Editorial

The first issue for 1986 contains information about the Business Law Section with a list of all its Committee members, it members as at 21st of February 1986 and a summary of submissions made by and on behalf of the Business Law Section and its various committees to various Government agencies on various aspects of Business Law. This issue features a short discription of the work of the International Bar Association Section on Business Law with which we have direct links. Members of our Section are encouraged to join the relevant Section.

We also feature conferences that are to be held later this year which may be of interest to members of the Section.

I conclude by asking members of the Section to submit articles on topics of interest in the areas of Business Law to me, c/- The Faculty of Law, Monash University, Clayton, 3168. Whilst we do not encourage very lengthy articles we would be happy to consider such articles for publication in successive issues where relevant.

In this issue we feature one article — a paper delivered by Alan Limbury at the recent Customs Law Seminars held in Sydney and Melbourne.

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Submissions made by Committees of Business Law Section since October 1985:

Submission	Committee
Trade Practices Amendment Bill 1985	Trade Practices
Trade Practices Amendment Bill 1985 (No. 2)	Trade Practices
Draft Companies and Securities Legislation Amendment Bill 1986	Companies
Second Exposure Draft — Futures Industry Bill	Companies
Petty Patents Amendment and Extension of Term	Intellectual Property
The Proposed Australian Capital Territory Loan Securities Stamp Duty	Banking Finance
Electronic Funds Transfer Systems	Banking Finance
Second Exposure Draft — Futures Industry Bill	Banking Finance (John O'Sullivan)
The Proposed Imputation System of Company Tax	Taxation
Negative Gearing and Depreciation	Taxation (Mark Leibler)

In addition to the above, the Customs Law Committee made a submission on the Customs Tariff (Anti-Dumping) Act 1975 which was forwarded with one made on the same topic by the Trade Law Committee. The Taxation Committee also contributed to the submission made by the Law Council on the 'Australian Card'.

Margery Nicoll
Administrator

Judicial Review of Customs' Anti-Dumping Decisions

Alan L. Limbury

Partner, Minter Simpson.

February, 1986

This paper considers some of the ways by which administrative decisions by customs officials in dumping matters are reviewed by the judiciary.

By way of brief reminder:

1. Dumping and countervailing duties may be imposed in addition to general duties of Customs imposed by the Customs Tariff Act.

2. Dumping may be defined as the export to Australia of goods at less than a fair price. A dumping duty is designed to raise the export price to a fair price.

3. A countervailing duty is designed to off-set any subsidy, bounty or assistance in the country of export which produces unfair pricing in the importing country.

4. Before either a dumping or countervailing duty may be imposed, the Customs Tariff (Anti-Dumping) Act , 1975 requires that there be shown to exist:

(a) export to Australia of goods at less than a fair price or the subsidisation of exports;

(b) material injury to an Australian industry; and

(c) a causal link between (a) and (b).

5. During the investigation leading to a final decision whether or not to impose a dumping or countervailing duty, the Customs may require security to be given upon continuing imports, designed to meet any duty that might subsequently be imposed. This power is to be found in Section 42 of the Customs Act.

Both the Administrative Decisions (Judicial Review) Act and the Administrative Appeals Tribunal Act allow review of administrative decisions.

The aim of both Acts was well summarised by Lockhart J. in *Toy Centre Agencies —v— Spencer*[1]

> "The ultimate aim of the Judicial Review Act is to ensure that decisions of public servants and others which affect the rights, prospects and property of citizens, are made after giving careful consideration to the questions involved in the particular case, so that it is more likely that the decision will be right and justice done to the persons affected by it. This is really what the Judicial Review Act and the Administrative Appeals Tribunal Act 1975 are all about. But the Court must not require perfection from decision makers or impose such onerous duties upon them as to cause them to be afraid to make decisions, lest they be challenged on trivial grounds, or it preoccupy them with minutiae. The determination by the Court of proper standards to be observed in decision making inevitably involves balancing the requirement of fair play to the citizen against the real problems that confront decision makers in the public service and calls for an approach by the Court that is fair, practical and of common sense. There is no essential inconsistency between the duty of decision makers to be fair to those who may be affected by their decisions and the advancement and efficiency of the public service. Extremes of view favouring one side or the other will not promote the plain objectives of administrative legislation including the Judicial Review Act."

Mr. Allan Hall has dealt comprehensively with the administrative review available under the AAT Act and I shall not presume to add anything to what he has already said.

The Administrative Decision (Judicial Review) Act, 1977 allows judicial review of a wide class of administrative decisions. Jurisdiction is granted to the Federal Court. When enacted, certain classes of decisions were specifically excluded by Schedule 1 from the ambit of the Act, including:

> Decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax or duty, or decisions disallowing objections to assessments or calculations of tax or duty, or decisions amending, or refusing to amend, assessments of tax or duty, under (inter alia) the Customs Act and the Customs Tariff Act.

As I shall recount, early challenges made under the ADJR Act to anti-dumping decisions led to amendment of Schedule 1 in an attempt to eliminate such challenges.

The challenges that have been made successfully to dumping decisions are as important in what they reveal as to the attitude of the public servants responsible for the administration of the Anti-Dumping Act as in charting the legal boundaries of the juristiction of the Federal Court.

So far as I am aware, the first ADJR challenge to a decision under the Anti-Dumping Act was the *Visy Board* case in July, 1982. The Customs decided to take cash securities in relation to an alleged case of "freight dumping", under Section 12 of the Anti-Dumping Act, that is where freight, by reason of subsidy, is less than normal, to the extent that injury is caused to an Australian industry. An officer of customs was honest enough, or imprudent enough (depending upon one's viewpoint) to admit that cash securities were being taken as a holding operation because there was something the Customs could not understand about the transaction, even though there was no evidence of subsidy or that injury had been caused. When told the Customs had no power to do this he said that was the advice they had also, but they were going to do it anyway.

At the time, there was in the Act a Section 14, which provided, in effect, that no duty could be imposed unless the Minister were satisfied that to do so was not inconsistent with Australia's treaty obligations relating to tariffs or trade. As a party to the General Agreement of Tariffs and Trade, Australia was and still is bound to refrain from imposing a dumping countervailing duty unless satisfied of the existence of dumping or subsidy causing injury. Further, preliminary measures, such as the taking of cash securities which might later be drawn upon to satisfy a duty properly imposed, may not be taken in accordance with the GATT unless a preliminary affirmative finding be first made to the same effect.

It was clearly inconsistent with the GATT for cash

security to be taken in the absence of such a preliminary affirmative finding, and an ex parte injunction was obtained by *Visy Board* from the Federal Court within four hours of the admission by the Customs official. The case is unreported because it was subsequently settled.

Tasman Timber[2] was the next anti-dumping decision challenged under the Act and the factual and legal issues received more comprehensive consideration. New Zealand "four by twos" were known to be the subject of two New Zealand subsidy schemes, one of which involved a 10.5% tax rebate for exports. Following complaints by the Australian industry, cash amounting to 19.9% of the value of the goods was taken before shipments were cleared by Australian Customs as security against any countervailing duty that might ultimately have been imposed.

Like *Visy Board, Tasman Timber* challenged the decision to take cash securities, seeking an injunction under Section 5 of the ADJR Act to restrain its implementation. A preliminary objection was taken that exporters had no standing to seek review under the ADJR Act, but this was quickly overcome by the joinder of importers as additional applicants, with the result that no ruling was made on the point.

Lockhart J. held that the decision in question was a decision of an administrative character made under an enactment and that it was susceptible of review.

His Honour said[3]:

"The power to take security pursuant to Section 42 must take its colour and content from the primary power to impose countervailing duties which it supports. Countervailing duties by their very nature are duties imposed on the importer of goods equal to the exporter's Government subsidy to prevent the dumping of the goods. If a countervailing duty was greater than the subsidy it would be a penalty or forefeiture or an ordinary impost acting as a trade barrier. The necessity for a countervailing duty to equal or balance the exporter's Government subsidy is not only inherent in the very nature of such a duty but is recognised expressly by the Act in Section 10(4) which provides, so far as relevant:

> "(4) . . . the contervailing duty in respect of goods is a sum equal to the amount of the subsidy, bounty, reduction or remission of freight or other financial assistance that has been paid or granted, directly of indirectly, upon the production, manufacture, carriage or export of the goods."

What happened in this case? The relevant officers of the Department were aware that two different subsidy schemes were in operation in New Zealand at the same time, one of which applied to some of the exporters (the Old Scheme) and the other applied to other exporters (the New Scheme) with quite different financial consequences. They disregarded the former. In so far as they considered the latter, they concerned themselves not with the amount of the subsidy, which is a direct tax rebate of 10.5 per cent, but with a different notion entirely extraneous to the subsidy paid or payable by the New Zealand Government. What they did was to measure in a rough way the extent to which prices in Australia of the timber imported from New Zealand would need to be increased to produce the same after-tax financial consequences to the New Zealand exporters as if there had been no subsidy. The officers of the Department did not assess the amount of any relevant subsidy or financial assistance. They determined the amount of duty needed to produce the consequence that, notwithstanding the subsidy or financial assistance afforded by the New Zealand Government, the New Zealand exporters would not be able to sell the timber competitively in Australia.

As the Minister had misconstrued and ill-considered the amount and the after-tax consequence of the subsidy provided by the New Zealand government, he was held to have addressed himself to an irrelevant consideration and to have failed to consider relevant considerations. Accordingly, the Minister was ordered to review his decision.

The next decision relating to anti-dumping reviewed under the ADJR was *Feltex Reidrubber*[4]. As in *Visy Board* and *Tasman Timber*, the Court initially made orders ex parte to restrain the imposition of cash securities. The Court eventually rejected the applicant's claim that the imposition of cash securities was improper, partly because the Court took the view that New Zealand tyres, although not the cheapest on the market, were nevertheless causing material harm to Australian industry.

This case was signficant among other things for the finding that:

> "a consideration of the entirety of the legislation in question does not suggest that dumping action may not be taken where harm is being caused to Australian industry and exports are coming from a number of countries no one of which is itself exporting a substantial quantity of dumped goods. If 5% of a particular market was an insignificant percentage, but 25% was not, it would be my view that dumping action might properly be taken in respect of the exports of five countries each of which had 5% of the market. Any other view would leave a very large loophole in the legislation for which its language provides no warrant."

Only days before the hearings in *Tasman Timber* and *Feltex Reidrubber* were due to commence, the then Minister for Industry & Commerce, Mr. Andrew Peacock, introduced regulations under the ADJR Act, announcing by way of press release:

> "... the Government is concerned that exporters of goods to Australia have been able to use the existing law to prevent the Customs from taking provisional anti-dumping and countervailing securities".

Action was therefore being taken "to minimise the opportunities to circumvent the government's intentions". Accordingly:

> "Regulations have been introduced today under the ADJR Act which are designed to remove from the scope of that Act decisions to take cash or other securities under the Customs Act as provisional anti-dumping and countervailing measures."

The amendment excluded from the decisions subject to review under the Act:

> "Decisions under Section 42 of the Customs Act to require and take securities in respect of any duty that may be payable under the Customs Tariff (Anti-Dumping) Act 1975"

At the same time, the Minister announced that Section 14 of the Customs Tariff (Anti-Dumping) Act was to be repealed. It was said this would "in no way lessen Australia'a adherence to its international agreements". The idea was to remove from judicial consideration the extent of any such adherence.

It is difficult to justify these actions by the Government in the light of the facts of *Visy Board, Tasman Timber* and *Feltex Reidrubber*. In the first, the Government took action which its own legal adviser said it had no power to do. In the second, it imposed cash securities unrelated in amount to any subsidy or financial advantage provided by the Government of New Zealand. In the third, important points of law were resolved for the first time.

As a result of these amendments, final decisions can no longer be challenged for the reason that the Minister did not have regard to Australia's treaty obligations and cash security decisions are generally believed to be no longer reviewable under the ADJR Act.

I say "generally believed to be no longer reviewable" because, although this was certainly the intent of those responsible for the amendments, the language of the Administrative Decisions (Judicial Review) Regulations, No. 317 of 1982 purports to exclude from judicial review under the ADJR Act decisions to require and take securities in respect of duty that *may be* payable.

Section 13 of the Act permits duty to be imposed in respect of goods that have been entered for home consumption in relation to which security has been taken in respect of any duty that *might become* payable. There may be a significant difference between the expressions "may be payable" and "might become payable" which can be illustrated thus:

> Where goods are already known to be the subject of duty but the precise quantum remains to be calculated, it is appropriate to use the expression "duty that may be payable".
>
> Where goods are not presently subject to any duty at all but, as a result of the decision subsequently to be made that a dumping duty is payable, those goods might in the future become liable to duty, it is appropriate to use the expression "duty that might become payable".

Accordingly, it may plausibly be argued that the only kind of decisions which the 1982 amendments excluded from review under the ADJR Act are decisions in relation to the taking of cash securities in respect of goods which are already known to be the subject of a duty but where the precise amount to be levied on a particular shipment remains to be calculated. On this view, untouched by the amendments, and therefore still amenable to judicial review under the ADJR Act, are decisions to impose cash securities upon the importation of goods which are the subject of a dumping or countervailing duty enquiry which has not yet resulted in the imposition of any duty. Accordingly, decisions of the kind successfully challenged in *Visy Board* and *Tasman Timber*, and which were the subject of the unsuccessful challenge in *Feltex Reidrubber* might still be the subject of review under the ADJR Act.

Be that as it may, another avenue of challenge is available.

Section 75 of the Constitution confers original jurisdiction on the High Court in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. Under Section 77, the Parliament is authorised to make laws with respect to matters:

(i) defining the jurisdiction of any Federal Court other than the High Court; and

(ii) defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to or is invested in the Courts of the State.

Pursuant to Section 77, the Judiciary Act was amended in 1983 by the insertion of Section 39B which provides:

> "The original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth."

This amendment opens the door to challenges in the Federal Court to cash security decisions in dumping matters by way of injunction to restrain an officer of the Commonwealth from taking cash securities in circumstances amounting to excess of power. Since Section 5 of the ADJR Act, in setting out the grounds upon which that Act provides for judicial review, gathered together a compendium of circumstances in which the common law already offered relief to the citizen from abuse of power by bureaucrats, the grounds upon which challenges may be made to cash security decisions under Section 39B of the Judiciary Act are similar to those set out in Section 5 of the ADJR Act. Of course, like the Ritz Hotel, the remedy has always been available in the High Court. Its current availability in the Federal Court means that the same decisions may be challenged not under the ADJR Act but under the Judiciary Act, upon much the same grounds. It might be argued that the injustice perpetrated by the 1982 amendments to the ADJR Act has in large measure been remedied by the 1983 amendments to the Judiciary Act.

McDowell v. Button[5] was a case involving conduct by the Customs at least as astonishing as in *Visy Board* and *Tasman Timber*. This time the decision challenged under the ADJR Act was a final decision. The Minister for Industry & Commerce, in imposing a dumping duty, made a declaration under Section 8 of Customs Tariff (Anti-Dumping) Act 1975 that the export price of glass panels imported from Spain was less than the normal value of the goods. In order to determine the normal value in Spain, USA normal values of like goods were used because the information from Spain was rejected as unreliable. In determining USA normal values, sales at a loss were ignored as being not in the ordinary course of trade. Accordingly a constructed normal value for the USA was determined and this was used as the normal value for exports from Spain.

The Court made the important finding that sales at a loss were not necessarily outside the ordinary course of trade. If they persisted, they might evidence an ulterior object sought to be achieved which would be sufficient to take the transactions outside the ordinary course of trade.

In any event, the Court decided that the information available as to USA normal values was unreliable and that there was, in fact, better information which had been made available by the Spanish producers, which ought no to have been rejected outright in favour of a reconstructed "normal" value of goods produced by a different enterprise in another economy and continent based on information which was rejected as unsuitable even for making USA normal value calculations.

The Minister's declaration was set aside.

Turning to the power of State Courts in these matters, pursuant to Section 77(ii) of the Constitution, Section 39 of the Judiciary Act invests State Courts with Federal jurisdiction in all matters in which the High Court has original jurisdiction except in respect of any matter which is specifically reserved exclusively to the High Court. By Section 38(c) of the Judiciary Act the jurisdiction of the High Court is exclusive of the jurisdiction of the several Courts of the States in respect of:

> "(e) matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth . . ."

Neither declarations nor injunction nor the writ of certiorari are mentioned in this sub-section and in the absence of a statutory provision to the contrary, it would appear possible to seek in the Supreme Court of a State a declaration or an injunction or a writ of certiorari against a customs officer in respect of his conduct in seeking cash securities or the payment of dumping duties. However, Section 9 of the ADJR Act appears to exclude the exercise by State courts of jurisdiction in almost all situations with which we are here concerned.

Not only does Section 9 preclude review by State Courts of decisions and conduct to which the ADJR Act does apply, it also precludes review of almost all of the classes of decision listed in Schedule 1 to the Act, to which it does not apply. Further, the section excludes State Court review of:

> "any other decision given, or any order made, by an officer of the Commonwealth or any other conduct that has been, is being, or is proposed to be, engaged in by an officer of the Commonwealth . . ."[6]

"Review" is defined for the purposes of ousting State court jurisdiction, as including review by way of the grant of an injunction, a prerogative or statutory writ (other than habeas corpus or an order having similar effect) and the making of a declaratory order.

Despite ingenious ways by which State courts have circumvented the operation of Section 9 of the ADJR Act in particular cases[7], it appears that resort to those courts as a means for achieving review of dumping decisions is likely to be a fruitless exercise.

Thus, in practice, proceedings challenging decisions of the Customs in dumping matters may be brought:

— In the Federal Court under the ADJR Act;

— In the Federal Court under Section 39B of the Judiciary Act; and

— In the High Court of Australia under Section 75 of the Constitution, (although that Court will usually remit the matter to the Federal Court).

In all of these proceedings denial of natural justice is a possible ground upon which a decision may be challenged. The extent (if any) to which the rules of natural justice apply to the proceedings of the Customs in conducting dumping enquiries and to the decision making of the Minister following those enquiries is likely to be one of the most important issues to be determined by the Federal Court in the next few years.

Although it is now established that:

> ". . . the rules of natural justice apply to both judicial and administrative authorities and even "purely" administrative and executive powers"[8]

in at least two customs cases denial of natural justice has been argued unsuccessfully.

In *Nashua & Channon*,[9] the plaintiff applied for by-law entry in respect of goods ordinarily subject to 25% duty. The defendant customs officer made such a determination under Section 273 of the Customs Act, which enabled the goods to be imported at a duty of 2% but subsequently revoked the determination.

The plaintiff sought a declaration in a Supreme Court that the revocation of the determination was invalid and an order quashing the revocation, alleging denial of natural justice in revoking the determination without notice.

It was held that although the rules of natural justice apply to both judicial and administrative authorities and even to purely administrative and executive powers, for the purposes and operation of the Customs Act, the rules of natural justice did not apply to the revocation of such a determination. There was no basis for any legitimate expectation that the determination would continue in force.

In *Toy Centre Agencies* v. *Spencer*[10] it was held that a court would not readily find that powers of statutory officers affecting the rights, property or legitimate expectations of a person could be exercised without that person having a right to be heard. However, such a right was not consonant with the power of seizure under Section 103 of the Customs Act, viewed in the context of the scheme of the Act, which recognised a measure of protection of the rights of such a person.

Despite these particular decisions, it is clear that where the rules of natural justice do apply, a person likely to be adversely affected by a decision is entitled to know and to have an opportunity to answer the case against him. This principle is, in my view, readily applicable in dumping cases. The scheme of the Anti-Dumping Act cannot be said to provide such persons a measure of protection. If anything, the reverse is the case. Typically, the Customs finds itself in receipt of information from the Australian industry, from importers and exporters and, increasingly, from "downstream" users, much of which is claimed to be confidential. Information from the Australian industry generally comprises information directed towards the establishment of a normal value, and information as to injury. In both cases, exporters and importers are kept substantially in the dark, unable properly to evaluate, and consequently unable to refute, the case against them.

In the case of normal value information the problem is less acute, since the exporter is in a position to disclose to the Customs his own costs and prices (not that this did the Spanish manufacturers of sheet glass much good in the *McDowell* case).

In the case of injury information, the exporter is flying blind. He has virtually no idea what is alleged by the local industry, beyond the ritual incantation of such abbreviated headings as 'price suppression'; 'loss of market share' 'loss of profitability' etc.

In these circumstances it is virtually impossible for an importer or an exporter to gather together from public sources sufficient information to demonstrate that any injury is attributable to factors other than dumping. The local industry's own records are the only practicable source of injury information. Yet the local industry has a legitimate interest in ensuring many of its disclosures to the Customs are kept confidential, both in relation to its own information and information which it might have received in confidence from overseas sources.

The problem has been addressed in the agreement on implementation of Article VI of the GATT (the anti-dumping code), which provides:

> "Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage

to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information) or which is provided on a confidential basis by parties to an anti-dumping investigation shall, upon cause shown, be treated as such by the investigation authorities. Such information shall not be disclosed without specific permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries thereof. In the event that such parties indicate that such information is not susceptible to summary, a statement of the reasons why summarisation is not possible might be provided."

Pausing there, adherence to this procedure can produce the result that an interested party is kept in the dark because the information is incapable of being summarised.

The Article continues:

"However, if the authorities concerned find that a request for confidentiality is not warranted and if the supplier is either unwilling to make the information public or to authorise its disclosure in generalised or summary form, the authorities would be free to disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct."

This is a somewhat limp-wristed approach, in my opinion, since being free to disregard information leaves plenty of room to place reliance on it, the one thing the concept of natural justice should preclude.

It could be argued that this provision of the Code affords a measure of protection to exporters and importers. But S.14, which had the effect of importing the Code into Australian domestic law, was repealed in 1982 for the purpose of preventing challenges to dumping decisions based on failure to comply with the Code. An unintended effect of this repeal may be to open the door to the more stringent requirements of the rules of natural justice.

In my opinion, unless confidential information can be made available either in non-confidential summary form, or under conditions which preserve the confidence yet enable a party to conduct its case (for example, by confining disclosure to legal representatives or independent experts), the Customs should be under an obligation to disregard it. This is the only solution which pays adequate regard to the need to preserve confidentiality and the need of a pary to know the case it has to meet.

Support for this position is to be derived from the judgment of the European Court of Justice in *Michelin N.V. —v— EEC Commission,*[11] involving the alleged dumping of Michelin tyres on the Dutch market.

The Commission refused to provide Michelin N.V. with the documents in its file, in particular the results of inquiries addressed to users and Michelin N.V.'s competitors, claiming that it did not use the results of that investigation which merely confirmed what it already knew. The Court held that once the Commission had decided that the information obtained during the investigation was covered by the principle of non-disclosure of business secrets, it was under a duty not to disclose it to Michelin N.V. Consequently, it could not use that information to support its decision in the case if the refusal to disclose reduced Michelin N.V.'s opportunity to express its views on the accuracy or scope of the imformation or on the conclusions drawn from it by the Commission.

This decision is in line with the resolution of the European Parliament which recommends in relation to the EEC domestic legislation implementing Article 6 of the Anti-Dumping Code[12] that "the confidentiality provisions should be interpreted as narrowly as possible."[13]

An argument similar to the Michelin argument has been raised for consideration before the Federal Court in the pending proceedings of *Atochem v. Button.*[14] It is claimed that a denial of natural justice occurred by reason of the withholding by the customs from the applicant exporter of information that was relied upon by the Minister in making his dumping decision.

In Canada, once a preliminary finding a dumping has been made, an inquiry is conducted by an independent Tribunal, a Court of record with powers to compel attendance of witnesses and production of documents. Parties are entitled to appear and be represented. Hearings may be in camera or in public and when confidential business information is received, it shall not be made public in such a manner as to be available for the use of a business competitor[15].

In the *Magnasonic* case[16] the Tribunal's inquiry comprised partly a public hearing at which all parties adduced evidence, partly visits of Tribunal members or staff to Canadian manufacturers and partly the receipt by Tribunal members or staff, otherwise than during sittings, of confidential material.

While the parties had full knowledge of the evidence adduced at the public hearing, they had no opportunity to know what other evidence or information was accepted by the Tribunal and had no opportunity to answer it or make submissions with

regard thereto. Accordingly, the Federal Court of Appeal set aside the Tribunal's decision.

Finally, some personal observations.

When one reflects upon the facts of *Visy Board, Tasman Timber* and *McDowell,* one might be excused for thinking that dumping enquiries and consequent Ministerial decisions are attended by a remarkably high degree of error, and that such errors as are made are predominantly in favour of the Australian industry.

On the other hand, when price undertakings were accepted from exporters of brandy from France, the Australian brandy producers felt hard done by when the decision was made to return hundreds of thousands of dollars worth of cash securities to importers.

Recent dissatisfaction by "downstream user" farmers at the imposition of dumping duty on imported fertilizer has prompted a hasty review of the Act with a view to enactment of a 'national interest' provision that would override a recommendation to impose a duty. It can be strongly argued that there exists, under the present legislation, a discretion in the Minister to refrain from imposing a dumping duty even where the necessary preconditions have been fulfilled, for example, where the Minister considers it to be in the national interest.

That so many different interest groups are dissatisfied with existing dumping procedures points, in my view, to the need to replace present bureaucratic, secretive and discretionary methods by the impartial, open and principled approach of the Court system.

Much of the dissatisfaction with the present procedures would disappear if the Customs Service were confined to an investigative and prosecutorial role, and if the decision-making power were placed in the hands of the judiciary. That is, the Court should have the power to make the declarations presently make by the Minister, upon hearing the evidence presented by all interested parties. Perhaps the Minister could be required to issue a certificate before proceedings may be commenced (as in the case of prosecutions under Part V of the Trade Practices Act). National interest could then be considered before the parties have been through an exercise which could prove futile.

If a Court were to make dumping decisions there will still be dissatisfied litigants, but they will be more likely to feel they have been treated fairly.

The author acknowledges the invaluable assistance of Louise Herron in the research of this paper.

FOOTNOTES

1. 46 ALR 351 at 359.
2. Tasman Timber Ltd and Others v. Minister for Industry and Commerce and Another 46 ALR 149.
3. 46 ALR 149 at 167, 168.
4. Feltex Reidrubber Ltd v. Minister for Industry and Commerce 46 ALR 171.
5. 50 ALR 647.
6. ADJR Act, s. 9(1)(d).
7. See Nomad Industries of Australia Pty Ltd v. FCT (1983) 83 ATC 4480; Appliance Holdings Pty Ltd v. Lawson (1983) 1 NSWLR 246; Clyne v. Deputy FCT (1983) 83 ATC 4001 and "State Courts and the Administrative Decisions (Judicial Review) Act" by L. J. W. Aitken, 1984 UNSW Law Journal 254.
8. Heatley v. Tasmanian Racing and Gaming Commission 137 CLR per Aickin J. at 498.
9. 36 ALR 215.
10. 46 ALR 351.
11. Nederlandsche Banden-Industrie Michelin N.V. v. E.C. — Commission (1985) 1 C.M.L.R. 282.
12. Article 8 of Council Regulation 30.7.79.
13. E.P. Resolution on the Community's anti-dumping activity, OJEUR (No. C11) 37 pt. 9 1982.
14. Federal Court of Australia, N.S.W. District Registry, General Division No. G166 of 1984.
15. Anti-dumping Act, R.S.C. — 1970 c. A-15, s. 29(3).
16. Re Magnasonic Canada Ltd and Anti-dumping Tribunal 30 D.L.R. (3d).

Business Law Section and Section on Business Law

Introduction

Following the recent decision of the Business Law Section of the LCA and IBA's Section on Business Law to create a firm and defined link, Officers of the two organisations met in September 1985 during the SBL's Conference in Singapore and discussed future plans.

It was felt that the joint venture held great promise for the future but, of course, in order that everyone may co-operate and become a part of this venture, it is important that members of both organisations are fully aware of the structure and objectives of the other. An article describing the Business Law Section, its relationship with the LCA and its current work, written by Russell Miller, as Chairman of the