FEDERAL COURT OF AUSTRALIA

Rio Tinto Aluminium (Bell Bay) Limited v Assistant Minister for Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science [2016] FCA 681

File number:	NSD 1730 of 2015
Judge:	**ROBERTSON J**
Date of judgment:	10 June 2016
Catchwords:	**ADMINISTRATIVE LAW** – judicial review – Part XVB of *Customs Act 1901* (Cth) – countervailing duties – certain silicon metal exported from the People's Republic of China to Australia – whether Minister was satisfied that a countervailable subsidy had actually been received – whether Minister erred in stating that it was reasonable to assume that an uncooperative exporter may be able to access all the national subsidy programs identified and all the regional programs in a particular region – whether the Minister transgressed the legal bounds of reasonableness by adopting such an assumption – standard of scrutiny of reasons **TAXATION** – Customs and Excise – countervailing duties – certain silicon metal exported from the People's Republic of China to Australia – judicial review – whether Minister was satisfied that a countervailable subsidy had actually been received – whether Minister erred in stating that it was reasonable to assume that an uncooperative exporter may be able to access all the national subsidy programs identified and all the regional programs in a particular region – whether the Minister transgressed the legal bounds of reasonableness by adopting such an assumption – standard of scrutiny of reasons
Legislation:	*Customs Act 1901* (Cth) ss 269T, 269TAACA, 269TJ, 269ZZM *Customs Tariff (Anti-Dumping) Act 1975* (Cth) s 10
Cases cited:	*East Melbourne Group Inc v Minister for Planning* [2008] VSCA 217; 23 VR 605 *Gamble v Emerald Hill Electrical Pty Ltd* [2012] VSCA 322; 38 VR 45 *Plaintiff M64/2015 v Minister for Immigration and Border*

Protection [2015] HCA 50; 327 ALR 8

Date of hearing:	6 April 2016
Registry:	New South Wales
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	84
Counsel for the Applicant:	Mr M Izzo
Solicitor for the Applicant:	Corrs Chambers Westgarth
Counsel for the Respondent:	Mr S Lloyd SC with Ms H Younan
Solicitor for the Respondent:	Clayton Utz

ORDERS

NSD 1730 of 2015

BETWEEN:	**RIO TINTO ALUMINIUM (BELL BAY) LIMITED ACN 009 483 201** Applicant
AND:	**ASSISTANT MINISTER FOR SCIENCE AND PARLIAMENTARY SECRETARY TO THE MINISTER FOR INDUSTRY, INNOVATION AND SCIENCE** Respondent

JUDGE:	**ROBERTSON J**
DATE OF ORDER:	**10 JUNE 2016**

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the respondent's costs, as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ROBERTSON J:

Introduction

1 Rio Tinto Aluminium (Bell Bay) Ltd (**Rio Tinto**) applies for judicial review of a decision made by the respondent (the **Minister**) on 25 November 2015 under s 269ZZM of the *Customs Act 1901* (Cth). The decision concerned countervailing duties in respect of certain silicon metal exported from the People's Republic of China (**PRC**) to Australia. Silicon is used in the chemical industry to produce silicones and photovoltaics. It is also used by aluminium producers as an alloying agent. Rio Tinto was an importer of silicon metal from China to Australia during the investigation period. It is an aluminium producer.

2 Rio Tinto contends that there are two essential matters which vitiate the Minister's decision. First, the Minister determined to impose countervailing duties by reference to the possibility that uncooperative exporters might be able to access subsidies now or in the future. According to Rio Tinto, that was impermissible because the Minister may only impose such duties if satisfied that exporters accessed subsidies in the past and she was not so satisfied. Secondly, Rio Tinto submits that the Minister assumed that uncooperative exporters would access all the subsidy programs which had been identified as relevant and all the subsidy programs in a given region, when that assumption was not open to her.

3 "Uncooperative exporter" is defined in s 269T(1) of the *Customs Act* to mean, relevantly, an exporter of goods that are the subject of the investigation, review or inquiry, or an exporter of like goods, where the Commissioner of the Anti-Dumping Commission (the **Commissioner**) was satisfied that the exporter did not give the Commissioner information the Commissioner considered to be relevant to the investigation, review or inquiry within a period the Commissioner considered to be reasonable. It is not in controversy that there were uncooperative exporters in the present case.

4 The Minister submits that Rio Tinto has mischaracterised her decision. According to the Minister, she was satisfied that countervailable subsidies "have been received". That decision, the Minister submits, was made on the basis of an assumption that an uncooperative exporter may be able to access all the national subsidy programs identified, and all the regional programs in a particular region. The Minister considered the assumption reasonable based on the

information available to her regarding eligibility for relevant subsidy programs, and in the absence of any further information contradicting the receipt of benefits under those programs.

Application to amend

5 Rio Tinto submitted that if it was successful in obtaining orders that the decision under s 269ZZM of the *Customs Act* be set aside and the matter be remitted to the Minister for consideration according to law, the Court should also set aside a further notice signed by the Minister on 25 November 2015 under s 10(3B) of the *Customs Tariff (Anti-Dumping) Act 1975* (Cth) (the ***Dumping Duty Act***) setting an effective rate of duty for uncooperative exporters. Rio Tinto sought leave to amend its Originating Application to reflect this relief. The Minister did not oppose that application. Since the proposed amendment was merely consequential; the Minister did not point to prejudice; and the Minister did not oppose the proposed application I granted the application to amend subject to Rio Tinto filing an amended Originating Application.

The history

6 Simcoa Operations Ltd (**Simcoa**) is an Australian producer of silicon metal and was found to be the Australian industry producing like goods by the Anti-Dumping Commission (**ADC**).

7 Pacific Aluminium manages the operations of three entities within the Rio Tinto Group of companies: Rio Tinto (Bell Bay) Company Ltd; Boyne Smelters Ltd; and Tomago Aluminium Co. Ltd.

8 The decision under review arose out of an application by Simcoa dated 6 January 2014 (lodged 10 January 2014) under s 269TB of the *Customs Act*. The application sought the imposition of dumping duties and countervailing duties. The ADC gave notice on 6 February 2014 of the initiation of an inquiry under the *Customs Act*. Dumping duties are no longer in issue.

9 The goods were silicon metal containing:

(a) at least 96.00 percent but less than 99.99 percent silicon by weight; and

(b) at least 89.00 percent but less than 96.00 percent silicon by weight and which also contain more than 0.20 percent aluminium by weight.

The application related to such silicon of all forms and sizes and included "off specification" silicon which, although meeting these requirements, also contains high percentages of other metals.

10 The application related to silicon exported from China. The ADC identified 16 potential exporters of silicon metal from China. The ADC sent exporter questionnaires to the 16 exporters. Only the Hua'an Linan Silicon Industry Co., Ltd (**Hu'an Linan**) and Guizhou Liping Linan Silicon Industry Co., Ltd (**Guizhou Linan**), and an associated selling agent Xiamen K Metal Co Ltd (**K Metal**), provided responses. I will refer to these three entities as the Linan Group. The ADC conducted a verification visit with Guizhou Linan and K Metal. The ADC also requested certain information from the Government of China (**GOC**). Although the GOC provided some information to the ADC, it did not provide all the information sought.

11 In the Statement of Essential Facts No. 237 (**SEF No. 237**) and Preliminary Affirmative Determination No. 237, dated 23 February 2015, the ADC found that silicon metal exported from China was exported at, relevantly, subsidised prices during the period 1 January 2013 to 31 December 2013 (the **investigation period**). The ADC further found that the volumes of, relevantly, subsidised goods were not negligible and that those exports caused material injury to the Australian industry.

12 Based on those preliminary findings, and subject to any submissions received in response to the SEF No. 237, the Commissioner proposed to recommend to the then Parliamentary Secretary that the Minister publish a dumping duty notice in respect of all exports of silicon metal from China and a countervailing duty notice in respect of all exports of silicon metal from China.

13 Following an investigation into 44 alleged countervailable subsidy programs, the ADC found that 38 programs were countervailable subsidies in relation to silicon metal. The ADC found preliminary subsidy margins of 3.7% in relation to the Linan Group and 35.0% in relation to uncooperative and all other exporters.

14 The details were set out in Chapter 7 of the Report. The following table is set out in that Chapter.

> After assessing all relevant information available, the ADC found that countervailable subsidies had been received in respect of silicon metal exported to Australia from China, under 38 countervailable subsidy programs.
>
> The findings in relation (sic) each investigated program are outlined in the below table.

Program Number	Program Name	Program Type	Countervailable in relation to the goods (Yes/No)
1	Electricity provided by government at less than adequate remuneration	Remuneration	Yes
2	Preferential Tax Policies for Enterprises with Foreign Investment Established in the Coastal Economic Open Areas and Economic and Technological Development Zones	Income Tax	No
3	Preferential Tax Policies for Foreign Invested Enterprises– Reduced Tax Rate for Productive Foreign Invested Enterprises scheduled to operate for a period of not less than 10 years	Income Tax	No
4	Preferential Tax Policies for Enterprises with Foreign Investment Established in Special Economic Zones (excluding Shanghai Pudong area)	Income Tax	No
5	Preferential Tax Policies for Enterprises with Foreign Investment Established in Pudong area of Shanghai	Income Tax	No
6	Preferential Tax Policies in the Western Regions	Income Tax	Yes
7	Land Use Tax Deduction	Income Tax	Yes
8	Preferential Tax Policies for High and New Technology Enterprises	Income Tax	Yes
9	Tariff and VAT Exemptions on Imported Materials and Equipment	Tariff & VAT	Yes
10	One-time Awards to Enterprises Whose Products Qualify for 'Well-Known Trademarks of China' and 'Famous Brands of China'	Grant	Yes
11	Matching Funds for International Market Development for Small and Medium Enterprises	Grant	Yes
12	Superstar Enterprise Grant	Grant	Yes
13	Research & Development (R&D) Assistance Grant	Grant	Yes
14	Patent Award of Guangdong Province	Grant	No
Program	**Program Name**	**Program Type**	**Countervailable in relation to the goods**

Number			(Yes/No)
15	Innovative Experimental Enterprise Grant	Grant	Yes
16	Special Support Fund for Non State-Owned Enterprises	Grant	Yes
17	Venture Investment Fund of Hi-Tech Industry	Grant	Yes
18	Grants for Encouraging the Establishment of Headquarters and Regional Headquarters with Foreign Investment.	Grant	Yes
19	Grant for key enterprises in equipment manufacturing industry of Zhongshan	Grant	Yes
20	Water Conservancy Fund Deduction	Grant	Yes
21	Wuxing District Freight Assistance	Grant	Yes
22	Huzhou City Public Listing Grant	Grant	Yes
23	Huzhou City Quality Award	Grant	Yes
24	Huzhou Industry Enterprise Transformation & Upgrade Development Fund	Grant	Yes
25	Wuxing District Public List Grant	Grant	Yes
26	Anti-dumping Respondent Assistance	Grant	Yes
27	Technology Project Assistance	Grant	Yes
28	Capital injections	Equity	Yes
29	Environmental Protection Grant	Grant	Yes
30	High and New Technology Enterprise Grant	Grant	Yes
31	Independent Innovation and High-Tech Industrialization Program	Grant	Yes
32	VAT Refund on Domestic Sales by Local Tax Authority	Tariff & VAT	No
33	Environmental Prize	Grant	Yes
34	Jinzhou District Research and Development Assistance Program	Grant	Yes
35	Grant for Industrial enterprise energy management centre construction demonstration project Year 2009	Grant	Yes
Program Number	**Program Name**	**Program Type**	**Coutervailable in relation to the goods (Yes/No)**

36	Key industry revitalization infrastructure spending in budget Year 2010	Grant	Yes
37	Provincial emerging industry and key industry development special fund	Grant	Yes
38	Environmental protection fund	Grant	Yes
39	Intellectual property licensing	Grant	Yes
40	Financial resources construction special fund	Grant	Yes
41	Reducing pollution discharging and environment improvement assessment award	Grant	Yes
42	Comprehensive utilization of resources - VAT refund upon collection	Tariff & VAT	Yes
43	Grant of elimination of out dated capacity	Grant	Yes
44	Grant from Technology Bureau	Grant	Yes

As will appear, the Minister ultimately excluded Programs 6, 18, 19 and 34.

15 As to subsidy margins, the ADC found that the Linan Group received financial contributions in respect of the goods that conferred a benefit under one program, being the provision of electricity at less than adequate remuneration (Program 1). In relation to uncooperative exporters, the ADC said that in the absence of GOC advice regarding the individual enterprises that had received financial contributions under each of the investigated subsidy programs, the ADC had had regard to the available relevant facts and determined that uncooperative exporters had received financial contributions that had conferred a benefit under 38 programs found to be countervailable in relation to silicon metal. The ADC's findings in relation to each program investigated were outlined in Non-Confidential Appendix 3. The calculation of subsidy margins for the Linan Group and uncooperative exporters was at Confidential Attachment 2.

16 In Non-Confidential Appendix 3 the ADC set out the definition of "subsidy" in s 269T, the definition of a countervailable subsidy in s 269TAAC, and referred to s 269TJ as providing one of the matters that the Minister must be satisfied of to publish a countervailing duty notice was that a countervailable subsidy had been received in respect of the goods. That Appendix contained a lengthy consideration of Program 1. It stated that Programs 2 to 44 had previously been investigated by the ADC or its predecessor. In relation to Programs 2, 3, 4 and 5 the ADC considered it was reasonable to conclude that the Programs were not operable subsidies during the investigation period. Further, the ADC considered that exporters of silicon metal to Australia would not have benefited from Program 14 and Program 32.

17 At paragraph 10.3.2 the ADC said that it considered that no evidence existed to show that countervailable subsidisation of Chinese products will be ceased in its entirety in the future and it therefore considered that silicon metal exporters will likely continue to receive financial contributions under at least some of the identified countervailable subsidy programs. In particular, it considered the existence and accessing of Program 1 (electricity at less than adequate remuneration) will continue in future and is thus likely to benefit silicon metal exporters. This Program is the Program under which the majority of benefit to silicon metal exporters had been observed during the investigation period. It therefore considered that subsidisation will continue in the future.

18 Eight submissions were received in response to SEF No. 237. Those submissions were received from Pacific Aluminium, the Linan Group, Simcoa and the GOC. The Commissioner then produced a report (**ADC Report No. 237**) setting out the findings and recommendations to the then Parliamentary Secretary in relation to Simcoa's application. (As it happens, the Minister for Industry and Science had delegated responsibility with respect to anti-dumping matters to the Parliamentary Secretary. The then Parliamentary Secretary was the same person who, in her capacity as Assistant Minister for Science, on 25 November 2015 acted under s 269ZZM to make the decision the subject of the application for judicial review.)

19 In the ADC Report No. 237 dated 7 May 2015, the Commissioner found that silicon metal exported from China was exported at dumped and subsidised prices during the investigation period. The Commissioner further found that the volumes of dumped and subsidised goods were not negligible and that those exports caused material injury to the Australian industry producing like goods. Based on those findings, the Commissioner recommended that the Minister publish a dumping duty notice in respect of all exports of silicon metal from China; and a countervailing duty notice in respect of all exports of silicon metal from China.

20 Relevantly, the Commissioner found that 38 programs were countervailable subsidy programs in relation to silicon metal and determined a subsidy margin of 6.3% for the Linan Group and 37.6% for uncooperative and all other Chinese exporters. The Commissioner was satisfied that dumping, subsidisation and material injury will continue if interim dumping and countervailing duties were not imposed in relation to silicon metal exported to Australia from China.

21 Chapter 7 set out the findings in relation to the subsidy investigation. The ADC's findings in relation to each of the 44 programs investigated, including the method of calculation of subsidy margins, were outlined in Non-Confidential Appendix 3. Again, the ADC referred to the

relevant provisions of the *Customs Act*, including s 269TJ. It excluded Programs 2, 3, 4, 5, 14 and 32. These were the same programs excluded in the SEF No. 237. In relation to Program 1 for uncooperative and all other exporters, reference was made to s 269TAACA(1)(c) and (d). That is, the Commissioner was satisfied that an entity, either a person concerned with the importation or exportation of the goods or the government of the country of export, had not given the Commissioner relevant information within a reasonable period so that "the Commissioner or the Minister may act on the basis of all the facts available to the Commissioner or the Minister (as the case may be); and may make such assumptions as the Commissioner or the Minister (as the case may be) considers reasonable."

22 As to Programs 2 to 44, they had previously been investigated by the ADC or its predecessor. Details were set out in the ADC's subsidy register. The ADC concluded that Programs 2, 3, 4 and 5 were not operable subsidies during the investigation period. As to Programs 6 to 44, the ADC considered that exporters of silicon metal to Australia would not have benefited from Program 14 and Program 32 on the basis that it was unlikely production of silicon metal would qualify for an award under the former program and on the basis that the ADC did not consider that Program 32 would have benefited exporters of silicon metal. As to the balance of Programs 6 to 44 for uncooperative and all other exporters, the ADC said no information was provided by either the GOC or the individual exporters themselves regarding whether benefits were conferred on these exporters under all other programs i.e. Programs 6-13, 15-31 and 33-44. After a brief discussion the following was stated:

> In the absence of the above relevant information, the Commission considers it is likely that uncooperative exporters meet the eligibility criteria for all these programs, have accessed these programs, and therefore received financial contributions under these programs.
>
> It is considered that this financial contribution has been made in respect of all products of these exporters, including silicon metal products.

23 The ADC then went on to consider the amount of subsidy in relation to Programs 6 and 8 – income tax programs – and all remaining programs being Programs 7, 10-13, 15-31, 33-44. The ADC also considered that subsidisation will continue in the future.

24 The Parliamentary Secretary accepted the recommendations of the ADC and on 3 June 2015 made the Reviewable Decision.

25 The Reviewable Decision was made under ss 269TJ(1) and (2) of the *Customs Act* and was to declare that s 10 of the *Dumping Duty Act* applied in respect of silicon metal exported from the

PRC and like goods (**the goods**) that were exported to Australia after 23 February 2015. In accordance with s 269TJ(11), the notice included a statement setting out the amount of the countervailable subsidy, being:

(a) 6.3% in respect of goods exported by Hua'an Linan and Guizhou Linan under Program 1; and

(b) a subsidy margin of 37.6% in respect of goods exported by uncooperative and other exporters under Programs 1, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44.

26 The Reviewable Decision of the Parliamentary Secretary involved accepting the findings and recommendations made by the ADC in the ADC Report No. 237.

27 An application for review of the Reviewable Decision was made to the Anti-Dumping Review Panel (**ADRP**) on 3 July 2015 by Pacific Aluminium on behalf of Rio Tinto.

28 The applicant argued that:

(a) the ADC, and hence the Parliamentary Secretary:

(i) failed to properly apply s 269TAACA(1) of the *Customs Act* and failed to apply a logical process of reasoning and evaluation of the facts;

(ii) made recommendations and findings about:

(1) whether uncooperative exporters obtained the benefit of various subsidy programs; and

(2) the amount of the subsidy obtained by those persons without regard to material facts; and

(b) the correct and preferable decision was that the uncooperative and all other exporters had a subsidy margin of 6.3 percent and that countervailing measures should be imposed by the Parliamentary Secretary at that rate.

The applicant also raised issues about the ADC's calculation of the amount of benefits received by the uncooperative and other exporters.

29 In its submission to the ADRP, Simcoa said that it strongly disagreed with the applicant's proposition. It submitted that the ADC's findings and recommendations, accepted by the Parliamentary Secretary and contained in ADC Report No. 237, as they related to the subsidy findings for uncooperative exporters of silicon metal from China to Australia was the "correct and preferred (sic) decision". Simcoa submitted that the applicant had not demonstrated that

the Commissioner had information available to him that was more reliable that could be relied upon, and which the Commissioner had disregarded. Simcoa requested the ADRP affirm the decision of the Parliamentary Secretary of 3 June 2015.

30 No issue was raised in relation to the conclusion that the uncooperative and other exporters received a subsidy under Program 1 relating to electricity provided by the GOC at less than adequate remuneration.

31 The ADRP completed a review of the Reviewable Decision to impose dumping duties with respect to certain Silicon Metal exported to Australia from the **PRC** (**ADRP Report No. 23**).

32 The ADRP considered that the decision the subject of the notice was not the correct and preferable decision in that the subsidies accessed by the uncooperative and other exporters in respect of the goods were incorrectly identified. It considered that, like the cooperative exporters, the uncooperative and other exporters only accessed subsidy Program 1.

33 The ADRP concluded as follows:

> 55 In light of all the circumstances, it does not appear reasonable to conclude or assume that each of the uncooperative exporters accessed each of the subsidy programs for the following reasons:
>
> (a) it appears inherently unlikely that *each* of the uncooperative exporters would access *each* of the 38 subsidy programs in issue. The geographical and subject matter limitations on the subsidies decreases (sic) the prospects that this would occur;
>
> (b) the Linan Group can be used as a comparator to the uncooperative exporters in relation to benefits received under subsidy programs. The Report states that "where there are cooperating and uncooperative exporters, the most directly relevant and therefore the best information would that obtained from those cooperating" (sic). The Linan Group did not access any of the subsidies, other than the subsidized electricity under program 1. There is no reason to think that the uncooperative producers were significantly better at obtaining subsidies than the Linan Group. The Linan Group employed 3,400 persons. It seems unlikely that any failure to obtain subsidies and grants would not be due to a lack of resources on the part of the Linan Group or knowledge of available grants. The Linan Group was used as a comparator to the uncooperative exporters at other points in the Report; and
>
> (c) efforts by the GOC to rationalize the industry are, on their face, inconsistent with the provision of widespread subsidies for participants in the industry.
>
> 56 It appears that, in this case, the primary factor in drawing the conclusion that each of the uncooperative and other exporters accessed all the programs was their failure to provide requested information. Although there may be cases where an adverse inference could perhaps be drawn, the matters identified

above persuade me that this inference should not be drawn in the present case.

57 In light of the above matters, I consider that a reasonable assumption is that the uncooperative exporters were only as successful in accessing subsidy programs as the Linan Group and that they would, therefore, only have accessed subsidy program 1. This is a preferable finding to the finding that each of the uncooperative exporters accessed each of the disputed subsidies.

(Footnote omitted.)

34 Accordingly, the ADRP recommended that the Minister:

(a) revoke the reviewable decision; and

(b) substitute a decision that s 10 of the Dumping Duties Act applies to the goods which identifies a subsidy margin of 6.3 percent under subsidy program 1 for all exporters.

35 On 28 October 2015, the ADC was asked by the office of the Minister to undertake a number of tasks in relation to the ADRP Report No. 23. It was asked:

(a) to review each of the applicable 38 subsidy programs and identify those programs that are based within a particular geographic region;

(b) to recalculate a subsidy margin excluding the programs identified in (a);

(c) to calculate a subsidy margin for a hypothetical exporter located in a geographic region that would be eligible for the highest number of programs (excluding geographic programs that would not apply).

36 The ADC's response was provided in early November 2015.

37 On 12 November 2015, the Minister noted a minute which contained the technical advice prepared by the ADC in accordance with her direction or request. The minute also contained, as Attachment C, policy advice to the Minister. Attachment D also contained a draft statement of reasons, which reasons were ultimately incorporated in the notification of the Minister's decision on 25 November 2015.

38 The policy advice referred to two alternatives. Alternative 2 was to amend the countervailing notice to replace the "uncooperative and all other exporters rate" with a subsidy duty rate representing the highest number of subsidy programs that could be accessed by a single exporter if they were based in the region with access to the greatest amount of subsidies identified. Alternative 1 was not followed by the Minister.

39 It seems that the Minister agreed with the ADRP that it was an unreasonable assumption that an exporter might have multiple, geographically separated facilities enabling one exporter to

access all identified subsidies including in multiple regions. It also appears that the Minister considered that on the information available to her it was reasonable to assume that an exporter may access all the national subsidy programs identified, and all the regional programs in a particular region. It appears that the Minister did not agree with the ADRP's views expressed in paragraph 55 (b) and paragraph 57 of its report, set out at [33] above.

40 Alternative 2 was also described in a further minute as Option 3. This was approved by the Minister on 12 November 2015.

41 Accordingly, by notice under s 269ZZM(4) made on 25 November 2015, having considered the ADRP Report No. 23 dated 21 September 2015, the Minister decided not to accept the recommendation made in that Report. The Minister determined, on 12 November 2015, to vary the Reviewable Decision and the countervailing duty notice, with effect from 3 June 2015, as it related to uncooperative and all other exporters as follows:

- the applicable countervailable subsidy programs by omitting reference to programs 6, 18, 19 and 34; and
- the subsidy margin by substituting the subsidy margin of 32.3%.

The Minister said that she had "partially adopted the reasoning of the ADRP in report 23 in support of this decision". She agreed with the ADRP that it did not appear reasonable to conclude or assume that each of the uncooperative exporters accessed each of the subsidy programs due to the geographical limitations on some of those subsidies. However, the Minister said, she considered that it was reasonable to assume that an uncooperative exporter, now or in the future, may be able to access all the national subsidy programs identified, and all the regional programs in a particular region. Further, the Minister said, she considered that it was appropriate that the uncooperative and all other exporters countervailing duty rate be set with this possibility in mind. She therefore decided that the uncooperative and all other exporters subsidy margin should be calculated based on the subsidy margin applicable for an exporter receiving the highest number of subsidy programs that could be accessed by a single exporter if they were based in the region with access to the greatest amount of subsidies identified. The Minister said she had varied the relevant subsidy programs and subsidy margin for uncooperative and all other exporters accordingly.

The statutory provisions

42 The relevant sections of the *Customs Act* provided as follows:

269TJ Countervailing duties

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

(a) a countervailable subsidy has been received in respect of the 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 10 of the Dumping Duty 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 public notice, declare that section 10 of that Act applies:

(c) to the goods in respect of which the Minister is so satisfied; and

(d) to like goods that were exported to Australia after the Commissioner made a preliminary affirmative determination under section 269TD in respect of the goods referred to in paragraph (c) but before the publication of that notice.

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

(a) a countervailable subsidy:

(i) has been received in respect of goods the subject of the application that have already been exported to Australia; and

(ii) may be received in respect of like goods that may be exported to Australia in the future; 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 public notice (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 Dumping Duty Act applies to like goods that are exported to Australia after the date of publication of the notice or such later date as is specified in the notice.

…

(11) If a notice under subsection (1) or (2) declares particular goods to be goods to which section 10 of the Dumping Duty Act applies, the notice must, subject to subsection (12), include a statement setting out:

(a) the amount of countervailable subsidy that the Minister ascertained, at the time of publication of the notice, had been or would be received in respect of the goods to which the notice relates; and

(b) the amount that the Minister has ascertained, at that time, was or would be the non-injurious price of the goods.

…

269TACD Amount of countervailable subsidy

(1) If the Minister is satisfied that a countervailable subsidy has been received in respect of goods, the amount of the subsidy is an amount determined by the Minister in writing.

(2) After the amount of the countervailable subsidy received in respect of goods has been worked out, the Minister must, if that subsidy is not quantified by reference to a unit of those goods determined by weight, volume or otherwise, work out how much of that amount is properly attributable to each such unit.

…

269TAACA Determination of countervailable subsidy if non-cooperation by relevant entities

(1) If:

(a) one of the following applies:

(i) there is an investigation under this Part in relation to whether a countervailing duty notice should be published;

(ii) there is a review under Division 5 in relation to the publication of a countervailing duty notice;

(iii) there is an inquiry under Division 6A in relation to the continuation of a countervailing duty notice; and

(b) the Commissioner is satisfied that an entity covered by subsection (2):

(i) has not given the Commissioner information the Commissioner considers to be relevant to the investigation, review or inquiry within a period the Commissioner considers to be reasonable; or

(ii) has significantly impeded the investigation, review or inquiry;

then, in relation to the investigation, review or inquiry, in determining whether a countervailable subsidy has been received in respect of particular goods, or in determining the amount of a countervailable subsidy in respect of particular goods, the Commissioner or the Minister:

(c) may act on the basis of all the facts available to the Commissioner or the Minister (as the case may be); and

(d) may make such assumptions as the Commissioner or the Minister (as the case may be) considers reasonable.

(2) For the purposes of paragraph (1)(b), the entities are as follows:

(a) any person who is or is likely to be directly concerned with the importation or exportation into Australia of goods to which the investigation, review or inquiry relates or who has been or is likely to

be directly concerned with the importation or exportation into Australia of like goods;

(b) the government of the country of export or country of origin:

(i) of goods to which the investigation, review or inquiry relates that have been, or are likely to be, exported to Australia; or

(ii) of like goods that have been, or are likely to be, exported to Australia.

…

269ZZM Minister's decision

(1) After receiving a report by the Review Panel under subsection 269ZZK(1), the Minister must:

(a) affirm the reviewable decision concerned; or

(b) revoke that decision and substitute a new decision.

(1A) …

(1B) …

(2) The Minister's decision under subsection (1) takes effect from the time specified by the Minister.

(3) Without limiting subsection (1), the Minister may, under that subsection:

(a) publish a dumping duty notice or countervailing duty notice; or

(b) vary or revoke a dumping duty notice or countervailing duty notice; or

(c) revoke a dumping duty notice or countervailing duty notice and substitute another dumping duty notice or countervailing duty notice (as the case requires); or

(d) if the following apply:

(i) the reviewable decision is a decision by the Minister under subsection 269ZHG(1) not to secure the continuation of anti-dumping measures;

(ii) those measures comprised a dumping duty notice or a countervailing duty notice;

(iii) the notice expired under subsection 269ZHG(3) on a day;

declare that the notice, as in force immediately before its expiry, is reinstated; or

(e) if the following apply:

(i) the reviewable decision is a decision by the Minister under subsection 269ZHG(1) not to secure the continuation of anti-dumping measures;

(ii) those measures comprised the giving of an undertaking by a person;

(iii) the person was released from the undertaking under subsection 269ZHG(3);

(iv) the person, by notice in writing given to the Minister, agrees to the undertaking being reinstated;

declare that the undertaking, as in force immediately before the person was released from the undertaking, is reinstated.

(4) The Minister must give notice of his or her decision on the Review Panel's website.

…

The grounds of judicial review and the parties' submissions

43 The grounds of judicial review refer first (at paragraph 3 of the amended application - **Ground numbered 3**) to errors of law in the Minister misconstruing or misapplying ss 269TJ(1)(a) and 269TJ(2)(a)(i) of the *Customs Act*. As to this ground Rio Tinto submitted that the Minister erred in proceeding on the basis that it was sufficient that a countervailable subsidy may be received "now or in the future". This was said to be erroneous first because receipt of a countervailable subsidy in the past was one of the matters of which the Minister must be satisfied before publishing a countervailing duty notice. Satisfaction that a subsidy is now being received, or will be received in the future, is insufficient. The second error referred to the Minister's language that an uncooperative exporter "may be able to access" all the national subsidy programs identified and all the regional programs in a particular region. Rio Tinto submitted that this failed to engage with the language of ss 269TJ(1)(a) and 269TJ(2)(a)(i) which required satisfaction that a countervailable subsidy had actually been received.

44 As to this ground, the Minister submitted that this was essentially one submission which failed because it mischaracterised the Minister's decision. The Minister submitted that the notice of 25 November 2015 should be read in conjunction with the notice of 3 June 2015. In the former notice, the Minister submitted, the Minister noted that the findings and recommendations of the ADC had been reported to her in ADC Report No. 237. The Minister stated that she had considered and accepted the recommendations of the Commissioner, the reasons for the recommendations, the material findings of fact on which the recommendations were based and the evidence relied upon to support those findings in ADC Report No. 237. On that basis, the Minister submitted, the Minister was satisfied that countervailable subsidies "have been received" in respect of goods exported to Australia. It was on that basis that the Minister declared under s 269TJ(1) and (2) that s 10 of the *Dumping Duty Act* applied.

45 The second ground of judicial review (at paragraph 4 of the amended application **- Ground numbered 4**) refers to errors of law in that the Minister misconstrued or misapplied s 269TACD and s 269TJ(11) of the *Customs Act*. The crux of this ground was that, in making her decision, the Minister did not set a countervailing duty rate which reflected the amount of the subsidy that had been received in the past but rather set a countervailing duty rate which reflected the amount of the subsidy which an uncooperative exporter may be able to receive now or in the future.

46 The Minister submitted that to the extent that this ground of review relied upon the same alleged error in respect to the application of s 269TJ (1) and (2) regarding the characterisation of the Minister's decision the submission should be rejected for the reasons outlined in relation to the first ground of judicial review.

47 The third ground of judicial review (at paragraph 5 of the amended application **- Ground numbered 5**) refers to errors of law in that the Minister misconstrued or misapplied s 269TAACA of the *Customs Act*. The amended judicial review application stated there was no evidence that any exporter of silicon had accessed any subsidy program other than Program 1 during the investigation period or at any other time. Rio Tinto also submitted that, on their face, the names of the identified subsidy programs suggested that they could not all have been accessed by uncooperative exporters as a whole. Further, the facts available to the Minister disclosed that during the investigation period the Linan Group had accessed only Program 1 and there was no apparent reason to suppose that uncooperative exporters were likely to be more successful in accessing subsidy programs than the Linan Group.

48 Rio Tinto submitted that there were at least three errors of law in the manner in which the Minister construed and applied s 269TAACA(1)(d). The first error, it was submitted, was that the assumption was contrary to the available facts because, so far as could be deduced, the only facts available to the Minister concerning subsidies actually received were that (i) the Linan Group had accessed Program 1 during the investigation period; and (ii) the Linan Group had not accessed benefits from any of the other subsidy programs. There was no reason to think that uncooperative exporters were significantly better at obtaining subsidies than the Linan Group. The Minister had before her the names of the relevant subsidy programs. It was immediately apparent from the labels that some of those subsidies could not possibly have been available to, let alone accessed by, uncooperative exporters as a whole. The second error, it was submitted, was that the Minister endeavoured to arrive at the most adverse margin possible,

without any apparent regard for whether uncooperative exporters in fact assessed the highest number of subsidy programs possible or whether they were in fact based in the region with access to the greatest amount of subsidies. It was submitted that it was not part of the function conferred by s 269TAACA(1) for the Minister to punish, or draw adverse inferences against, non-cooperative exporters by reason of the non-cooperation. The third error, it was submitted, was that the Minister failed to proceed on the basis of an assumption that she considered reasonable, contrary to s 269TAACA(1)(d). It was submitted that the Minister did not consider it was reasonable to assume that uncooperative exporters in fact accessed all national subsidy programs identified and all regional programs in the region with the greatest number of subsidy programs.

49 The fourth ground of judicial review (at paragraph 6 of the amended application **- Ground numbered 6**) refers to the Minister's decision being irrational and/or unreasonable. Rio Tinto submitted that the Minister transgressed the legal bounds of reasonableness by adopting an assumption that uncooperative exporters accessed the highest number of subsidy programs that could be accessed by a single exporter if they were based in the region with access to the greatest amount of subsidies. Rio Tinto submitted that such an assumption was contrary to the facts the Minister knew about the Linan Group; was contrary to what may fairly be deduced about the availability of some subsidies from the labels alone; and it was the assumption most unfavourable to importers that could be imagined. It could not sensibly be directed to the purpose of arriving at an accurate subsidy determination. To adopt the most adverse assumption possible was an obviously disproportionate response to the absence of relevant information. Rio Tinto also submitted that the Minister's assumption lacked an evident and intelligible justification. The Minister referred to no positive evidence that an exporter of silicon met the eligibility criteria for, and accessed, programs other than Program 1. The Minister's reasons otherwise disclosed no process of reasoning or evaluation directed to exposing why it was reasonable to assume that uncooperative exporters accessed any subsidy other than Program 1. Rio Tinto also relied on the concept of irrationality or illogicality in decision-making as founding jurisdictional error. It was not open to a logical or rational person to arrive at the assumption the Minister made as to the subsidies that were accessed by uncooperative exporters.

50 In answer to the third and fourth grounds of review (Grounds numbered 5 and 6), the Minister submitted as follows. As to Rio Tinto's contention that uncooperative exporters "accessed" all the national subsidy programs identified and all the regional programs in a particular region

contrary to available facts, the Minister submitted the assumption made was one regarding eligibility for (as distinct from receipt of benefits under) the identified subsidy programs. The Minister submitted that her assumption was not inconsistent with any facts. Further, once it was assumed that the uncooperative exporters were eligible for benefits under the programs, in the absence of any information to the contrary it was not a leap of logic to conclude that the uncooperative exporters had received those benefits. The Minister submitted that she need not have assumed that the reason why the Linan Group did not receive benefits also pertained to the uncooperative exporters, thus preventing those exporters from accessing benefits. In any event, the Minister submitted, it was not accepted that those were the only facts available and relevant to the Minister's assumption of eligibility.

51 As to the contention by Rio Tinto that the Minister "endeavoured to arrive at the most adverse margin possible *without any apparent regard* to whether uncooperative exporters in fact accessed the highest number of subsidy programs possible or whether they were in fact based on the region with access to the greatest amount of subsidies" (emphasis added), the Minister submitted that the "inference" was not borne out by the Minister's calculation of the subsidy margin "based on the subsidy margin applicable for an exporter receiving the highest number of subsidy programs that would be accessed by a single exporter if they were based in the region with access to the greatest amount of subsidies identified". The basis of that calculation was stated to be the assumption that (one and all) uncooperative exporters were able to access all the national subsidy programs identified and all the regional programs in a particular region. That assumption, the Minister submitted, was a rational basis for calculation at the highest margin possible and, in the absence of information to the contrary, with a view to the maximum financial contribution that can be made under the relevant subsidy program. The Minister submitted that Rio Tinto had not demonstrated that she drew an adverse inference by reason only of non-cooperation, as distinct from making an assumption that she was entitled to make under s 269TAACA(1)(d), and calculating the subsidy margin in accordance with that assumption. No punitive action or purpose had been demonstrated by Rio Tinto. Uncooperative exporters were not treated any worse than the "other exporters".

52 As to the three further matters identified by Rio Tinto which were said to make the Minister's assumption unreasonable, the Minister submitted as follows. First, the Minister submitted the notice of 25 November 2015 did not contain, nor purport to be, a complete statement of reasons. Furthermore, there was no obligation pursuant to s 269ZZM to provide such a statement. Secondly, the Minister repeated her submissions that the available facts were not inconsistent

with the assumption. Thirdly, the Minister did not assume that uncooperative exporters in fact accessed all subsidy programs identified, but that they were eligible to do so. This was not a basis upon which to infer that the Minister did not consider the assumption that she made was reasonable. The Minister submitted that Rio Tinto's submission on legal reasonableness failed for the same reasons.

Consideration

Ground numbered 3

53 In my opinion, the contention on behalf of Rio Tinto that the past was not considered by the Minister at all is not sustainable given the prior history of the matter: to accept that the Minister did not proceed on the basis that a countervailable subsidy had been received in respect of the goods (see s 269TJ of the *Customs Act*) would be to take the decision of the Minister made on 25 November 2015 overly literally and out of context.

54 I accept the submission on behalf of the Minister that the notice of 25 November 2015 is to be read in conjunction with the notice of 3 June 2015, which was being varied. In the 3 June 2015 notice, the Parliamentary Secretary noted that the findings and recommendations of the Commissioner had been reported to her in ADC Report No. 237. The Minister stated that she had considered and accepted the recommendations of the Commissioner, the reasons for the recommendations, the material findings of fact on which the recommendations were based and the evidence relied upon to support those findings in ADC Report No. 237. The Parliamentary Secretary there stated that she was satisfied that countervailable subsidies "have been received" in respect of the goods exported to Australia. It was on that basis that the Minister declared under s 269TJ(1) and (2) that s 10 of the *Dumping Duty Act* applied.

55 I do not accept the submission, developed on behalf of Rio Tinto in oral argument, that the words in the notice under s 269ZZM(4) show that the wrong question was addressed. More specifically, I do not accept that the words "now or in the future" in the third sentence of the paragraph headed "Reasons" are a clear and deliberate contrast to the tense of the word "accessed" in the immediately preceding sentence. The substance of what was being considered by the Minister was the question of geographical limitations on some of the subsidy programs. The Minister was accepting, as the ADRP had concluded, that some other subsidy programs had geographical limitations and for that reason would not be accessible by all the exporters under consideration. In my opinion, the Minister was stating which part of what the ADRP had

said that she accepted and which part she did not. But these were the same programs which had been considered throughout the course of the decision-making, beginning with the ADC.

56 I reject this ground. In particular I reject the submissions that the reasoning of the Minister disclosed two distinct errors of law. Both of the alleged errors stemmed from the proposition that the Minister had failed to address whether a subsidy was received and I have rejected that proposition at the level of fact.

57 There was no dispute that if the past was considered, it was done by reference to the investigation period.

Ground numbered 4

58 This ground, referring to misconstruction or misapplication of s 269TACD and s 269TJ(11) of the *Customs Act*, as developed, was a further legal characterisation of the Minister's alleged failure to be satisfied that a countervailable subsidy had actually been received. This ground fails for the same reason as Ground numbered 3 fails.

59 I reject Ground numbered 4.

Ground numbered 5

60 This ground centred on the alleged misconstruction or misapplication by the Minister of s 269TAACA of the *Customs Act*.

61 On the face of it, the broad language of the section may be thought to provide less than fertile ground for judicial review: paragraph (1)(c) provides that in the specified circumstances the Commissioner or the Minister may act on the basis of all the facts available to the Commissioner or the Minister (as the case may be); and paragraph (1)(d) provides that in the specified circumstances the Commissioner or the Minister may make such assumptions as the Commissioner or the Minister (as the case may be) considers reasonable.

Whether assumption contrary to the available facts

62 Nevertheless, I accept for present purposes that any assumption that is made for the purposes of s 269TAACA(1)(d) must not be inconsistent with all the facts available to the Minister, for the reason that it is unlikely in those circumstances that the ADC or the Minister would consider such an assumption reasonable. Rio Tinto then submitted that any assumption that uncooperative exporters accessed all the national subsidy programs identified and all the regional programs in a particular region was contrary to the available facts. The three reasons

advanced by Rio Tinto were as follows. First, the only facts available to the Minister were that the Linan Group had accessed Program 1 and the Linan Group had not accessed benefits from any of the other subsidy programs. Second, there was no reason to think that uncooperative exporters were significantly better at obtaining subsidies than the Linan Group. Third, it was immediately apparent from the labels of the relevant subsidy programs that some of those subsidies could not possibly have been available to, let alone accessed by, uncooperative exporters as a whole.

63 In my opinion, Rio Tinto has not established that the Minister's assumption was inconsistent with the facts available to her. Indeed, in my opinion, the contentions were not put at the level of fact but at the level of inference or reasoning. The Court was not taken to primary facts underlying conclusions that had been reached by, for example, the ADC.

64 Similarly, in my opinion what the Linan Group had accessed, in terms of whether or not the entities in the Linan Group were in receipt of benefits under a program, does not provide a basis for saying that it was not open for the Minister to make an assumption as to the eligibility of other exporters. I see no reason why the Minister was required to conclude that uncooperative exporters received the same subsidies as the Linan Group.

65 Whether uncooperative exporters were, or were not, better at obtaining subsidies than the Linan Group does not seem to me to turn on an inconsistency with the facts available to the Minister: rather it is a matter of reasoning at a more abstract level.

66 In my opinion, in this context, it cannot be established from the title or label of a program that an uncooperative exporter was not eligible for benefits under the programs.

67 I also take into account, in determining whether the Minister's assumption was contrary to the available facts, the following material which formed part of the administrative process. The ADC had found, at paragraph 7.3 of ADC Report No. 237 that, after assessing all relevant information available, countervailable subsidies had been received in respect of silicon metal exported to Australia from China under 38 countervailable subsidy programs. I have set out the findings in relation to each investigated program at [14] above. Further, the ADC said that the information it relied on included information provided by the cooperating exporter group in the Exporter Questionnaire responses, as well as information provided during the verification visit. The ADC also considered other information as part of its assessment, being the findings from the Canada Border Services Agency in relation to its investigations into the subsidisation

of silicon metal exported to Canada and findings of some other subsidy investigations conducted by the ADC. The ADC also said that details of its consideration of the legal basis, eligibility criteria and specificity could be found in its subsidy register. Further, the ADC noted, in relation to uncooperative and all other exporters, that some of the programs were limited to enterprises in specific regions in China but it was not certain for each "supplier" whether they were in fact the exporter of the goods and whether the supplier operated in more locations than the one listed. The ADC considered it was likely that uncooperative exporters met the eligibility criteria for all of the programs, had accessed the programs, and had therefore received financial contributions under the programs.

68 In light of this material, I do not accept the submission put on behalf of Rio Tinto that the only facts available to the Minister were that the Linan Group had accessed Program 1 and the Linan Group had not accessed benefits from any of the other subsidy programs.

Adverse inferences

69 Rio Tinto submitted that the Minister's statement that she had calculated the margin "based on the subsidy margin applicable for an exporter receiving the highest number of subsidy programs that could be accessed by a single exporter if they were based in the region with access to the greatest amount of subsidies identified" disclosed that the Minister endeavoured to arrive at the most adverse margin possible, without any apparent regard for whether uncooperative exporters in fact accessed the highest number of subsidy programs possible or whether they were in fact based on the region with access to the greatest amount of subsidies. It was submitted that this course was not permitted by s 269TAACA(1). It was submitted that it was not part of the Minister's function to enable her to punish, or draw adverse inferences against, non-cooperative exporters by reason of their non-cooperation.

70 In essence, in my opinion, this ground involves an allegation of improper purpose on the part of the Minister. I would not draw that conclusion, put as it is as a matter of inference, from the bare statement by the Minister on which Rio Tinto relies. Rio Tinto has not established that the Minister drew an adverse inference by reason only of non-cooperation and no punitive action or purpose on the part of the Minister has been demonstrated. Indeed the calculation does not apply only to uncooperative exporters but also to "other exporters".

71 Further, the basis of the Minister's calculation of the margin was consistent with the conclusion of the ADC that in calculating the amount of subsidy attributable to benefits under the relevant programs, where the legislative instrument that established the program specified the maximum financial contribution that could be made under the program, that maximum amount was to be the amount determined to be the benefit for each program (point 1) and where the maximum financial contribution grantable under a program was not stipulated, the amount of the financial contribution was to be considered to be the maximum amount found in relation to point 1.

72 I do not accept Rio Tinto's submissions as to adverse inferences.

No assumption the Minister considered reasonable

73 Rio Tinto also submits that the Minister misapplied s 269TAACA(1)(d) because, it should be inferred, she failed to proceed on the basis of an assumption that she considered reasonable. It was submitted that it was difficult to describe as a "reasonable" assumption the most adverse assumption possible. The Minister's "reasons" identified no basis for making the assumption and the facts known to the Minister were inconsistent with the assumption. It was also submitted that the assumption was contrary to the terms of the Minister's "reasons", which referred not to uncooperative exporters accessing subsidy programs but to uncooperative exporters being able to access such programs.

74 I do not draw the inference for which Rio Tinto contends. I would not lightly infer that an assumption the Minister made was, at the same time, one which she did not consider reasonable. The preferable categorisation of the point is to frame it as whether, for the purposes of s 269TAACA(1)(d), it was open to the Minister to consider the assumption reasonable.

75 Further, first, the Minister's notice of 25 November 2015 was not and was not required to be a statement of reasons: see [79]-[80] below.

76 Second, I have already considered and rejected the submissions on behalf of Rio Tinto that the assumption made by the Minister was contrary to the available facts: see [60]-[68] above.

77 Third, I do not accept the submission that there was no assumption the Minister considered reasonable because the assumption was contrary to the terms of the Minister's reasons. I see no contrariety between exporters having an ability to access subsidy programs and exporters accessing those programs.

Generally

78 As I have indicated, the more detailed submissions made by Rio Tinto as to impermissible fact-finding by the Minister are difficult to sustain given the absence of challenge to the underlying findings made by the ADC and the Commissioner, combined with the fact that the material that was before that body or those bodies is not before the Court.

79 In relation to the Minister and her "reasons", I bear in mind the recent statements in *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; 327 ALR 8, French CJ, Bell, Keane and Gordon JJ said, at [25]:

> It is well settled that in the context of administrative decision-making, the court is not astute to discern error in a statement by an administrative officer which was not, and was not intended to be, a statement of reasons for a decision that is a broad administrative evaluation rather than a judicial decision. It is possible that error of law on the part of the Delegate might be demonstrated by inference from what the Delegate said by way of explanation of his decision; but it must be borne in mind that the Delegate was not duty-bound to give reasons for his decision, and so it is difficult to draw an inference that the decision has been attended by an error of law from what has *not* been said by the Delegate. Further, "jurisdictional error may include ignoring relevant material in a way that affects the exercise of a power"; but here the plaintiff does not show that relevant material was ignored simply by pointing out that it was not mentioned by the Delegate, who was not obliged to give comprehensive reasons for his decision. Further, the Delegate's letter is "not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed".
>
> (Original emphasis. Citations omitted.)

80 Gageler J said, at [72]:

> ... The letter was not a formal statement of the reasons for the decision: it was not a document devoted to setting out, exclusively and exhaustively, the findings of fact made by the delegate and the process of reasoning which the delegate adopted to reach the conclusion that there were no compelling reasons for giving special consideration to granting the visas. It was somewhat informally expressed.

81 Rio Tinto relied on an observation made by Ashley and Redlich JJA in *East Melbourne Group Inc v Minister for Planning* [2008] VSCA 217; 23 VR 605 at [229] to the effect that the caution against construing reasons "with an eye keenly attuned to perception of error" may be of more limited significance if the reasons have been formulated carefully and deliberately with the possibility of judicial review clearly in mind. However, I see much force in, and prefer, what was said by a later Court of Appeal, constituted by Maxwell P and Cavanough AJA, in *Gamble v Emerald Hill Electrical Pty Ltd* [2012] VSCA 322; 38 VR 45 at [8] and following, with reference to the observation in *East Melbourne Group*, concluding at [17]-[18], as follows:

> In [*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259], the decisions and statements of reasons in question were those of delegates of the Minister for Immigration and Ethnic Affairs upon applications for refugee status.

> Kirby J pointed out in his concurring judgment that the delegates were "not untrained laymen"; that they had "obvious expertise for the performance of their functions"; that, by the evidence, they also had legal advice available to them; that they were obviously familiar with relevant legal authority; that standard paragraphs for their decisions were prepared, evidencing what were suggested to be considered positions on common matters of approach; and that the decisions committed to them were extremely important for the persons involved, and also for Australia as a nation.
>
> Even in that context — so markedly different from the present — the plurality in *Liang* were constrained to warn against "over-zealous judicial review"; and Kirby J himself made observations to similar effect. As far as we are aware, the High Court has never since qualified what it said in this regard in *Liang*, notwithstanding that, in the intervening years, it has had ample opportunity to do so, especially in the multiplicity of cases relating to judicial review of the decisions of ministers, delegates and tribunals in the refugee and general migration field.
>
> (Footnotes omitted.)

Ground numbered 6

82 This ground refers to the Minister's decision being irrational and/or unreasonable.

83 In my opinion, this ground involves no more than a different legal characterisation of the submissions based on s 269TAACA which I have considered above. This ground fails for the reasons I have already given. Irrationality or unreasonableness is not made out merely by pointing to different reasoning, and the drawing of different inferences, as between the ADRP on the one hand and the Minister on the other.

Conclusion and orders

84 For these reasons, the application should be dismissed, with costs.

I certify that the preceding eighty-four (84) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Robertson.

Associate:

Dated: 10 June 2016