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Précis Paper

Anti-dumping duty

A discussion of the decision of *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC 20.

Discussion Includes

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Anti-dumping duty

1. In this edition of BenchTV, Phillip Walker SC (Barrister - Blackburn Chambers, Canberra) and Brodie Buckland (Barrister – Blackburn Chambers, Canberra) discuss the recent decision of *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC 20.

What is dumping?

2. A duty is placed on imported goods considered to have been dumped.
3. This anti-dumping duty resembles what people would consider to be a tariff, however it does not have the historic justification that a tariff does.
4. This is because tariffs were typically protective and designed specifically to protect domestic industry from foreign competition.
5. Dumping occurs where the price at which a good is exported into Australian markets is less than the price which the good sells for in the country it is produced, that is, a price below the 'normal value'.
6. The purpose behind an anti-dumping duty is fairness, as opposed to protection.
7. In some countries, the Government subsidises goods so that if those goods are imported into a country which has a competitive market, the 'normal value' is distorted and Australian markets suffer from unfair competition.
8. The rationale behind anti-dumping laws is to ensure that unfair competition is prevented.

Statutory regime

9. The statutory regime for the imposition of anti-dumping duties is found in the *Customs Act 1901* (Cth).
10. If the Commissioner can determine the price paid for like-goods sold in the exporting country, he can then compare that price to the price at which the goods are actually being exported.
11. However, in some markets it is difficult to determine what the arms-length competitive price is in the country in which the production takes place.
12. The Commissioner must determine what the 'normal value' for the production of goods in the country of export.
13. In such cases, the Commissioner can construct the 'normal value' of the goods by methods set out in the legislation.
14. This involves the Commissioner determining the cost of making the goods, the selling, general and administrative costs of the making and marketing of the goods in the country of production, and also the profit on those goods.

15. In doing so, the Commissioner assesses what is considered to be a proper value for the goods in the country they are produced, and then compares this price to the export price of the goods.
16. If the export price is lower, then there is a case of dumping which may warrant the imposition of anti-dumping duty.
17. Thus, if the 'normal value' of the goods is close to the export price, there may be little case for the imposition of anti-dumping duty, or the duty may be minimal.
18. Once there is a wider gap between the normal value and the export price, the case for the imposition of anti-dumping duty becomes more compelling.
19. Together with the *Customs Act 1901* (Cth), the Commissioner must also act in accordance with the criteria laid down in the *Customs (International Obligations) Regulation 2015* (Cth), which implements Australia's obligation to anti-dumping.
20. Anti-dumping duty represents a significant impost on the importation of goods and it also has a significant consequence on Australian manufacturers who may be forced to compete with dumped goods if no anti-dumping duty is imposed.

Process imposing anti-dumping duty

21. In the case of *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC 20, there was an application to the Commissioner for review of the normal value of steel.
22. As part of the process, the Commissioner is required to publish a notice informing people that they have 37 days to make submissions to the Commissioner about any general matter relevant to the normal value and duty which may be imposed as a consequence.
23. Once the submissions have been received and the 37 days have passed, the Commissioner is then required to prepare a Statement of Essential Facts, which will include details about the cost of production, selling, general and administrative costs, profit, and the state of the market in the export country in question.
24. The Statement of Essential Facts will also address questions such as whether the transaction was an arms-length transaction, and whether the goods which are exported are sold in the ordinary course of trade.
25. Submissions can come from anybody, though the most likely people are the importer and those who produce similar goods in Australia.
26. Submissions from domestic producers of similar goods can have an impact on the obligations of the Commissioner to afford procedural fairness to the applicant for review of the normal value.
27. Where the production of competing goods is widespread, the potentially large number of people who make submissions presents natural justice difficulties, particularly given the tight statutory timeframes.

28. Agricultural production such as the importation of pineapples is an example of the kind of industry where there could be many interested parties. See *Thai Pineapple Canning Industry Corp Ltd v Minister for Justice and Customs [2008]* FCA 443; 104 ALD 481.
29. Any matter raised in the submissions might be taken into account by the Commissioner, and the importer may be taken to be on notice once they have been informed of the submission. This means that the importer will be considered as having been provided the opportunity to address any submission merely by the fact that a submission had been made to the Commissioner.
30. It is often difficult for a person faced with submissions given to the Commissioner to work out which points raised by the submissions will be considered important by the Commissioner, and therefore, how much effort they should put into responding to any given submission.
31. The difficulty is compounded by the fact that the timeframe of 37 days is not a lot of time, especially when the matters are complex.
32. If the submissions come in close to the expiration of the time period, the ability to deal with the submissions comprehensively is extremely limited, and whilst the timeframe may be extended, there is no statutory guarantee to this effect.
33. At common law, if there is a large class of people who may be interested in a matter, there may be an implication that there is no right to be heard. There is no such implication under the anti-dumping legislation because the statute confers a right to make a submission.
34. Once the Commissioner has put on the Statement of Essential Facts, there is an entitlement to put on a submission in response for 20 days after which the Commissioner must make a report recommending whether duties should or should not be imposed.
35. The formal decision about anti-dumping and the imposition of any relevant duty, is made by the Minister.
36. In the matter of *Steelforce*, the preliminary finding by the Commissioner was that there would be no anti-dumping duty.
37. This was largely due to no figure being allowed for the profit component because of the difficulties with ascertaining it in China.
38. However, once the Final Report to the Minister was submitted, the Report recommended the imposition of substantial duty.
39. This was largely on the basis of a submission made by an industry participant, ATM, between the publication of the Statement of Essential Facts and the publication of the report.
40. The applicant considered the Commissioner's report imposing anti-dumping duty to contain legal and procedural errors, and commenced a judicial review application. This application was heard at first instance by Robertson J in the Federal Court.
41. Robertson J did not grant the application and the applicant appealed to the Full Federal Court.
42. The applicant, *Steelforce Trading Pty Ltd*, is a company which imports hollow steel section (HSS) from China into the Australian market.

43. There is steel product produced as part of this process which does not meet Australian standards and is therefore not imported into Australia. It is sold on the Chinese domestic market.
44. The product was referred to by two labels, 'Non-prime' and 'Downgrade', and a question before the Court was what these two terms actually represented.
45. The question was whether they were simply two labels for the same substandard product which could not be sold in Australia, or whether they were indicative of two different types of substandard product sold in the Chinese market.
46. In the Statement of Essential Facts, the Commissioner treated 'non-prime' and 'downgrade' almost indistinguishably.
47. However, this changed in the final report as a result of a submission made by ATM that 'non-prime' was different to 'downgrade'. ATM also thought that it was possible to determine a proper profit component for the sale of the non-prime steel in China, which may be used in determining a 'normal value' and therefore imposition of anti-dumping duty.
48. If downgrade and non-prime were taken together, almost no profit was shown. If only non-prime was considered, the profit was much higher.

Ground of Appeal – Natural Justice

49. The first ground of appeal was natural justice. The applicants argued that they did not have notice of the change in distinction between non-prime and downgrade products in the Commissioner's final report.
50. The applicant relied on the decision of *Thai Pineapple Canning Industry Corp Ltd v Minister for Justice and Customs [2008]* FCA 443; 104 ALD 481, which found that if there was going to be a significant change in approach of the Commissioner, there needs to be notice and the opportunity for submissions given.
51. The applicant argued that the substantial change was that the Commissioner treated non-prime and downgrade as different goods.
52. The applicant also argued that the change meant that a profit component would now be taken from the goods, when originally, they were not considered to be in the normal course of trade and not available to be used for determining the profit component of the normal value.
53. However, the Court dismissed this ground of appeal due to the fact that ATM made the submission, which then put Steelforce on notice, which Steelforce subsequently responded to.
54. The Court held that this was sufficient to put Steelforce on notice about the issue, and the requirements to be heard on the topic were satisfied.

Ground of Appeal- Failure to find adequate evidence

55. The applicant contended that there was no factual evidence to distinguish between 'downgrade' and 'non-prime' in the Commissioner's report.
56. The applicant contended that they had used the terms 'downgrade' and 'non-prime' interchangeably.
57. However, the Full Court did not agree that the terms had been used interchangeably and held that it was open to the Commissioner to rely on the different labels as indicative of them being different products.
58. The profit margin when looking at the products individually and collectively, showed a significant difference, and the Court felt that this difference was enough to constitute evidence that the products were different.
59. If a profit was ascertained on the sales of non-prime product, it was a reasonable profit.
60. If profit was ascertained using both non-prime and downgrade product, it was a bare profit.
61. If only the downgrade product was used, there was no profit, and instead, a substantial loss.
62. The Court deemed it appropriate to leave it to the Commissioner's judgment to ascertain a profit figure of non-prime alone and use this figure to calculate the normal value.

Ground of Appeal - Subcategorising goods

63. In the report, the Commissioner described the non-prime product as the closest to the product exported to Australia.
64. The applicant argued that this was not appropriate for the Commissioner to have done, as once the Commissioner has a number of goods in the same general category, it is not his role to further subcategorise and pick those from the group which are closest to the product in question.
65. The primary judge accepted that it was not permissible to subcategorise goods in the same general category, and this appears to have been accepted as correct in the Full Court. On the facts of the case however, the Court held that no subcategorisation had taken place.

Ground of Appeal – Failure to identify 'actual amounts realised'

66. *The Customs Act 1901* (Cth) sets out the different components of 'normal value' for the purposes of assessing whether a good is dumped or not.
67. The Act requires the profit component of the 'normal value' to be determined in accordance with reg 45 of the *Customs (International Obligations) Regulation 2015* (Cth).
68. Whilst the regulations provide a number of methods for the calculation of profit, the Commissioner chose to use the method contained in reg 45(3)(a), which required the Commissioner to determine the actual amounts realised from products sold in China.
69. In the Statement of Essential Facts, the Commissioner noted that the method contained in reg 45(3)(a) was not available. However, in the report to the Minister there was a reversal of this position.

70. The key word in reg 45(3)(a) was that the Commissioner must **identify** the actual amount realised.
71. This was significant in the current case as some HSS had been produced at an earlier time than the time when it was sold. The cost of the steel used to produce HSS had fallen throughout the period.
72. In assessing the actual amount realised on HSS produced over several periods, the Commissioner only looked at the final period, and used the sale price in the final period only irrespective of when the steel had been produced to arrive at a profit figure.
73. The applicant argued that the Commissioner had calculated the profit by reference to production costs only in a small, defined period, which showed production costs to be less than the actual cost of production over the other periods. The applicant thus argued that the Commissioner had not identified the actual amount realised on the steel that was sold.
74. The Court agreed, holding that there was not an identification of the actual amount realised.
75. The Court made it clear that if the Commissioner uses reg 45(3)(a) as a method of calculation, the Commissioner will be held tightly to identify the actual amounts realised, not some hypothetical approximation.
76. The Commissioner could have used s 269TAC(6) of the *Customs Act 1901* (Cth), which allows the Commissioner to use any other reasonable method to determine normal value.
77. In the present case, the Commissioner did not use any other reasonable methods; instead he applied more specific methods of determining normal value in relation to the profit component of domestic sales of the product in China.
78. On this ground, the Full Court upheld the appeal, set aside the report and ordered that it needed to be redone, due to the fact that the accounting exercise was not applied correctly by the Commissioner and there was an artificially inflated profit figure as a result.
79. If the Commissioner could not calculate the actual amount realised on the domestic steel sales for the purpose of calculating profit, then he was required to go to some more general provision in the statute, namely s 269TAC(6).
80. The difficulty of the task did not require any loosening of the statutory language, rather it required using an alternative statutory test.
81. Pagone J held that the exercise in s 269TAC(2)(c) is essentially a hypothetical one where one is not obtaining an actual value, but rather a normal value which is a hypothetical price had it been sold for domestic use.
82. Pagone J thought this was determinative in interpreting the regulations and this therefore meant that the process which was available to the Commissioner upon application of reg 45(3)(a) was much broader than Bromwich and Perram JJ held it was.
83. Bromwich and Perram JJ held that although the exercise set out by s 269TAC(2)(c) was a hypothetical one, the task to which the regulation directed the Commissioner was a very specific one using as much 'real world data' as possible.

<u>Ground of Appeal – Using benchmark from third party countries</u>

84. The Commissioner must determine the cost of making the import products as part of determining what the normal value actually is.
85. In the current case, the Commissioner determined that he couldn't identify what a proper price of the steel used to make HSS actually was in China.
86. This was due to a general subsidy program undertaken by the Chinese Government called 'Program 20'.
87. Whilst there is some international debate as to whether the price of products can be taken into account if they are subsidised, the Commissioner took the view that he would not take into account products which were subject of the subsidy program.
88. As a result, the Commissioner used a 'benchmark' which was a weighted average comprising steel prices in Korea, Malaysia, and Taiwan.
89. It was argued by the applicant that the Commissioner was required to determine the cost of steel in the country of export, ie China.
90. Whilst the statute makes express provision for the Commissioner to use information from other countries, the applicant argued that if he did, there had to be some adjustment, particularly if the country of export enjoyed a comparative advantage over the countries from which the benchmark was set.
91. It was found that China does enjoy a comparative advantage over the steel costs in Korea, Malaysia, and Taiwan, and the Commissioner did not adjust for the comparative advantage at all.
92. The applicant claimed that this had to be an error of law.
93. Nevertheless, the Full Court held that the Commissioner had quite clearly turned his mind to the question of comparative advantage and reached a judgment about the difficulty associated with making the adjustment, and this was sufficient cause to use the foreign steel prices.
94. There is a question as to whether this aspect of the judgment will be tested in the future.
95. It is a difficult task for the Commissioner to make an adjustment for comparative advantage in the country of export.
96. In the event that profit cannot be assessed in accordance with reg 45, and in the event that the benchmark is not adjusted for the domestic country, all the Commissioner has left is the tool found in s 269TAC(6), which is any other reasonable method.

<u>Takeaways from case</u>

97. The purpose of the anti-dumping regime is to ensure that something which is sold for a higher price in the country of export is not being dumped at a lower price in Australia, impacting Australian producers.
98. In relation to the right to be heard in relation to the Statement of Essential Facts and the report ultimately produced to the Minister, people interested in these decisions should pay

close attention to the submissions and may not be able to complain if, in the final report to the Minister, the Commissioner takes a different view to that which was in the Statement of Essential Facts as a result of a submission.

99. Precision in describing goods which are the subject of any domestic sales is very important because it may affect the conclusions the Commissioner draws about the product and out of which certain statutory decisions will be made. If one wants profit calculated on goods which one says are the same class, one must be in a position to prove that they are in the same general category.

100. The extent to which a Commissioner uses a Regulation requiring him to identify the actual amounts realised to calculate profits will be a fairly precise accounting exercise and tied strictly to legislative meaning.

101. It is open for the Commissioner, so long as he at least considers the question of adjusting costs obtained from third party countries, to rely on unadjusted costs from third party countries so long as he directs his attention to the feasibility of making those adjustments.

BIOGRAPHY

Philip Walker SC

Barrister – Blackburn Chambers, Canberra

Philip was admitted to the ACT Bar in 1989 before taking silk in 2013. He mainly practices in commercial and administrative law. As President of the ACT Bar Association, Philip assisted in introducing procedures that significantly reduced the case backlog in ACT Courts. He has also been a member for the ACT Law Reform Commission.

Brodie Buckland

Barrister – Blackburn Chambers, Canberra

Brodie was admitted as a lawyer in 2014 and called to the ACT Bar in 2015. His practice is predominantly focused on administrative law, commercial litigation, and professional liability. Prior to his legal career, Brodie was an Olympic rower who competed in the 2012 London Olympics.

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Benchmark Link

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Legislation

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