Australian Government
Anti-Dumping Review Panel

ADRP Report No. 83

Steel Rod in Coil exported to Australia from the People's Republic of China

August 2018

Table of Contents

Abbreviations

Term	Meaning
Act	*Customs Act 1901*
ADN	Anti-Dumping Notice
Amending Act	*Customs Amendment (Anti-Dumping Measures) Act 2017*
Applicants	Hunan Valin Xiangtan Iron & Steel Co., Ltd and Jiangsu Shagang Group Co., Ltd
Commission	Anti-Dumping Commission
Commissioner	The Commissioner of the ADC
CIO Regulation	*Customs (International Obligations) Regulation 2015*
Div 5 Applications	The applications made under s 269ZA by the applicants for review of the anti-dumping measures imposed by the then Minister
Div 5 Reviews	The reviews Div 5 Part XVB of the Act initiated by the Commissioner by Notice of Initiation of Review published on 24 May 2017.
Goods	The goods described in the Div 5 Applications being: Hot rolled rods in coils of steel, whether or not containing alloys, that have maximum cross sections that are less than 14mm. The goods…include all steel rods meeting the above description regardless of the particular grade or alloy content. Goods excluded…include hot-rolled deformed steel reinforcing bar in coil form, commonly identified as rebar or debar and stainless steel in coils.
Hoa Phat	Hoa Phat Group, a Vietnamese exporter of rod in coils
Hunan	Hunan Valin Xiangtan Iron & Steel Co., Ltd., a Chinese exporter of steel rod in coils
IDD	Interim dumping duty
Interpretation Act	*Acts Interpretation Act*
Minister	Assistant Minister to the Minister for Jobs and Innovation

OneSteel	OneSteel Manufacturing Pty Ltd (trading as “Liberty OneSteel”)
Original Decisions	The decisions made by the former Minister to publish a dumping duty notice applying to rod in coils exported from China on 22 April 2016.
Original Investigation period	1 July 2014 to 30 June 2015
Report	The report published by the Commission in relation to the Review of Anti-dumping measures applying to steel rod in coils exported from China by Jiangsu Shagang Group Co., Ltd. And Hunan Valin Xiangtan Iron & Steel Co., Ltd in respect of matters 413 and 414 and dated March 2018
Reviewable Decision	The decision of the Minister made on 19 April 2018
Review Period	1 April 2016 to 31 March 2017
SEF	Statement of Essential Facts in relation to the Review of Anti-dumping measures applying to steel rod in coils exported from China by Jiangsu Shagang Group Co., Ltd., and Hunan Valin Xiangtan Iron & Steel Co., Ltd in respect of matters 413 and 414 and dated October 2017
Shagang	Jiangsu Shagang Group Co., Ltd., a Chinese exporter of steel rod in coils
Supplementary materials	The materials provided by the applicants with their submissions of 5 July 2018.

Recommendation

This is a review of the decision made by the Hon Zed Seselja, the Assistant Minister for Science, Jobs and Innovation on 19 April 2018 to alter the variable factors used in calculating the amount of interim dumping duty payable on exports of steel rod in coil from the People's Republic of China by Jiangsu Shagang Group Co., Ltd and Hunan Valin Xiangtan Iron and Steel Co., Ltd.

I consider that the decision was the correct or preferable decision.

I recommend that the decision be affirmed.

……..
Scott Ellis
Panel Member
Anti-Dumping Review Panel
6 August 2018

Summary

1. The review concerns interim dumping duty (IDD) payable on steel rod in coil exported by Jiangsu Shagang Group Co., Ltd (Shagang) and Hunan Valin Xiangtan Iron and Steel Co., Ltd (Hunan) from the Peoples' Republic of China.

2. On 19 April 2018, the Hon Zed Seselja, the Assistant Minister for Science, Jobs and Innovation (Minister) determined to alter the variable factors used in calculating the amount of IDD payable on their exports of the goods to Australia (Reviewable Decision).[1]

3. The effect of the Reviewable Decision was that the dumping margin and rate of IDD for Hunan's goods changed from 40.2% to 24.3%. The dumping margin and rate of IDD for Shagang changed from 36.1% to 24.2%.

4. When altering the variable factors, the Minister applied s 269TAB(2A) and (2B) of the Customs Act,[2] which are new provisions introduced by the *Customs Amendment (Anti-Dumping Measures) Act 2017* (Amending Act).

5. The applicants contended that the Minister should have determined the export price under s 269TAB(3) rather than s 269TAB(2B) either because:

   (a) s 269TAB(2A) and (2B) were not applicable to the applicants' situation (Ground 1); or

   (b) the Minister did not apply s 269TAB(2A) correctly and wrongly concluded that the applicants were "low volume exporters" within s 269TAB(2A) (Ground 2).

[1] The Reviewable Decision was the subject of ADN 2017/50 (sic).

[2] Unless indicated otherwise, reference to sections are references to sections of the Act.

Determination of the export price under s 269TAB(3) would have allowed or provided for the Minister to determine that the export price was equal to the normal value.

6. The applicants also contended that the Minister did not calculate the normal value correctly because he wrongly failed to take into account the costs of a Vietnamese exporter, Hoa Phat Group (Hoa Phat) which would have lowered the benchmark billet price used by the Minister to calculate the normal value (Ground 3).

7. I concluded that the Reviewable Decision was the correct or preferable decision because:

   (a) the Amending Act applied to the applicants' applications under Div 5 of Part XVB of the Act;

   (b) no error was shown in the decision of the Minister under s 269TAB(2A) to apply s 269TAB(2B) and the Minister was correct to apply s 269TAB(2B); and

   (c) the Minister was correct to not include Hoa Phat in the benchmark used to calculate the normal value, because the relevant information available to the Minister did not enable a fair comparison with the other exporters used to calculate the benchmark.

8. I recommended that the Reviewable Decision be affirmed.

Background

9. Shagang and Hunan are Chinese manufacturers and exporters of steel rod in coil (the goods).[3] It appears that each of the applicants is a substantial trading enterprise. The total production of each of Shagang and Hunan was s45 [redacted] Each was treated an "integrated" steel manufacturing operation. The Commission explained that, from its point of view, this connoted that the entity produced its own billet, rather than buying it in.[4] Billet is the primary component of rod in coils.

10. On 22 April 2016, the former Minister decided to impose interim dumping duty (IDD) on exports of the goods by the applicants from China. This decision was revoked and a new decision substituted (Original Decisions) following a review by this Panel. The rates of IDD were based on a dumping margin of 36.1% for Shagang and 40.2% for Hunan. Those measures were the outcome of Investigation No. 301. The investigation period for Investigation No. 301 (Original Investigation Period) was 1 July 2014 to 30 June 2015. Shagang and Hunan cooperated with Investigation No. 301.[5]

11. Shagang and Hunan each applied under Division 5 of Part XVB for review of the variable factors determined in the Original Decisions (Div 5 Applications).[6] The basis for the Div 5 Applications was that the benchmark used to calculate the normal value had changed since the Original Decisions.

12. A review was initiated under Division 5 Part XVB of the Act in response to each Div 5 Application - REV 413 for Shagang and REV 414 for Hunan (together the

---

[3] The goods are more fully defined in the list of abbreviations.

[4] Conference proceedings between OneSteel and the ADC on 18 July 2018.

[5] Commission Report 301, at p 10.

[6] REV 413, EPR 1 26 April 2017 (Shagang). REV 414, EPR 1, 27 April 2017 (Hunan).

Div 5 Reviews). A single Notice of Initiation of Review under s 269ZC(4) was published on 24 May 2017.[7]

13. The review period for the Div 5 Reviews was 1 April 2016 to 31 March 2017. Neither Shagang nor Hunan exported any of the goods to Australia during the review period.

14. During the Div 5 Reviews, the Act was amended by the Amending Act. The Amending Act received Royal Assent on 30 October 2017 and Schedule 1 of the Amending Act (including Item 4) came into force on 31 October 2017.[8]

15. A Statement of Essential Facts (SEF) was published on 21 December 2017 in respect of both the Div 5 Reviews.[9] Each of the applicants responded separately to the SEF on 12 January 2018. A final report (Report) dealt with both Div 5 Reviews.

16. The Reviewable Decision dealt with both Div 5 Reviews. In making the Reviewable Decision, the Minister accepted the findings and recommendations made in the Report, including all the material findings of facts and law.

17. In addition to making the Reviewable Decision, the Minister determined the duty method. The duty method was a combination of a fixed rate of IDD plus a variable rate equal to the amount, if any, by which the actual export price was lower than the ascertained export price. It will be apparent that the Minister determined that the export price was substantially less than the normal value for both the applicants.

18. The applications for review by the Panel (Review Applications) were made on 21 May 2018. Both applicants were represented by J Bracic & Associates Pty Ltd.

---

[7] ADN 2017/76.

[8] Section 2 of the Amending Act.

[9] The document was, however, dated October 2017 on its face.

The terms of both applications were substantially identical. The issues raised were common to both applications.

19. The Senior Member determined that the Panel in respect of the Review Applications should be constituted by me.

20. A review in respect of both Review Applications was initiated on 5 June 2018.

21. On 5 July 2018 submissions were received from:

    (a) Hunan and Shagang;[10] and

    (b) OneSteel Manufacturing Pty Ltd (Trading As 'Liberty OneSteel') ("OneSteel").

    OneSteel's submissions were made on behalf of the Australian industry.

22. A submission was received from the Commission on 6 July 2018, which was more than 30 days after the review was initiated, and thus did not comply with the requirements of 269ZZJ. I did not take that submission into account in making my recommendation.

23. I held a conference with OneSteel and the Commission on 18 July 2018. I held conferences with the applicants, represented by Mr Bracic, and the Commission on 18 and 24 July 2018. The conferences were held pursuant to s 269ZZHA.[11]

[10] It is not clear than a person who has made an application under s 269ZZC in accordance with s 269ZZF may subsequently make submissions under s 269ZZJ. This would have the consequence that other persons interested in the proceedings would not have the opportunity of responding to those submiissions. However, is not necessary to reach a conclusion on this point in this review.

[11] The Panel website contains non-confidential sumamaries of conferences held by the Panel.

The Grounds of Review

24. The grounds of review advanced by the applicants are summarised at paragraphs 5 and 6 above.

25. A review by the Panel under the Act is directed to ascertaining whether the Reviewable Decision is the correct or preferable decision. The review is not directed primarily to the reasoning in the Report adopted by the Minister for making the Reviewable Decision, although, of course, errors in the reasoning may indicate that the Reviewable Decision itself was wrong.

26. I will deal with the grounds advanced by the applicants in turn.

Ground 1: Retrospective application of the *Customs Amendment (Anti-Dumping Measures) Act 2017*

27. The first ground of both Review Applications was that the Minister erred in applying the amendments to s 269TAB effected by the Amending Act when considering the applicants' Div 5 Applications.

The Amendments

28. The substantive provisions of the Amending Act are contained in Items 1, 2 and 3 of Schedule 1 to the Act. They amended s 269TAB so that the Minister may apply a special regime for determining the export price when considering applications under Div 5 of Part XVB. The Amending Act introduced subsections (2A) to (2G) into s 269TAB.

29. The Amending Act did not amend s 269TAB(1), which is the usual mechanism for determining export price. It provides for the determination of export price by reference to what might, in broad terms, be described as market transactions. It also provides, by paragraph (c) that the Minister may determine the export price having regard to all the circumstances of the exportation where paragraphs (a) and (b) do not apply.

30. The “gateway” provision to the special regime is s 269TAB(2A):

> (2A) If an export price of goods exported to Australia is being ascertained for the purposes of conducting a review of anti-dumping measures under Division 5, the price may, despite subsection (1), be determined by the Minister in accordance with subsection (2B) if:
> (a) the price is being ascertained in relation to an exporter of those goods (whether the review is of the measures as they affect a particular exporter of those goods, or as they affect exporters of those goods generally); and
> (b) the Minister determines that there is insufficient or unreliable information to ascertain the price due to an absence or low volume of exports of those goods to Australia by that exporter having regard to the following:
> (i) previous volumes of exports of those goods to Australia by that exporter;
> (ii) patterns of trade for like goods;
> (iii) factors affecting patterns of trade for like goods that are not within the control of the exporter.

31. Section 269TAB(2B) identifies information which may be used in determining the export price:

> (a) the export price determined in prior determinations involving the exporter. Section 269TAB(2D) specifies the determinations;
>
> (b) the price paid for sales by the exporter to third countries; and
>
> (c) the export price determined in in prior decisions under the Act involving a third-party exporter from the same country of export within a two-year period prior to initiation of the Div 5 review.

32. Section 269TAB(2G) provides that the export price determined under s 269TAB(2B) may be adjusted to reflect what the export price would have been had there not been an absence or low volume of exports, including adjustments relating to timing of exports and differences between the goods the subject of a Div 5 application and the goods the subject of the information under s 269TAB(2B).

33. Section s 269TAB(3) was not amended. It provides that the Minister may have regard to “all available information” if the Minister is satisfied that “sufficient

information has not been furnished, or is not available, to enable the export price of goods to be ascertained under the preceding subsections".

The Transitional Provision

34. The transition from the unamended Act to the Act as amended is dealt with by Item 4 of Schedule 1 to the Amending Act:

> **4 Application of amendments**
>
> The amendments made by this Schedule apply in relation to the following:
>
> (a) a review under Division 5 of Part XVB of the Customs Act 1901 for which an application is lodged, or request is made, on or after the commencement of this Schedule;
>
> (b) such a review that was being undertaken immediately before the commencement of this Schedule but for which a declaration in accordance with subsection 269ZDB(1) of that Act had not been made at that time;
>
> (c) an application for such a review that was lodged, or a request for such a review that was made, before the commencement of this item but for which a notice of a review under subsection 269ZC(4), (5) or (6) of that Act had not been made at that commencement.

35. The Div 5 Applications were not made after 31 October 2017, so Item 4(a) does not apply. A notice under s 269ZC was published on 24 May 2017, so Item 4(c) does not apply.

36. The issue raised by ground 1 of the review applications is whether Item 4(b) applied, so that the regime in s 269TAB(2A) to (2G) applied when the Minister made the Reviewable Decision.

The Applicants' contentions

37. The applicants advanced two primary contentions:

    (a) Item 4(b) is not applicable because the amendments "should only be applied to those reviews that were "undertaken immediately before the commencement of this schedule"". The applicants argued that the word

"immediately" should be given the meaning of "at once, instantly" and "without any intervening time or space"; and

(b) The amendments should only be applied to "reviews initiated after the Government had announced its intention to amend the Act by introducing the Bill into Parliament on 13 September 2017." The applicants said that this approach should be adopted to avoid the retrospective application of the legislation.

Consideration

38. I do not accept the contentions of the applicants.

39. Item 4(b) refers to "a review that was being undertaken immediately before the commencement of this Schedule" rather than to reviews that "were undertaken" or "had been undertaken". The expression, "was being undertaken", conveys the idea of a process that had started before the commencement of the Schedule and was continuing up to the commencement of the Schedule. The word, "immediately" was used to emphatically exclude reviews which had been completed prior to 31 October 2017, or which for some reason, were not being undertaken at that time.

40. The language of Item 4(b) is apt to describe the status of the Div 5 Reviews in this case. They were initiated on 24 May 2017. The Div 5 Reviews were not completed until 20 April 2018, when the Reviewable Decision was made. The Div 5 Reviews were being undertaken throughout the whole of the period from 24 May 2017 to 20 April 2018, including 30 October 2017, so that the Div 5 Reviews were "being undertaken immediately before the commencement of [the] Schedule" on 31 October 2017. There was no intervening period between the undertaking of the Div 5 Reviews and 31 October 2017.

41. The applicants' second contention was that the Amendments should only apply where the Div 5 application was made after 12 September 2017, the date on which the Government announced the amendments. They said that interpreting Item 4(b) in this way would prevent the amendments having unfair retrospective

effect. As persons interested in the applications, they had, they said, reasonable expectations that would be observed if the amendments applied only to "reviews commenced immediately prior to the commencement of the schedule" and that the law "should be capable of being known in order to comply".

42. The retrospective operation of amending legislation is dealt with by s 7 of the Interpretation Act. Section 7(2) provides:

> (2) If an Act, or an instrument under an Act, repeals or amends an Act (the affected Act) or a part of an Act, then the repeal or amendment does not:
>
> …
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act or part; or
>
> …
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment.
>
> Any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the affected Act or part had not been repealed or amended.

43. Section 7(2) may be taken as expressing a general principle that amendments will not operate retrospectively to adversely affect accrued rights or privileges. Section 7(2) applies subject to a contrary intention.[12]

44. The critical component of s 7(2) of the Interpretation Act is paragraph (c). The reference to "such right, privilege, obligation, liability, penalty, forfeiture or punishment" in the final sentence of s 7(2) is a reference back to the language of s 7(2)(c). It is necessary, therefore, to consider whether:

[12] Interpretation Act, s 2(2).

(a) the Amending Act purported to affect any "right, privilege, obligation or liability acquired, accrued or incurred under the pre-amendment Act; and

(b) if it did, whether it is possible to infer that there was an intention for the Amending Act to have that effect, notwithstanding s 7(2).

45. It may be that the applicants had a "hope" or "expectation" that their Div 5 Applications would be determined on the basis of the legislation current at the time those applications were made. In my opinion, such a hope or expectation falls short of an accrued right or privilege within s 7(2) of the Interpretation Act.[13] The outcome of a Div 5 review is essentially prospective. A Div 5 review determines the variable factors that will be used in the future, subject to the operation of s 269ZDB(6)(a). A declaration under s 269ZDB will not affect the duty payable in respect of goods that have been entered into Australia before the declaration under s 269ZDB is made, subject to s 269ZDB(6)(a). It may be noted that the amendments are concerned with the situation where no goods or only a low volume of goods have been exported to Australia during the review period. If a substantial volume of goods had been entered into Australia during the review period, the new s 269TAB(2A) would not apply.

46. It is also relevant that the amendments to s 269TAB are about the materials to which the Minister may have regard in determining the export price: the amendments to s 269TAB may be seen as a procedural or evidentiary change, to determine the export price more accurately, rather than a substantive change in the definition of the export price.

47. Section 269ZDB(6)(a) does permit the Minister to make a declaration which has limited retrospective effect. However, the Minister may only back date the declaration to the date of publication of the notice under s 269ZDB indicating that a review would be undertaken. Any possible prejudice that might be suffered through the interaction of Item 4(b) of the Amending Act and s 269ZDB(6)(a) may

[13] See *Mathieson v Burton* (1971) 124 CLR 1 at 23, *Hicks v ALS* (2001) 108) FCR 589

better be accommodated by recognizing that the Minister may consider any prejudice when fixing a date under s 269ZDB(6)(a). The Minister chose the date of the Reviewable Decision as the date from which that decision became effective. In this case, the Reviewable Decision did not have retrospective effect.

48. In any event, the clear intention of the Amending Act is that the amendments would apply to Div 5 applications that were on foot. This is apparent from Item 4(c), which applies the Act to applications which had been commenced but in respect of which a notice of a review under subsection 269ZC(4), (5) or (6) of that Act had not been made. There is no reason why the Amending Act would apply retrospectively to applications falling within Item 4(c) but not to applications falling within Item 4(b).

49. The interpretation of Item 4(b) advanced by the applicants involves adding words which substantially change the effect of the Item. There is no sufficient justification for doing so.

50. This interpretation of Item 4(b) is confirmed by the Explanatory Memorandum which says:[14]

> The purpose of retrospectively applying the specific methods to applications lodged, or reviews being undertaken, prior to commencement is to apply the methods to all reviews currently on foot, without extending to reviews already finalised. This will avoid applying a disproportionately low duty to reviews already underway. Failing to do so, could allow Exporters to subvert the intent of the anti-dumping system and produce an unfair outcome for Australian industry.

51. For these reasons, I consider that there is no basis for the proposition that the Minister failed to make the correct and preferable decision because he applied the Act as amended, rather than the Act as it was before 31 October 2017.

[14] At page 3.

Ground 2: Incorrect application of s 269TAB(2A)

Introduction

52. The second ground advanced by both applicants was that the Minister incorrectly applied s 269TAB(2A) if, contrary to the applicants' first ground, that provision applied at all.

53. The applicants contended that the Minister should have concluded that determination of the export price under s 269TAB(2B) was not warranted and that he should determined the export price under s 269TAB(3). This, they said, would have provided for the export price to be the same figure as the normal value, leading to a 0% rate of duty and a floor price measure. They attacked the reasoning in the Report in respect of each sub-paragraph of s 269TAB(2A)(b).

OneSteel's submissions

54. OneSteel made submissions supporting the Reviewable Decision, which were responsive to the substantive points advanced by the applicants in the review applications. They are largely subsumed by my consideration of the arguments advanced by the applicants.

55. However, OneSteel also argued that it was not necessary for the Minister to have considered the matters specifically referred to in paragraphs (i), (ii) and (iii) of s 269TAB(2A) because each of the applicants did not export any of the goods to Australia during the review period. Each was a "no volume" exporter rather than a "low volume" exporter.

56. The question for consideration under s 269TAB(2A) is whether s 269TAB(2B) should be used to determine the export price. That is determined by whether the information is "insufficient" or "unreliable", rather than by characterizing the exporter.

57. Section 269TAB(2A) requires the Minister to have regard to the matters identified in sub-paragraphs (i), (ii) and (iii), to determine whether or not there have been

no exports during the review period or a low volume of exports. This appears from the structure of paragraph (b). It is also follows from the nature of the matters identified in sub-paragraphs (i), (ii) and (iii). Those matters provide a reason why there had been no exports at all during the review period as readily as they provide a reason why there had been low volumes of exports during the review period. I do not consider that the fact that there were no exports during the review period means that the matters identified in s 269TAB(2A)(b) are irrelevant.

58. I turn now to the arguments advanced by the applicants.

Sub-paragraph (i): "Much" higher volumes

59. The first argument advanced by the applicants was that the legislation required the Minister to find that the previous export volumes were "much higher" than the volumes exported during the Review Period. The applicants said that the previous volumes exported to Australia during the Original Investigation Period were not "much higher" than the export volumes during the Review Period. They said that the difference in volumes was not such as to indicate a strategy to exploit the dumping framework.

60. They relied on the following passage from the Explanatory Memorandum:

> 14. New paragraph 269TAB(2A)(b)(i) requires consideration of the previous volumes of exports (if any) of the goods that are the subject of the review to Australia by that Exporter. If the previous volumes of exports are **<u>much higher</u>** than the volume of exports during the period being examined by the review, this may indicate that the Exporter has adopted a strategy of low volume exports in an attempt to exploit the unintended consequence of the review of measures to obtain a more favourable rate of duty. This may be relevant in the Minister's determination that the information (if any) provided by the Exporter is insufficient or unreliable for the purpose of determining an appropriate export price and that the specific methods prescribed under new subsection 269TAB(2B) should be applied.

61. There are two difficulties with the applicants' argument:

62. Although the Explanatory Memorandum states that "much higher" volumes may indicate the adoption of a strategy of low volume exports, the Explanatory

Memorandum does not state that "much higher" volumes are the only circumstance where a strategy of low volume sales may be inferred or the only circumstance in which a difference in volumes may be relevant; and more fundamentally, the Explanatory Memorandum is not the legislation.

63. The process of interpretation or construction of a statute is directed to ascertaining the meaning of the legislation. In that process, the primary focus is on the language of the statute. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* French CJ. said:

> The Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of the legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.[15]

64. The applicants, and, to a lesser degree, the Commissioner in the Report, referred to the Explanatory Memorandum. The Interpretation Act deals with the circumstances in which "extrinsic materials", such as an explanatory memorandum, may be used as part of the interpretation process. Section 15AB of the Interpretation Act provides:

> Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
>
> (b) to determine the meaning of the provision when:
>
> (i) the provision is ambiguous or obscure; or

[15] (2009) 239 CLR 27at [47]. See also *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ)

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

65. While the Explanatory Memorandum may help, it is not a substitute for the language of the Act itself. My task is not to apply the Explanatory Memorandum but to apply the language of s 269TAB, read, where necessary, with the benefit of the Explanatory Memorandum.

66. Section 269TAB(2A) does not refer to "high" volumes, at all. The legislation refers to "an absence or low volume of exports". The requirement that there be "low volumes" should not be further qualified. The issue is whether volumes are "low", not very low, nor whether previous volumes are "very high". Of course, the size of the difference between the volume of exports in the review period and previous volumes may be relevant. The greater the difference, the stronger the inference which might be drawn.

67. The applicants provided information about the volume of exports during the Original Investigation Period and compared it to the volume of exports during the Review Period. Even if the applicants' arguments about s 269TAB(2A)(b)(i) are rejected, it is appropriate to consider the proposition that the discrepancy between the volume of exports during the Review Period and their previous volume of exports was not such as to warrant the conclusion that they were low volume exporters.

68. I note firstly that the comparison contemplated by s 269TAB(2A)(b)(i) is not between exports during the Review Period and exports during the Original Investigation Period. Sub-paragraph (i) refers to "previous volumes" which includes all volumes prior to the commencement of the Review Period, including any period between the end of the Original Investigation Period and the start of the Review Period.

69. Second, the exercise of the Minister's discretion under s 269TAB(2A) does not involve the categorisation of the exporters as "low volume" or "high volume" exporters. The exercise of the Minister's discretion revolves around whether the

information is “insufficient or unreliable” having regard to the matters referred to in s 269TAB(2A).

70. The applicants did not export during the Review Period. Exports by Shagang during the period from s45 were about s45 Exports by Hunan during the s45 were about s45. Although these amounts may be a small proportion of the overall Australian market, they may still be regarded as “substantial”. This difference between the substantial earlier volumes and the volumes exported during the review period supports the proposition that the Minister should have exercised his discretion under s 269TAB(2A) to determine the export price under s 269TAB(2B).

Sub-paragraph (ii): Patterns of Trade

71. The applicants’ second argument was that the Minister failed to adequately assess the patterns of trade under s 269TAB(2A)(b)(ii). They said he did not have any, or any sufficient, regard to the patterns of trade of the exporters in questions and other Chinese exporters. Properly analysed, the applicants argued, the patterns of trade showed that the exports of Shagang and Hunan to Australia reflected the pattern of trade of Chinese exporters generally, and so did not support the application of s 269TAB(2A)(b)(ii).

72. The applicants referred to the following passage from the Report:

> As shown below in Figure 1, while exports from China to Australia declined markedly around the time securities were implemented on exports of the goods from China, exports from all other countries increased substantially. The Commission interprets these results as the general market for the goods remaining persistent and that Hunan Valin’s lack of exports during the review period does not pertain to a general lack of exports or low volumes of exports to Australia.

73. The applicants contended that the Minister gave “entire weight” to the total volume of like goods exported to Australia from all countries, when the Minister should have had regard to pattern of trade in like goods from the exporter and from China.

74. The applicants contended that s 269TAB(2A)(b)(ii) requires that the Minister's assessment of patterns of trade "is to be undertaken in the context of "exporter in question" and "the pattern of trade generally among Exporters of goods from the country of export".

75. The applicants quoted the following passage from the Explanatory Memorandum in support of their contention:

> 15. New paragraph 269TAB(2A)(b)(ii) requires consideration of the patterns of trade for those goods. For example, some goods are specialty or custom products that are consistently exported in low volumes. Considering patterns of trade may involve an examination of the previous patterns of trade for the Exporter in question, or the pattern of trade generally among Exporters of goods from the country of export. The Minister may also consider the pattern of trade in other ways. For example, if a decline in the pattern of trade from the Exporter reflects a similar decline in the pattern of trade from the country of export generally, during the period being examined by the review, this may demonstrate that low volumes are indicative of broader market trends, rather than a strategy of low volume exports in an attempt to exploit the unintended consequence of the review of measures to obtain a more favourable rate of duty. This may weigh in favour of the Minister determining that the information (if any) provided by the Exporter is sufficient and/or reliable for the purpose of determining an appropriate export price and that the specific methods prescribed under new subsection 269TAB(2B) should not be applied.[16]

76. I do not accept the applicants' arguments.

77. Clearly, the passages emphasised by the applicants in this quote from the Explanatory Memorandum are just examples, rather than a comprehensive articulation of all the circumstances that may be considered a "pattern of trade". Again, it is the legislation which needs to be interpreted, rather than the Explanatory Memorandum.

[16] Emphasis in the applications.

78. The Minister is required to consider "patterns of trade for like goods" under s 269TAB(2A)(b)(ii). As a starting point, there is no reason the provisions of s 269TAB(2A)(b) should be approached narrowly.

79. In s 269TAB(2A)(b)(ii) the expression, "patterns of trade for like goods" is not further qualified. By contrast, sub-paragraph (iii) refers to patterns of trade that are not "within the control of the exporter". Similarly, sub-paragraph (i) refers to "volumes of exports … by that exporter". Sub-paragraph (ii) is not limited to patterns of trade of the particular exporter. Conversely, s 269TAB(2A)(b)(ii) does not provide any warrant for excluding trends in exports of goods involving any particular country, including the country of export.

80. The outcome is that the Minister is not required by s 269TAB(2A)(b)(ii) to have regard only to patterns of trade involving exports from the particular exporter's country of origin, in this case China. Nor is the Minister confined to patterns of trade involving the particular exporter. Although, the Minister may have regard to both those matters, the Minister may also have regard to volumes of exports of like goods from all countries exporting to Australia.

81. A fair reading of the passage from the Report set out at paragraph 73 above indicates that there was proper regard to the matters identified in s 269TAB(2A)(b)(ii). Both exports to Australia from all sources, and exports from China were considered.

Sub-paragraph (iii): "Market dynamics"

82. The applicants' third argument was that there were factors affecting the patterns of trade for like goods that were not within the control of the exporter within s 269TAB(2A)(b)(iii). These factors explained the volume of exports during the review period, such that it was not appropriate to apply s 269TAB(2A).

83. The matters upon which the applicants relied were "confirmed market dynamics, the high price sensitive competition and substitutability between imports and locally produced goods, the price of rod in coil imports from the countries subject to investigation in case 316". I will refer to these matters collectively as "market

dynamics". The applicants contended that these matters were beyond their control.

84. It does not appear to be in dispute that the market for the goods was competitive and price sensitive.

85. The applicants criticised the Commissioner treatment of s 269TAB(2A)(b)(iii) in the Report. It may be helpful to set out the relevant passage in full:

> The SEF stated that the Commission did not have any information regarding factors outside the exporters' control that would affect their patterns of trade. The explanatory memorandum to the amending legislation defines factors outside the exporter's control as supply disruptions or natural events that reduce production levels (e.g. a flood, drought or fire).
>
> In their submissions in response to the SEF, the applicants stated that dumping from other countries, as well as the anti-dumping measures placed on the applicants' exports have prevented them from exporting to Australia.
>
> The Commission considers that the anti-dumping measures in place in relation to the applicants' exports to Australia are not a result of factors outside their control. In fact the measures directly resulted from the behaviour of the applicants during the original investigation period, in the sense that the goods were priced and sold by the exporters willingly at that time, and were found to have been dumping.
>
> In terms of dumping occurring from countries other than China preventing the applicants from exporting, the Commission considers that the behaviour of other exporters in no way prevents the applicants from exporting the goods to Australia.

86. The applicants argued, and I agree, that the first paragraph of the quote does not accurately reflect the Explanatory Memorandum or, more importantly, the legislation. The Explanatory Memorandum gives three examples of factors beyond the exporter's control, flood, drought and fire, which are "traditional" events of force majeure. The Explanatory Memorandum does not say that they are the only events which might qualify as factors beyond the control of the exporters, or, more generally, that "traditional" events of force majeure are the only events which might fall within s 269TAB(2A)(b)(iii). There does not appear to be any reason why s 269TAB(2A)(b)(iii) should be given a narrow or restrictive

meaning. The ordinary meaning of s 269TAB(2A)(b)(iii) is not confined to traditional events of force majeure.

87. The application of s 269TAB(2A)(b)(iii) is essentially a factual inquiry. "Market dynamics" might influence the volume of exports to Australia in ways that are beyond the control of exporters to Australia. If, for example, the export price of goods exported from a country other than China fell substantially, that might influence volumes of exports to Australia from China. Of course, exporters are not helpless in the face of market dynamics and make commercial pricing decisions. However, Parliament would not have intended that exporters would be required to export goods to Australia at prices which are below cost or, more relevantly, below the normal value of the goods, in order to escape the operation of s 269TAB(2A) of the Act. The effect, and explanatory power, of "market dynamics" depends on the particular circumstances.

88. The second paragraph of the passage quoted above asserts that the applicants had argued that dumping from other countries, as well as the anti-dumping measures imposed on the applicants' goods prevented them from exporting to Australia. This does not reflect the argument advanced by the applicants in response to the SEF. The applicants were discrete about the anti-dumping measures imposed on their goods and did not contend that other goods were dumped into Australia. They emphasised in both the response to the SEF and their submissions to this review, that the bulk of the goods sold in the Australian market were undumped or locally manufactured goods.

89. I agree with the contention in the third paragraph of the passage quoted that the imposition of anti-dumping measures is not a factor which is beyond the control of the applicants.

90. Finally, in the last paragraph of the passage quoted, the Report concludes that the behaviour of other exporters "in no way prevents the applicants from exporting the goods to Australia." This conclusion is not expressed in language which reflects the language of s 269TAB(2A)(b)(iii). That paragraph refers to "factors affecting patterns of trade that are not within the control of the exporter".

The effect which a factor has on the pattern of trade does not need to be such as to completely prevent the exporter exporting to Australia. A factor may fall within s 269TAB(2A)(b)(iii) even if its effect is less decisive than "preventing".

91. I am not, however, persuaded by the analysis advanced by the applicants. The applicants pointed to the fact that the proportion of steel rod in coil purchased in Australia from China had declined and that the volume of rod in coil manufactured in Australia and exported to Australia from Indonesia and Vietnam had increased. It appears to me likely that this change was the result of the imposition of anti-dumping measures on exports of the goods from China. The anti-dumping measures had the effect of increasing the effective price in Australia of the applicants' goods by at least the amount of the IDD imposed, i.e. by 40.2% for Hunan and 36.1% for Shagang. This must have had an adverse effect on the applicants' exports to Australia. The imposition of dumping duties is not a matter which is relevantly beyond the control of the applicants.

92. Further, although the applicants pointed to the changes in the makeup of sales of the goods in Australia, there was no direct evidence about the impact of market dynamics on exports from China. The review applications did not say, or point to specific evidence showing, that they were unable to compete with the undumped exports of the goods to Australia or with local manufacturing. The decline in the volume of goods exported from China is consistent both with the effect of "market dynamics" and a decision by the applicants to not export to Australia. It is noted that the normal value of the applicants' goods was determined under Reg 43 of the *Customs (International Obligations) Regulation 2015* (CIO Regulation). The cost of manufacturing was calculated using a benchmark which was an average of the cost of billet for three integrated producers and exporters of the goods, each of whom sold into the Australian market during the review period and might be regarded as competitors of the applicants. While it is accepted that the normal value was a constructed figure, the use of the benchmark suggests that "market dynamics" were not such as to prevent the applicants exporting to Australia.

Conclusion: s 269TAB(2A)

93. For the reasons given above, I consider that the reasoning in the Report, adopted by the Minister, was not flawed in the ways the advanced by the applicants. It does not appear that the determination by the Minister of the export price was flawed in other ways.

94. The applicants contended that the export price should have been determined under s 269TAB(3), which enables the Minister to determine the export price by having regard to "all relevant information" where "sufficient information has not been furnished or is not available, to enable the export price to be ascertained under the preceding sections". It may be that s 269TAB(3) permits access by the Minister to the information upon which the Minister relied in this case or to the more general information that, during the Original Investigation Period, the export price of the goods exported by the applicants was been significantly less than the normal value of those goods, undermining the reliability of the normal value as a basis for determining the export price. Consequently, it is not clear that recourse to s 269TAB(3) would have resulted in a different export price. However, it is not necessary to reach a conclusion on the point.

Ground 3: The normal value

95. The applicants contended that the calculation of the normal value in the Report was flawed.

96. In calculating the normal value, the Report proceeded under s 269TAC(2)(c) and Regulation 43 of the CIO Regulation. A benchmark for the costs of steel billet was used, rather than the steel billet costs recorded in the exporters' records. Steel billet is the main component of the goods. In calculating the benchmark, the Report relied on information about 3 integrated exporters of the goods to Australia from Indonesia, Spain and Taiwan. Information about these exporters had been gathered as part of reviews into the alleged dumping of rod in coil, Investigations 416 and 418. Investigation 416 extended to goods from Vietnam. Hoa Phat Group is a Vietnamese exporter of the goods to Australia. It too is an

integrated producer, in the sense that it produces some billet from scratch, rather than relying or scrap or purchasing billet from other producers. Hoa Phat was not included in the benchmark. The applicants contended that it should have been.

97. The Report does not clearly articulate the reasons why Hoa Phat was not included in the benchmark. The applicants' submissions forming part of the review applications addressed the question whether Hoa Phat was an integrated producer.

98. The applicants' submissions of 5 July 2018 proceeded on the basis that Hoa Phat was not included in the benchmark because the Commission did not have verified information about Hoa Phat's billet price that was properly comparable to the billet prices of the other benchmark exporters. The applicants' submissions of 5 July 2018 provided copies of materials relating to Hoa Phat's billet costs (supplementary materials). Mr Bracic represented Hoa Phat during Investigation 416. The applicants contended that the supplementary material had been provided to the Commission during course of Investigation 416.

99. During the conference on 24 July 2018, the representative of the Commission accepted that

    (a) Hoa Phat's billet costs were not included in the benchmark billet costs because the Commission did not have verified information about Hoa Phat's billet costs that was comparable to the billet costs of the other exporters; and

    (b) the supplementary materials had been provided to the Commission during the course of Investigation 416.

    The Commission's representative said that the supplementary materials were not referred to by the Commissioner in deciding on the recommendations in the Report and I accept that this was the case.

100. Section 269ZZK(4) provides that I must not have regard to any information other than “relevant information”. “Relevant information”, for the purposes of a review of a decision relating to a Div 5 application, is defined by s 269ZZK(6)(c). There are two limbs to the definition:

(a) information to which the Commissioner (actually) had regard when making the recommendations set out in the Commissioner’s report; and

(b) information to which the Commissioner was required by s 269ZDA(3)(a) to have regard when making the recommendations set out in the Commissioner’s report.

101. As indicated above, the Commissioner did not, in fact, have regard to the supplementary materials in making his recommendations. The supplementary materials do not therefore fall within the first limb of s 269ZZK(6)(c).

102. Paragraph 269ZDA(3)(a) requires the Commissioner to have regard to a list of particular types of documents eg, timely submissions made in response to the SEF. Materials provided to the Commission during the course of a separate investigation are not among the items the Commissioner is required by s 269ZDA(3)(a) to take into account. They do not fall within the second limb of s 269ZZK(6)(c).

103. It follows that the supplementary materials are not ‘relevant information’. I cannot have regard to them.

104. The Div 5 Reviews proceeded on the basis that a comparison was not possible between Hoa Phat’s billet costs and the billet costs of the other integrated producers making up the benchmark. The composition of the benchmark has not been shown, on the basis of relevant information, to be wrong. The calculation of the normal value was not vitiated as suggested by the applicants.

105. I considered the possibility of requesting that the Commissioner to reinvestigate the normal value. However, I was informed during the conference that the supplementary materials had not been verified during the course of Investigation

416. Verification of the supplementary materials at this stage would be problematic because it was not information of the applicants in this review.

Recommendation

106. For the reasons set out above, I made the recommendation set out at the beginning of this Report.

……..
Scott Ellis
Panel Member
Anti-Dumping Review Panel
6 August 2018