exported from a country where, under the laws of that country, countervailing duty is being imposed on goods exported from Australia by reference to criteria which are not in accord with the criteria in the scheme established by s269TJ(1) to (3). This subsection clearly concerns action the Minister might take in response to the conduct of another government, namely the enacting and implementation of laws imposing countervailing duty.

Subsections 269TJ(5) and (6) concern situations where there has been imposed a countervailing duty under the laws of another country on goods exported from Australia which are

alleged to have been the subject of prescribed assistance and, in relation to s269TJ(5), goods exported from the country concerned have been the subject of prescribed assistance as well: see s269TJ(5)(c) or, in relation to s269TJ(6) the duty is imposed without regard to whether the Australian goods are causing injury: see s269TJ(6)(c). Prescribed assistance is defined in s269TJ(7) as "any assistance, incentive, exemption, privilege or benefit (whether financial or otherwise)" but not assistance which is a benefit of the type identified in s269TJ(1). That is, not assistance which is the payment or grant of "a subsidy, bounty, reduction or remission of freight or other financial assistance". Both s269TJ(5) and (6) authorise the Minister to impose a duty on goods exported to Australia from that country.

The significance of s269TJ(5) to (7) is twofold. First, it again concerns action the Minister might take in response to the conduct of another government, namely the enacting and implementation of laws imposing a countervailing duty. Second, the expansive definition of prescribed assistance which is exclusive of the benefits identified in s269TJ(1) indicates the limited nature of benefits identified in s269TJ(1). Prescribed assistance ranges beyond those identified benefits and does not include them.

In my opinion the nature of the scheme established by s269TJ is plainly one directed to the conduct of the governments of other countries limiting free trade with

Australia and responses that might be made by the Australian Government through the action of the Minister consistent with that scheme. Section 269TJ(1) concerns payments or grants by government. This construction of s269TJ is consistent with the relevant provisions of GATT and the Countervailing Code. Generally these international agreements are directed to what a party to them may do in the event of another party subsidising goods. Those parties are governments, to continue to use the language of s269TJ, or sovereign states. Having regard to footnote (v) to Article 7 of the Countervailing Code this includes governments or emanations from governments in the form of public bodies.

The next question raised by the submissions of the parties is what the words, ", directly or indirectly," qualify in s269TJ(1) and (2). The competing constructions are that they qualify the words preceding them, "paid or granted" on the one hand, or "upon the production (etc)..." on the other. The latter is the construction advanced by the respondents.

The language and structure of s269TJ(1) provides little indication of what is the proper construction of that subsection. Commas precede and follow the words "directly or indirectly". This suggests the words are intended to qualify the words they follow rather than those they precede as the comma after "directly", in particular, appears to be unnecessary if they qualify the words "upon the production (etc)..." . The language and structure of the remainder of

s269TJ provides further support for this construction. In s269TJ(4)(e), (5)(b)(i) and (6)(b) the expression "paid or granted, directly or indirectly" appears where "directly or indirectly" clearly qualifies "paid or granted". There is thus a repetition of the language of s269TJ(1) elsewhere in s269TJ with "directly or indirectly" attaching to "paid or granted" and not to "upon" or "on" "the production (etc)". It is most apparent from the language of s269TJ(4)(e) in which the relevant expressions in s269TJ(1) are found in reverse order but where "directly or indirectly" qualifies "paid or granted". This, in my opinion, suggests that "directly or indirectly" qualifies "paid or granted" in s269TJ(1) if, as is likely, the section was drafted with a view to ensuring consistency of form and language. Subsections 269T(4), (5) and (6) deal with circumstances that differ from those dealt with in s269TJ(1). In particular, ss269TJ(5) and (6) deal with prescribed assistance which is not what is addressed in ss269TJ(1) to (4). However that does not, in my opinion, justify approaching the construction of the section on the basis that it was not intended that there would be a consistency of language and form in the entire section.

Having regard to the language and structure of s269TJ, the provisions of s269TJ(1) are intended to relate to the direct or indirect payment or grant by a government of one of the benefits referred to in the concluding words of s266TJ(1)(a). This construction conforms with the purpose of the section which is to enable the Australian Government to

offset the effect of subsidisation by a government of export goods in circumstances where the government's actions constitute an unfair trading practice injuring Australian industry either because the government is directly paying or granting the benefit or because it is doing so indirectly. The reach of the section is not intended to be limited to situations where injury is caused by direct payment or grant only. It must be accepted, however, that the construction advanced by the respondents also conforms generally with the apparent purpose of the section and the only indications I can discern of to how the words ",directly or indirectly," should be construed, is the punctuation of s269TJ(1) and the assumed consistency of drafting in the section as a whole.

The question that next arises is whether the pricing scheme adopted by the Government of Pakistan constitutes the direct or indirect payment or grant of a benefit by that Government of the type referred to in s269TJ(1), that is "a subsidy, bounty, reduction or remission of freight or other financial assistance". In my view it does not. The pricing scheme had the effect of either entirely or substantially removing for a period exporters as purchasers of cotton on the domestic market. It is the removal of the exporters as purchasers on the domestic market that may assist the local producers of yarn. Is this assistance of the type referred to in s269TJ(1)? In ordinary usage "subsidy" means a payment underpinning and partly defraying the cost of commencing or continuing an activity or undertaking though it has a broader

meaning in GATT and the Countervailing Code as comprehending not only a payment but revenue forgone. The Government of Pakistan provides no subsidy whether it is given the narrower or broader meaning. There is no bounty paid or granted. The word "bounty" connotes the grant or payment of money to assist a person to carry on or commence a business: see Reckitt & Colman Pty Ltd v Federal Commissioner of Taxation (1974) 3 ALR 381 at 389 and is "most commonly a payment which is quantified by reference to the volume of goods produced or exported": see Seamen's Union of Australia and Utah Development Co (1978) 144 CLR 120 at 148 per Mason J and Stephen J at 141: see also The Vacuum Oil Company Pty Ltd v The State of Queensland (1934) 51 CLR 18 and The Squatting Investment Company Ltd v Federal Commissioner of Taxation (1953) 86 CLR 571. Nor is there a reduction or remission of freight by the Government of Pakistan.

This leads to a consideration of what is meant by "other financial assistance". The expression "other financial assistance" in s269TJ(1) is not of unlimited width. So much is apparent from s269TJ(7) where, in defining "prescribed assistance", a distinction is drawn between the broad concept of financial or other assistance that is prescribed assistance and the narrower concept of assistance of the type on which s269TJ(1) operates.

The expression "other financial assistance" in s269TJ(1) could simply mean assistance of any type that impacts

beneficially on the financial circumstances of the recipient of the assistance. Viewed this way, the likely reduction of the price on the domestic market of Pakistani cotton by the removal of exporters of cotton as purchasers in that market by the taxing policies of the Government of Pakistan might be seen as financial assistance to the remaining purchasers, namely the local producers of cotton yarn. However the word "financial" is, in my opinion, intended to refer to the character of the assistance as it is provided by the government and not as it affects the recipient. The expression appears in conjunction with words that relate to assistance that involve outlays or forgone revenue on the part of a government. Construing words ejusdem generis remains a relevant approach to the construction of statutory provisions: see Cachia v Haynes (1994) 120 ALR 385 at 387, notwithstanding criticism of it: see Pearce & Geddes, Statutory Interpretation in Australia, 3rd edition at 78 and Gifford, Statutory Interpretation at 70-74.

The entire phrase "subsidy, bounty, reduction or remission of freight or other financial assistance", is intended to describe a class of assistance with a common characteristic which is that the assistance has resulted from the expenditure of moneys by a government or the government forgoing revenue. The language of s269TJ(8) and (9) is consistent with this construction of s269TJ(1). Subsection (8) enables the Minister to determine the "amount" of any "subsidy, bounty, reduction or remission of freight or other

financial assistance" if there is insufficient information to ascertain the "amount". This is plainly a reference to the benefits referred to in s269TJ(1). Subsection (9) enables a determination of the "amount, cost or value" of prescribed assistance being the assistance defined in s269TJ(7). The word "amount" in s269TJ(8) appears to be, in context, a reference to a monetary amount: see also s10(3E)(a) of the Anti-Dumping Act where the amount of the duty, a monetary amount, is an amount equal to the relevant subsidy, while in s269TJ(9) the word "value", as it concerns prescribed assistance, refers to the value to a recipient of a non-monetary benefit which cannot be directly quantified. It must, however, be valued for the purposes of ascertaining the level of any duty that might be imposed by the publication of a notice under s269TJ(5) or (6): see also s10(4)(b)(ii) of the Anti-Dumping Act.

In my opinion, the conduct of the Government of Pakistan did not involve the provision of "other financial assistance" and thus did not constitute conduct to which s269TJ(1) is directed which would authorise the imposition of a countervailing duty.

I acknowledge, however, that the view I have taken of the meaning of the s269TJ is not free from doubt and the meaning of s269TJ is, in some respects, obscure. The provisions of GATT and the Countervailing Code support, though not unambiguously, the construction I prefer. That these

agreements, in so far as they deal with subsidies, concern only the actions of governments, including emanations of governments, is reasonably clear. In addition there are some reasonably compelling indications that the subsidies to which the agreements are directed are those involving expenditure or forgone revenue by governments. This is evident, in particular, from the last compendious example of a subsidy in the annex to the Countervailing Code which speaks of "Any other charge on the public account constituting an export subsidy in the sense of Article XVI of the General Agreement" as well as some of the earlier, more specific, examples.

The EEC has adopted its interpretation of GATT in its Council Regulation (EEC) No. 2176/84, which includes as an annex the illustrative list of export subsidies found in the annex to the Countervailing Code. Article 3 of that Regulation deals with subsidies and has been interpreted by the European Court of Justice as involving "the grant of an economic advantage through a charge on the public purse": see EEC Seed Crushers, supra at 4189. That decision concerned a taxing regime imposed on the export of soya beans and meal from Argentina which restricted "the exports of beans so guaranteeing the Argentinian oil-seed crushing industry supplies of raw material at low cost": EEC Seed Crushers, supra at 4187. It appears to have been, both in principle and effect, a scheme similar to that imposed by the Government of Pakistan in relation to the sale of cotton on the domestic

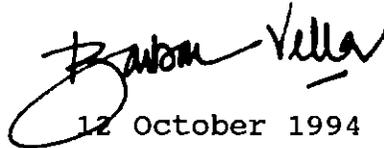
market. The European Court of Justice concluded it was not a subsidy.

Both the terms of the EEC regulation and the approach to the construction of it adopted by the European Court is consistent with the construction of s269TJ which I consider is the correct one. I should add, however, that the approach the EEC takes to the obligations arising from GATT may be more narrow than the approach taken by the United States of America: see Beseler and Williams' Anti-Dumping and Anti-Subsidy Law at 123, though this matter was only referred to in passing in submissions.

I have concluded that the effect on Pakistani producers of the cotton policy of the Government of Pakistan does not constitute a countervailable subsidy for the purposes of s269TJ. It was agreed if I was to reach this conclusion I should dismiss the application under the ADJR Act. Accordingly I dismiss the application. I reserve the costs of the application and the parties have leave to have the matter listed on 7 days notice to argue the question of costs if no agreement is reached.

I certify that this and the preceding twenty-six (26) pages are a true copy of the Reasons for Judgment herein of his Honour Justice Moore.

Associate:

A handwritten signature in black ink, appearing to read "Bazem Vella". The signature is written in a cursive style with a large initial "B".

Date:

12 October 1994

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Date of hearing:

23 and 31 August 1994

Date of judgment:

12 October 1994