Administrative Appeals Tribunal of Australia

Vulcan Australia Pty Ltd and Comptroller-General of Customs and Dimplex Australia Pty Ltd (Party Joined) [1994] AATA 150 (26 May 1994)

ADMINISTRATIVE APPEALS TRIBUNAL

VULCAN AUSTRALIA PTY LTD v. COMPTROLLER-GENERAL OF CUSTOMS and DIMPLEX
AUSTRALIA PTY LTD (Party Joined)
No. V93/979
AAT No. 9506
Number of pages - 24
Tariff

COURT

ADMINISTRATIVE APPEALS TRIBUNAL
GENERAL ADMINISTRATIVE DIVISION
S.A. FORGIE (Deputy President), C.G. WOODARD (Member) AND W.G. McLEAN (Member)

CATCHWORDS

Tariff - tariff classification order - whether application on mertis core criteria - whether substitutable goods manufactured in Australia - meaning of "use" - whether granting application likely significant adverse ffect on market for substitutable goods - identification of market - meaning of "likely",

"signficant" and "adverse" - decision affirmed.

Administrative Appeals Tribunal Act 1975 - Section 37
Customs Act 1901 - Sections 269B(1), 269C, 269(a), 269C(b), 269(e), 269D, 269E, 269P, 269P(1)

Trade Practices Act 1974 - Sections 4E, 45(4), 87(1A)
Civil Aviation Regulations
Tasmanian Criminal Code - Section 157(1)
Federal Court of Australia Act 1976

Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd [1991] FCA 621; (1991) 104 ALR 633
Re Denison and Civil Aviation Authority [1989] AATA 84; (1989) 19 ALD 607
Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union

and Others [1979] FCA 85; (1979) 27 ALR 367

Trade Practices Commission v TNT Management Pty Ltd (1985) 6 FCR 1
Boughey v The Queen [1986] HCA 29; (1986) 161 CLR 10
Poighand v NZI Securities Australia Ltd and Others [1992] FCA 369; (1992) 109 ALR 213
McVeigh and Another v Willarra Pty Ltd and Others [1984] FCA 379; (1984) 57 ALR 344
Nickelberg, P and R v The Queen [1989] HCA 35; (1989) 86 ALR 321
ACI Pet Operations and Collector of Customs [1990] FCA 398; (1990) 26 FCR 531

HEARING

MELBOURNE, 7 April 1994
26:5:1994

Counsel for the Applicant: Mr Gross

Counsel for the Respondent: Mr Hegarty

Counsel appearing for the Mr Smith,

Party Joined: Loch M. Fraser (Customs) Vic Pty Ltd

ORDER

The Tribunal affirms the decision under review.

DECISION

S.A. FORGIE, C.G. WOODARD AND W.G. McLEAN On 5 July, 1993, the delegate of the Comptroller-General of Customs ("the Comptroller-General) decided to accept an application made by the party joined in these proceedings, Dimplex Australia Pty Ltd ("Dimplex"), for a tariff classification order ("a TCO") for goods described as

> "HEATERS, space, liquid fuel, domestic portable which do NOT require connection to any external fuel source or electricity supply."

As a result of his decision, a written TCO, numbered TC 9308326 was made and published in the Commonwealth of Australia Gazette No. TC 93/27 issued on 14 July, 1993. It came under the Tariff classification numbered 7321.82.00. At the date of Dimplex's application for a TCO, that heading was applicable to:
"7321 STOVES, RANGES, GRATES, COOKERS (INCLUDING THOSE WITH SUBSIDIARY BOILERS FOR CENTRAL HEATING), BARBECUES, BRAZIERS, GAS- RINGS, PLATE WARMERS AND SIMILAR NON-ELECTRIC DOMESTIC APPLIANCES, AND PARTS THEREOF,

> OF IRON AND STEEL:
> 7321.1-Cooking appliances and plate warmers:
> 7321.11.00-For gas fuel or for both gas and other fuels
> 7321.12.00-For liquid fuel
> 7321.13.00-For solid fuel
> 7321.8-Other appliances:
> 7321.82.00-For liquid fuel."

2. The publication of the TCO was followed by an application dated 10 August, 1993 on behalf of the applicant, **Vulcan Australia** Limited ("Vulcan"), for review of the decision to make it. This was followed by a further decision made on behalf of the Comptroller-General on 16 September, 1993. He decided to affirm the delegate's original decision.

3. Vulcan has lodged an application for review of the decision. At the hearing of its application, it was represented by Mr Gross, Barrister and Solicitor. The Comptroller-General was represented by his Advocate, Mr Hegarty, and Dimplex by Mr Smith from its customs brokers, Loch M Fraser (Customs) Vic Pty Ltd. The documents lodged pursuant to section 37 of the Administrative Appeals Tribunal Act 1975 ("the AAT Act") ("the T documents") were admitted in evidence together with copies of an advertisement and various brochures, to which we will refer in the course of these reasons, statements of Mr Wayne McKay and Mr Geoffrey Gibb and a letter from Dimplex to Mr

Brown dated 21 June, 1993. Oral evidence was given by Mr Brown, Mr McKay and Mr Gibbs on behalf of Vulcan and by Mr Dennis Adams on behalf of Dimplex.

LEGISLATION

4. TCOs are dealt with in Part XVA of the Customs Act 1901 ("the Customs Act"). Division 2 of that Part sets out the manner in which an application for a TCO may be made, the manner in which it is to be screened to determine whether it is a valid application and the manner in which it is processed. It appears that the application was dealt with in accordance with these procedures.

5. Division 3 then goes on to provide for the making and operation of TCOs. As the goods in question in this case are not goods which have been sent out of Australia for repair, section 269P is relevant. We are concerned only with sub-section (1) of that section and it provides:

> "If a TCO application in respect of goods, other than goods sent out of Australia for repair, has been accepted as a valid application under section 269H, the Comptroller must decide, not later than 150 days after the gazettal day, whether or not he or she is satisfied, having regard to:
> (a) the application; and
> (b) all submissions lodged with the Comptroller before the last day for submissions; and
> (c) all information supplied and documents and material produced to the Comptroller in accordance with a notice under subsection 269M(4);
> that the application meets the core criteria."

6. What is meant by the term "core criteria" is set out in section 269C which provides:

> "For the purposes of this Part, a TCO application is to be taken to meet the core criteria if, on the day occurring 28 days before the day on which the application was lodged:
> (a) no substitutable goods were produced in Australia in the ordinary course of business; or
> (b) substitutable goods were produced in Australia in the ordinary course of business but the granting of the TCO was not likely to have a significant adverse effect on the market for the substitutable goods."

7. The meaning of the term, "goods produced in Australia" is set out in section 269D and the meaning of the term, "the ordinary course of business" is set out in section 269E. We will not dwell on those sections for there is no question in these proceedings, and we are satisfied, that the goods which are manufactured by Vulcan and which it argues are "substitutable goods" within the meaning of section 269C, are goods that have been produced in Australia in the ordinary course of business.

8. The term "substitutable goods" is defined in sub-section 269B(1). That term, when used

> "... in respect of goods the subject of a TCO application or of a TCO, means goods produced in Australia that are put to a use that corresponds with a use (including a design use) to which the goods the subject of the application or of the TCO can be put."

DESCRIPTION OF GOODS LEADING TO APPLICATION FOR TCO

9. While we accept Mr Gross's submission that, once a TCO has been made, any person may take advantage of that TCO provided his, her or its goods come within it, it is relevant to describe the goods leading Dimplex to make an application for a TCO. There was no dispute between the parties as to what those goods were. In light of that, and on the basis of the evidence, we will set out what we have found to be a description of those goods.

10. The goods which led to Dimplex's making its application for a TCO may generally be described as Toyoset portable kerosene heaters. They operate on kerosene and do not require connection to any external power source such as electricity or gas. They are completely portable. There are presently four models of heater with two being convection heaters and two being radiant heaters.

11. Based on the pamphlet at Exhibit 2D, we find that the smaller convection heater, called "Rainbow", has a maximum heat rating of 2,780 watts per hour or 9,500 BTU per hour while the larger convection heater, model No. KSA-120 has a maximum heating rating of 6,740 watts per hour or 23,000 BTU per hour. The two radiant heaters, model Nos. RCA-80DX and RCA-80, have the same maximum heating ratings of 2,880 watts per hour or 9.800 BTU per hour.

12. We accept Mr Hegarty's submission that "substitutable goods" are not limited to those produced by Vulcan. Even so, it is useful to describe the goods which Vulcan claims came within that description. The seven items which Vulcan initially submitted were substitutable goods were described in its submission objecting to the making of the TCO (T documents page 24). They were the Vulcan Quasar Elite thermostatically controlled fan assisted space heater, the Vulcan Column heater thermostatically controlled fan assisted space heater, the Vulcan Burwood thermostatically controlled fan assisted space heater, the Vulcan Quasar Wall Furnace thermostatically controlled fan assisted space heater, the Powerhouse Gas fired central heater (f) CX System Gas fired central heater, the Quasar unflued thermostatically controlled fan assisted space heater and the Vulcan Tangi thermostatically controlled fan assisted space heater.

13. At the hearing, Vulcan had a slightly different range of products which were described in brochures which were before the Tribunal although not formally admitted in evidence. They are the Vulcan Quasar unflued gas heater, the Vulcan Conray electric heater, Vulcan column heaters and the Vulcan Wintermate electric heater. Some of the heaters, such as the Vulcan Conray, are fully portable in that they need only be plugged into an electric power point. The Vulcan Wintermate had the option of being portable or being wall mounted. The Quasar unflued gas heater can be connected

to a gas bottle, if local regulations permitted it, permanently connected to a gas supply from outside the building by means of copper tubing or portable from room to room where it is connected to an external gas supply by means of a bayonet gas connection.

BACKGROUND OF VULCAN AND DIMPLEX

14. Vulcan has been manufacturing heaters in Victoria since 1948. It considers itself to be part of the general appliance industry and manufactures products ranging from home heating to hot water systems and dishwashing machines. It exports products to New Zealand, South Africa, Korea and the United States of America. Vulcan is part of the Southcorp Appliance Group. That group also includes Bonaire, with which Vulcan's home heating section has recently merged, Rheem and Chief.

15. Dimplex was established in Australia in 1984 with Dimplex UK Limited ("Dimplex UK") as its major shareholder. Until that time, products of Dimplex UK were distributed in Australia by an independent company. Dimplex continues to distribute in Australia the electrical heating products made by Dimplex UK but also distributes products imported from other manufacturers and those which it itself manufactures in Australia in a joint venture with an Australian company.

THE EVIDENCE

16. Mr Wayne McKay, who is the Production Manager, Heating Products for Vulcan, said that Vulcan manufactured eight heating products at its Bayswater complex. These ranged in sizes from small, portable electric heaters to a full gas home heating system. Vulcan employs in its heating production between 100 people in the summer or "low season" and 180 people in the peak season. The varying demand for labour is catered for by the use of casual labour, the use of overtime or by taking labour from other manufacturing areas of Vulcan's operations and incorporating it into the existing shifts or into additional shifts. Unlike heating products, which are subject to seasonal demands, other manufacturing areas from which it may draw labour, such as dishwashers and hot water services, have a flatter production base. The production of those products can be reduced in order to provide labour to cater for the seasonal demands for the heating products.

17. Vulcan has acquired full accreditation to Australian Standards in the manufacturing process. In its manufacturing operations, it has focussed on manufacturing the goods as close to the point of sale as possible and as close to the demand as possible. This enables Vulcan to respond to market requests for increased product supply and also to minor design changes.

18. At the moment, Vulcan products are facing very fierce competition from their overseas competitors. This competition is felt mainly in the range of small electrical heaters and in the range of oil filled column heaters. The competition has been such that Vulcan has had to reduce its overheads and margins, tighten its production labour input and ask its suppliers to tighten their belts so that Vulcan can continue to provide a range of products in the market place. It currently has products which are "in negative margin". It does so to ensure that it has a full range of heating products.

19. Mr McKay went on to say that a further reduction in Vulcan's share of the market would cause the company seriously to look at its involvement in the full range of home heating. If there were a reduction in the market share for small electrical home heaters, Mr McKay would confidently expect there to be a reduction in the market for portable gas heating products. One has a flow on effect from the other. Vulcan has very little room to move and is currently trying to maintain its local manufacturing base. Mr McKay dealt further with this aspect in his statement when he said:

> "... an initial effect of this Tariff Concession Order will be felt in our small portable room heater market which is already currently under fierce pressure from imports. The current price threshold of small electric heaters has dramatically reduced the contribution that those products make to the profitability of Vulcan to the point where in fact they are in a negative profit margin situation in some instances. If the TCO is upheld and a further market share reduction occurs, it would only take a small loss to have a significant effect. In other words, the profitability of this market is already very much under question. If it is subjected to further price competition then realistically speaking, Vulcan would not be able to continue with its manufacture of those imported goods and would have to resort itself to importing. Obviously, Vulcan reviews the contribution of all products in its range and it would be forced to rationalise if this current negative trend was in fact accelerated." (page 2)

20. If Vulcan were to lose the small to medium heating market, Mr McKay said that there would be a significant impact on those employed in manufacturing heaters and that eighty people would immediately lose their jobs.

21. Vulcan manufactures some 200,000 units each year. That number might vary by ten per cent depending on seasonal variations. There are other manufactures of space and room heaters but Mr McKay considered that Vulcan's share of the locally manufactured market was greater than 60%. This figure was later supported by Mr Gibb. Mr McKay expanded on his evidence on this aspect in the light of a market survey report prepared by BIS Shrapnel. The report was not tendered or admitted in evidence to members and officers of the Tribunal, Vulcan and its legal representatives, the Comptroller-General and his representatives and Mr Smith and an order was made restricting access to Mr McKay's evidence and further ordering that it be used only in connection with these proceedings. Mr Smith gave an undertaking that he would not disclose that evidence to his client. The Tribunal made this order on the basis that the evidence concerned commercial information which should not properly be disclosed to Vulcan's commercial competitors. It did so pursuant to section 35 of the AAT Act and in light of the principles discussed in News Corporation Ltd and Others v National Companies and Securities Commission [1984] FCA 400; (1984) 57 ALR 550 (Fox, Woodward and Beaumont JJ) and Thomson Australian Holdings Pty Ltd v Trade Practices Commission and Others [1981] HCA 48; (1981) 37 ALR 66 (Gibbs, Stephen, Mason and Wilson JJ,

Murphy dissenting). In view of that order, we will not summarise that evidence.

22. Mr McKay regarded the use to which Toyoset products could be described as being home heating. In using the term "home heating", he meant space or room heating and drew a distinction between that type of heating and central heating. Vulcan manufactures eight heaters which could be described as space or room heaters. Among these heaters are both gas and electrical heaters.

23. Mr McKay said that Vulcan's Quasar electric heater was the product which faced the most direct competition from the kerosene heaters. The price of a Quasar electric heater is $230.91 and that of a kerosene heater would be $275 to $399.

24. Mr Geoffrey Gibb is the Branch Manager for Victoria and Tasmania for Vulcan and Bonaire. He qualified as an electrical fitter in 1966 and has had extensive retail experience with various retailers since then as well as sales experience for various manufacturers.

25. Mr Gibb regarded the Toyoset heaters as supplementary heaters i.e. supplementary, in colder climates, to the main heating unit which is heating, say, four or five squares of a house. Such a supplementary heater is used in bedrooms and bathrooms which are often not heated by the main heating system or to supplement that heating on a particularly cold day. Supplementary heaters are also used in the northern and provincial areas of Australia where they cater for short sharp periods of cold and more substantial heating units are not required.

26. In Mr Gibb's view, many purchasers of supplementary heating make their purchase on impulse when the weather confirms the need to buy a heater. Such buyers are substantially influenced by price. In his view, if Dimplex were able to reduce the price of its kerosene heaters by 10%, that would give it a further selling advantage. Mr Gibb indicated that he did not believe that people would buy a main central heating unit on impulse and thought that the expenditure of four or five hundred dollars would be a considered purchase.

27. Mr Gibb drew a comparison between the Toyoset kerosene heaters, which he understood to retail for between $275 and $399, and a Vulcan Quasars ranging in price from approximately $299 to $399, its column heaters ranging in price from approximately $169 to $299, its Winter Mate 1 and 2 ranging from approximately $69 to $199 and its Conray radiator at a price of approximately $189. Based on these figures, Mr Gibb drew the conclusion that the Toyoset and Vulcan products all competed in the same price bracket.

28. In addition to these heaters, Mr Gibb also believed that the Toyoset kerosene heaters will compete directly with Vulcan's liquid petroleum gas (LPG) products, particularly those which are unflued. These heaters are portable in the sense that they can be moved from room to room and are connected to a gas bottle or gas tank by means of a bayonet type fitting. They are popular in areas of northern New South Wales and northern Victoria where natural gas is not available. They are also used as supplementary heating. They retail at prices between approximately $599 and $689.

29. If the heater is connected to gas points located in a number of rooms of the house, a plumber must install those points. If it is simply connected to a portable gas bottle, then a plumber is not required. Whether or not a portable gas bottle may be used inside a house depends on the rules and regulations of each local authority. Unflued LPG heaters may not be used in a bedroom or bathroom, Mr Gibb said, but he assumed that there was no similar limitation on the use of a kerosene heater.

30. The essence of Mr Gibb's concerns regarding loss of market share for Vulcan's heaters appears in the following exchange between Mr Hegarty and Mr Gibb at page 35 of the transcript:

> "... your company is obviously concerned about the impact of kerosene heaters. Has it conducted a survey on the matter? Has it been monitoring the situation since then?---Well, I'm not aware of a price drop, certainly. I am not aware of a price drop in the market place at this stage.
> But are you aware of any particular segment of your market which has been affected by kerosene heaters?---Well, I think when a heater is compared on the floor, showroom floor or a sales outlet, that any sale that a kerosene heater is sold must take from an electrical-type heater. Well, it is simply a marketing ploy. They are trying to market a product?---Yes.
> And of course you market heaters with other heaters. Where else would you market them?---That's correct. Yes.
> It does not mean that it is taking away market share. You have got to come up with more substantial information than the fact that they happen to be sitting side by side on a salesroom floor. And to assist the tribunal, we are trying to say, well, where are the hard facts?---Any sale must take market share from us or any other company if it is an alternative fuel source.
> But are you aware in terms of your sales figures, for example, for the last six months or whatever, that there has been any impact, any adverse injurious effect that is attributable to the granting of the tariff concession?---A direct impact to say, okay, kerosene heaters have taken x amount of sales would be very hard to ascertain because of market conditions, weather patterns."

31. This issue was explored further in re-examination in the following exchange between Mr Gross and Mr Gibb at page 39 of the transcript:

> "... If we can just go back to the evidence concerning the choice of product by a person coming into a shop, and Mr Hegarty put to you the question of why someone who wanted to buy a Conroy - Conray heater, which only retails for 189, might be affected - might consider a

> kerosene heater Now, is the position that - well, what are the factors that go - in your experience, that go through a customer's mind? What are the things he looks for when he is buying a heater in that sort of range?---Well, first of all he wants to do the largest possible area with the least possible outlay of money. He would look at the size of the product and using the information supplied by the salesman of what area it will do and will it suit his purpose, and that's also in the information that that customer gives the salesman.
> So it is fair to say that a person may look at a Conray radiator at 198 but then the salesman may say, well, look, if you want to pay X amount extra you can get this kerosene heater which does Y amount in additional heating. Is that a potential - - -?---Yes, that is, because a salesman always is trying to sell up the line of product, if you like, to get the higher dollar turnover, regardless of what product it is.
> Now, if there was a 10 per cent reduction in the retail price of that kerosene heater, does that - what effect does that have in terms of the competition?---Well, it certainly brings it back to the field more so. Those steps aren't as hard to make or to justify in going up the scale in the price relevance compared to the product."

32. Mr Gibb went on to say that people also considered the cost of running heaters in making a choice. He also agreed that kerosene heaters were not as convenient to operate as gas or electric heaters but did not know how consumers regarded the inconveniences of filling kerosene heaters. As for their "image", Mr Gibb did not think that the average person would see them as smelly or as having an image problem. Mr Gibb explored this more fully. He explained in his statement at page 3

> "Kerosene heaters have not been attractive in the past to consumers because they were not efficient, they smelt and they were dangerous in that they could catch alight easily if tipped over. I have seen sales material as prepared by Dimplex for its kerosene heaters and am aware that the modern kerosene heater has been substantially improved. As such, it is aroma free in operation, is extremely efficient in its heating output and has numerous safety features. As such its selling point is not simply that it can be used in areas where there is no reticulated source of power. It is a modern heater that competes on specifications and on price. If the price of the Dimplex product is reduced by at least 10%, then there is no doubt that it will have a direct adverse impact on the market for goods manufactured by Vulcan."

33. Mr Gibb said that there was no equivalent to the Toyoset KSA-120, which has a rating of 2.78 kilowatts per hour because the maximum permissible rating for an electric heater is 2.4 kilowatts unless it is directly wired into the electrical system. Such a heater would heat up to two and a half squares. Even so, it is still a supplementary heater.

34. Mr Gibb said that locally manufactured goods represented 40% to 50% of the heating goods sold in Australia and that Vulcan has approximately a 60% share of that locally produced market. It produced approximately 200,000 products per year and that figure included all of its gas and electrical products as well as its central heating products.

35. In cross-examination by Mr Smith, Mr Gibb acknowledged that Dimplex's Glenair and Dimplex brand column heaters and its fan heaters, other than its lowest priced $29-$39 fan heaters, compete directly with Vulcan products. The competition is particularly fierce in the market for column heaters of all brands. In answer to Mr Smith, Mr Gibb indicated that he assumed competitors such as Dimplex paid duty on column heaters they imported and acknowledged that the fierce competition was not the result of any tariff concession.

36. Mr Gibb did not consider that trademarks and brand names had the same value in today's market as that which they had previously enjoyed in inducing consumers to prefer one product over another. This is because the market is much more competitive today and it comes down to dollars at the end of it all. Even so, he hoped that the Vulcan brand name would persuade the person but names such as "Dimplex" are also respected in the market place. Toyoset heaters, he said, are sold as Dimplex at the point of sale.

37. We will digress for a moment to refer to the literature relating to the kerosene heaters. An advertisement on page 14 of the Herald Sun of 15 June, 1993 (Exhibits A and B) illustrates three heaters and describes each as a "Toyoset" followed by its serial number. Apart from the description of the heaters, the text of the advertisement reads

> "Pay as you go heating.
> Buy a new high tech Toyoset kerosene heater and free yourself of costly quarterly heating bills. Because with kerosene heating you pay as you go so you always know exactly how much it's costing you up front.
> Call the Toyoset Hotline for a free brochure and professional advice on heating requirements."

This is followed by a telephone number and the word "Toyoset". In smaller lettering appear the words "Another quality product distributed by Dimplex".

38. Mr Brown, the Principal Customs Broker for Vulcan's customs brokers, Macbro Customs Services Pty Limited, telephoned the Toyoset Hotline. He was sent a letter, which did not make any reference to the name "Toyoset". The letter thanked Mr Brown for calling the "Dimplex Hotline", enclosed the "Dimplex brochure", spoke of "Dimplex units" and "Dimplex's appliances" and referred him to his "local Dimplex retailer" (see Exhibit C). The letter enclosed a brochure (Exhibit 2D). It is a four page brochure which is headed "Toyoset" on its front and first page and also bears the word "Toyotomi". Those two names appear on page 2 at various points in the test. No names are used on

page 3. The first and only reference to Dimplex appears at the foot of the final page when its name is shown as the distributor. After he received this letter, Mr Brown visited Myers in Knox City, Bayrite Electric in Richmond and Clive Peters in Ringwood where he found Toyoset kerosene heaters on display and for sale with portable electric heaters.

39. Mr Gibb and Mr McKay also gave additional evidence, disclosure of which the Tribunal ordered be restricted to members and officers of the Tribunal, to Vulcan and its representatives and the Comptroller-General and his representatives and further ordered that they use it only in connection with these proceedings. This evidence concerned wholesale pricing structures.

40. Mr Gibb gave evidence as to the rebates which may be offered by a manufacturer to retailers. So, for example, the manufacturer may offer a rebate of so many dollars on the wholesale price of each unit sold by the retailer provided the retailer sells an agreed number of units. Where a large retailer is concerned, the retailer may insist that it be given a rebate regardless of the number of units it sells.

41. Mr Adams, the Finance Manager of Dimplex also gave evidence. In view of the commercial nature of his evidence, an order was made restricting access for the purposes of these proceedings to the Tribunal to Dimplex and its representatives, to the Comptroller-General and his representatives and to Mr Smith who undertook not to disclose it to Vulcan.

CONSIDERATION

42. Mr Smith submitted that goods produced by Vulcan are not substitutable goods. He based his submission on the meaning of the word "use" appearing in the definition of "substitutable goods". To say, he argued, that all heaters are substitutable, regardless of the way they may be fuelled and regardless of whether they are fully portable, semi-portable or fixed units is to give too wide a meaning to that word. Certainly, if a Vulcan heater is warming a room, it can be turned off and a Toyoset kerosene heater substituted for it to heat the room. That it may be substituted does not mean, however, that the two items are substitutable goods. The focus is upon the use and Mr Smith submitted that the use to what we will call "the TCO goods" are put is that of space heaters, being fully portable, stand-alone units, which operate on liquid fuel held in their own fuel tanks and not requiring connection to an external fuel source or electricity supply in order to operate. Vulcan's goods use a different fuel and may or may not be fully portable.

43. Mr Gross and Mr Hegarty both submitted that the goods are substitutable. Mr Hegarty argued that the definition of "substitutable goods" was very broad and showed an intention to cast a net fairly widely in order to identify local products at risk. He said that the use to which the goods could be put was domestic space or room heating. Mr Gross drew the same conclusion and emphasised that the definition focuses on a use to which the goods can, and not must, be put. That it is a use to which the goods can be put is underlined by the specific reference in the definition to the design use as well as the use.

44. Many meanings of the word "use" appear in the dictionaries. That meaning which is relevant in

the Shorter Oxford Dictionary (3rd edition, 1944, reprinted with corrections 1983) is that of "A purpose, object, or end, esp. of useful or advantageous nature ...". The Macquarie Dictionary (1st edition, 1981) defines it, again in so far as it is relevant, as

> "1. to employ for same purpose; put into service; turn to account: use a knife to cut, use a new method. 2. to avail oneself of; apply to one's own purposes: use the front room for a conference ..."

45. What is apparent from both of these definitions is that the focus of the word "use" when used in isolation without reference to a context is upon the end result i.e. the purpose, object or service. It is not upon the means of achieving that purpose, object or service. If the word is intended to encompass those means, it must come from the context in which the word "use" appears. When we look at the context in which the word is used in the Act, we can find nothing which suggests that we should give the word "use" anything other than its ordinary meaning. The definition of substitutable goods refers to "a use (including a design use) to which (TCO) goods ... can be put". Clearly, the definition is not simply confining itself to a use for which the TCO goods were designed but is looking to the use to which they can be put. There seems to be no suggestion in this that the means by which that use is achieved have any relevance at all.

46. We also note that the definition refers to the goods produced in Australia being "put to a use ... that corresponds with a use" to which the TCO goods can be put. Again the emphasis is upon the ultimate use and not the means by which it is achieved and this is not altered by the use of the word "corresponds". That word has been defined, again in so far as it is relevant, in the Shorter Oxford Dictionary as

> "1. To answer to something else in the way of fitness; to agree with; be conformable to; be congruous or in harmony with. 2. To answer to in character or function ..."

and in the Macquarie Dictionary as

> "1. to be in agreement or conformity (aft. fol. by with or to): his words and actions do not correspond. 2. to be similar or analogous; be equivalent in function, position, amount etc ..."

These definitions do focus in part on the function or process but that is not the appropriate focus of the word "correspond" in the definition of "substitutable goods". Reference must be made to the two things which must correspond. Those two things are the use to which the TCO goods can be put and a use of the substitutable goods. The ordinary meaning of "correspond" in that context is that one use conforms with or is in harmony with the other use. It would be reading too much into the words "corresponds with" to say that the function or process of the use of one must conform with or be in harmony with the other. It follows that, we can find no suggestion in the definition that the means by

which the goods achieve any such use is of any relevance at all. We consider, therefore, that we should give the word "use" its ordinary meaning.

47. Having done that, we must decide the use (including a design use) to which the goods described in the TCO can be put. We find that they are used for providing domestic space or room heating. In determining their use, we have not included a reference to their use of liquid fuel for that is the means by which they achieve that use and not the use itself. We have reached the same conclusion in respect of their connection to any external fuel although that aspect, in so far as it impinges upon portability, has caused us more concern. We have concluded, however, that the aspect of portability relates essentially to the way in which the TCO goods achieve their overall purpose of providing domestic heating of a space or room rather than to a use to which they can be put.

48. The use to which Vulcan's goods may be put is also that of domestic space or room heating. They have, therefore, the same use and it is not relevant that the goods achieve that use in different ways. If Vulcan's goods have the same use, they must have a use "that corresponds with" a use to which the TCO goods can be put. As we have already found that Vulcan's goods are produced in Australia, they are substitutable goods within the meaning of the definition.

49. As we have also found that these substitutable goods were produced in Australia in the ordinary course of business (see paragraph 7 above), it follows that the application for a TCO does not meet the core criterion set out in paragraph 269C(a). That brings us to the criterion in paragraph 269C(b) and the only issue is whether the granting of the TCO is likely to have a "significant adverse effect on the market for the substitutable goods".

50. Paragraph 269C(b) does not refer to the market without qualification. As all parties submitted, we must keep in mind that it is qualified by reference to the substitutable goods and that the market which we are considering is the market for those substitutable goods. We are, therefore, required to consider whether the granting of the TCO will have any significant adverse effect on that market and not whether it will have any significant adverse effect on the market for domestic space and room heaters whether produced in Australia or overseas. As it is the market for substitutable goods we are considering, it necessarily follows that we are looking beyond Vulcan's goods to those substitutable goods produced in Australia in the ordinary course of business. On the evidence, we find that there are other Australian manufacturers of such goods and will return to them later in these reasons.

51. What is meant by the word "market"? The term is not defined in the Act and our attention has not been drawn to any authorities in which the term or the word "market" has been considered in the context of section 269C. Mr Hegarty submitted that it does not connote any concept of a market in strictly economic terms i.e. as a place where goods directly compete with each other. In doing so, he said that its use in the Act should be contrasted with its use in the Act as it stood prior to its amendment in 1992 and its use in the Trade Practices Act 1974.

52. The meaning of the word "market" has not been considered by the authorities so much as the

identification of a market. Such identification was relevant when, for example, the Trade Practices Tribunal considered competition then existing in a market and the likely effect on that competition should a merger proposal proceed (Re Queensland Co-operative Milling Association Ltd (1976) 8 ALR 481, Woodward J, President, Shipton and Brunt, Members). The Tribunal said

> "We take the concept of a market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them (if there is no close competition there is of course a monopolistic market). Within the bounds of a market there is substitution - substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm's product to another, or from this geographic source of supply to another. As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives."

As Mr Gross submitted, this passage was cited with approval by the High Court in Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Co Ltd and Another [1989] HCA 6; (1989) 83 ALR 577 at 583.

53. Identification of the market was also the primary concern of the Full Court of the Federal Court in Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd [1991] FCA 621; (1991) 104 ALR 633 (Spender, French and O'Loughlin JJ). The word "market" had been defined in section 4E of the Trade Practices Act 1974 which provided that

> "For the purposes of this Act, unless the contrary intention appears, 'market' means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services."

54. French J canvassed a number of authorities which had considered the word in a variety of contexts. He then turned to consider the relevant market in the case before him. That case had arisen because the appellant had restricted the wholesaling of its Maldives' service by the respondent to

those passengers departing from Western Australia where the respondent was based. It had also imposed on the respondent prices which were higher than those paid by other wholesalers. His Honour canvassed the range of possible substitutes for the service at the centre of the case and concluded that "the primary product class of concern ... consists of airline services from Australia to destinations off-shore" and did not include holiday travel within Australia although that would have formed part of the infinite range of possible substitutes. His Honour looked also to the geographic market in issue and determined that it was Australia wide. This was so even though some competitors at both the wholesale and retail level would confine their activities to one or more centres. Costs of extending beyond a certain geographic area might constitute a hurdle to some but there was no evidence that they would amount to a barrier. French J then turned his attention to identification of the market by reference to functional levels. That is to say, he considered whether he should limit it to the supply of services by airlines to wholesalers or whether packaged tours by wholesalers to retailers are packaged tours by retailers to consumers should be included. He concluded that the exercise of the market power at either the supply of air services to wholesalers or the supply of packaged tours by wholesalers to retailers could affect competition down the chain of supply. His Honour then went on to define the product market in the case before the Court.

55. Turning to the case with which we are concerned, the Act does not contain a definition of "market" but paragraph 269C(b) identifies the products which comprise the market by stating that it is the market for the substitutable goods. It does not go on to deal with any other limitations which may be placed on that market.

56. The first limitation may be a geographical limit. The evidence appears to have been led on the basis that the market for substitutable goods is to be limited to Australia. A geographical limitation does not follow directly from the words of paragraph 269C(b) for substitutable good may be sold overseas as well as in Australia. Those words must, however, be read in the context of the Act generally and of tariff concessions particularly. Tariff concessions provide a system for enabling goods to be imported in Australia free of duty in certain circumstances. We have already set out the scheme in paragraphs 4 to 8 above but, at the heart of it, is a consideration of reduced costs on the one hand and, on the other, whether there are Australian manufactured goods which will be significantly adversely affected if they have to complete with imported goods without the benefit of any tariff protection. That leads us to conclude that we must be required to consider only the market for the substitutable goods in Australia for the Act can have no influence on the ability of Australian goods to compete on the world market.

57. We have considered also the functional levels of the market but see no reason in this case to distinguish amongst those levels. The manufacture of substitutable goods is directly influenced by the consumers' demand for those goods from the retailer. We have concluded, therefore, that the market comprises both the manufacture and supply of goods to the retailer by the manufacturer and the supply of these goods by the retailer to the consumer. There is no evidence that there are any wholesalers in the market other than the manufacturers themselves.

58. The third possible limitation relates to what may be described as sub-markets. While not using

this term, Mr Gross seemed to touch upon it in his reply. He gave as an example a hand lawn mower which could not in anyone's imagination, he said, be described as substitutable for an expensive electric steam roller lawn mower used to cut a bowling green. There must be a direct relationship, he argued, and so we perhaps should look to a market consisting only of those goods which actually compete with the TCO goods. We do not accept this argument and do not accept that we can look to sub-markets. Paragraph 269C(b) has limited the market to which we may have regard and that is the market for substitutable goods. These goods are identifiable by means of their uses and not by reference to factors such as the manner in which they achieve that use or their cost. It we were to take such factors into account and so identify a sub-market, we consider that we would be stepping beyond the limits permitted by the Act.

59. We must then look at the effect, if any, which the granting of the TCO may have on the market for substitutable goods and decide whether it is "likely to have a significant adverse effect". In order to understand what these words mean, we have looked at each of them individually in the first instance.

60. Beginning with the word "likely", it has been defined in the Shorter Oxford Dictionary, in so far as it is relevant, as

> "... having an appearance of truth or fact; seeming as if it would happen, or prove to be as stated; probable ..."

And the Macquarie Dictionary as

> "... 1. probably or apparently going or destined (to do, be, etc.): likely to happen. 2. seeming like truth, fact or certainty, or reasonably to be believed or expected; probable ..."

61. The word "likely" has also been considered in a variety of contexts. So, for example, in the context of a pilot's licence under the Civil Aviation Regulations, the Tribunal has decided that, a case requiring consideration of whether the grant of a licence "would be likely to affect the safety of air navigation" required consideration of whether there should be a "significant and unacceptable risk to the safety of the public". The acceptability of the risk was to be assessed with reference to the medical standards set in the Air Navigation Orders (see Re Denison and Civil Aviation Authority [1989] AATA 84; (1989) 19 ALD 607, Deputy President Thompson, Dr Howell and Mr Wilson, Members).

62. It has also been considered by the Full Court of the Federal Court in Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union and Others [1979] FCA 85; (1979) 27 ALR 367 (Bowen CJ, Evatt and Deane JJ), in the context of the Trade Practices Act 1974 and whether certain conduct had the likely effect of causing substantial loss or damage to the business of the appellant.

63. Bowen CJ, with whom Evatt J agreed, reviewed the authorities but was not prepared to prefer one interpretation of "likely" to another. Deane J reviewed the authorities and concluded at page 382:

> "The conclusion which I have reached is that, in the context of s45D(1), the preferable view is that the word 'likely' is not synonymous with 'more likely than not' and that if relevant conduct is engaged in for the purposes of causing loss or damage to the business of the relevant corporation, it will suffice, for the purposes of the sub-section, if that conduct is, in the circumstances, such that there is a real chance or possibility that it will, if pursued, cause such loss or damage. Whether or not such conduct is likely (in that sense) to have that effect is a question to be determined by reference to well-established standards of what could reasonably be expected to be the consequence of the relevant conduct in the circumstances. In determining the answer to that question, it will be relevant that the persons engaging in the conduct did so with the purpose of causing such loss or damage."

64. Franki J in Trade Practices Commission v TNT Management Pty Ltd (1985) 6 FCR 1 was concerned with the meaning of the words "is likely to have" in connection with the words "significant effect on competition" as they appeared in sub-section 45(4) of the Trade Practices Act 1974. His Honour's consideration took place in the context of penal proceedings brought under that Act. He canvassed previous authorities and said

> "In my opinion, it is desirable to note the warning given by Bowen CJ in Tillmanns Butcheries Pty Ltd v Australasian Meat Employees' Union (supra), and not to place a gloss on the section by preferring one meaning of a particular case. If, however, I am required to adopt a view, I consider that the word in s45(2) now under consideration is to be read with due regard to the fact that it appears in a penal statute, that it is linked with the word 'significant' and that this means that, whilst the meaning need not be restricted to a situation where the odds are greater than equally balanced or somewhat less than equally balanced, the probability must be something not very far short of 'more probably than not', except in unusual circumstances ..." (page 49)

65. The Tillmanns Butcheries case was again referred to by the High Court in Boughey v The Queen [1986] HCA 29; (1986) 161 CLR 10 (Gibbs CJ, Mason, Wilson and Deane JJ, Brennan J dissenting). The High Court considered sub-section 157(1) of the Tasmanian Criminal Code which provided that culpable homicide was murder if committed, inter alia, by means of an unlawful act or omission which the person "... knew, or ought to have known, to be likely to cause death in the circumstances, although he had no wish to cause death or bodily harm to any person".

66. Gibbs CJ said

> "It is trite to say that the meaning of a word will be influenced by the context in which it appears. In my opinion the word 'likely' in ss.156 and 157 of the Criminal Code Act means 'probable' and not 'possible'. That is its natural meaning. It is the meaning which a draftsman, familiar with common law rules regarding malice aforethought, might be expected to attribute to it. In any case, if the expression were thought to be ambiguous, the doubt should be resolved in favour of the liberty of the subject. If 'likely' in s.157(1)(c) were regarded as meaning 'possible', that provision would have a very drastic operation, since it would treat as murder a culpable homicide caused by an unlawful act which the offender knew would possibly cause death. A death in those circumstances might understandably be regarded as manslaughter, but it would be Draconian to call it murder." (pages 14-15)

67. Mason, Wilson and Deane JJ referred to previous authorities including Tillmanns Butcheries and concluded that, in their view, the word "likely" was used with what they

> "... apprehend(ed) to be its ordinary meaning, namely, to convey the notion of - a substantial or "real and not remote" - chance regardless of whether it is less or more than 50 per cent: cf Sheen v Fields Pty Ltd (51 ALR 345 at 348) and Waugh v Kippen [1986] HCA 12; (1986) 160 CLR 156 at
> pp166-167.
> There is a further reason why one should not superimpose upon the word 'likely' in either s.156(2) or s.157(1) of the Code refinements of meaning which the word does not convey as a matter of ordinary language. A basic objective of any general codification of the criminal law should be, where practicable, the expression of the elements of an offence in terms which can be comprehended by the citizen who is obliged to observe the law and (where appropriate) by a jury of citizens empanelled to participate in its enforcement. History would indicate that the codifier will never achieve the clarity and completeness which would obviate any need for subsequent interpretation or commentary: see Jolowicz, Historical Introduction to the Study of Roman Law (1939), pp.491-492; Gray, The Nature and Sources of the Law (1909), pp.176-177. The courts should, however, be wary of the danger of frustrating that basic purpose of codification of the criminal law by unnecessarily submerging the ordinary meaning of a commonly used word in a circumfluence of synonym, gloss and explanation which is more likely to cause than to resolve ambiguity and difficulty. To bury the word 'likely' in s.157(1) of the Code beneath the gloss of 'more likely than not' and the explanation of

> 'a more than 50 per cent' or an 'odds on' chance would be to succumb to that danger. It would also, in our view, be to attribute to the word 'likely' a requirement of a specific degree of mathematical probability which the word does not convey either as a matter of ordinary language or in its context in s.157(1) of the Code." (pages 21-22)

68. Both Tillmanns Butcheries and Boughey's case were referred to by Gummow J in Poighand v NZI Securities Australia Ltd and Others [1992] FCA 369; (1992) 109 ALR 213. The case concerned, in part, the standing of unit holders to bring a representative action seeking damages, declaratory relief, an injunction and certain other orders. Their action was brought pursuant to part IVA of the Federal Court of Australia Act 1976 and required consideration of sub-section 87(1A) of the Trade Practices Act 1974. Sub-section 87(1A), wrote Gummow J,

> "... authorises applications of persons who have suffered or are 'likely to suffer' loss or damage by conduct of another person that was engaged in contravention of the relevant provisions of the TP Act. The phrase 'likely to' is susceptible of various meanings, and takes its colour from the statutory context. It may indicate a degree of contingency falling short of probability. This and other shades of meaning are discussed in Boughey v R [1986] HCA 29; (1986) 161 CLR 10; 65 ALR 609, in the context
> of s157(1) of the Criminal Code (Tas).
> One evident purpose of the inclusion of the phrase 'likely to suffer loss or damage' in s87(1A) is to afford the opportunity to an applicant to move quia timet by analogy to the obtaining of injunctive relief against the commission of apprehended wrongs. Section 87(1A) is expressed as being without limit to the generality of s80. The power of the court to grant prohibitory or mandatory injunctions may be exercised whether or not there is an imminent danger of substantial damage to any person: see s80(4), (5).
> In Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union [1979] FCA 85; (1979) 27 ALR 367; 42 FLR 331 at 346-8, in a passage referred to
> in Boughey at CLR 20, Deane J discussed the sense to be given to 'likely' in s45D of the TP Act. His Honour held that it would suffice for the purposes of that provision if the conduct in question was such that, in the circumstances, there was a real chance or possibility that if pursued it would cause loss or damage.
> As matters stand on the present motion, I accept the submission by the applicant that there is a real chance or possibility that the unit holders are likely to suffer loss or damage by the conduct complained of against the respondents. It may be that some lesser degree of

> contingency will suffice for s87(1A) and for s45D. But that is a question for another day." (page 222)

His Honour did not need to consider the matter further for he found that the applicants had already sustained loss or damage.

69. It appears from this review of the cases that there may be slightly different shades of the meaning of "likely" depending upon the context in which it appears. We favour its ordinary meaning of "probable" and will explain our reasons in paragraph 74 below.

70. The word "significant" has been considered in several authorities including McVeigh and Another v Willarra Pty Ltd and Others [1984] FCA 379; (1984) 57 ALR 344 (Toohey, Wilcox and Spender JJ) which was concerned with whether there was "significant Australian content" in a film and Nickelberg, P and R v The Queen [1989] HCA 35; (1989) 86 ALR 321 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ) which considered whether there was a "significant possibility" that a jury would have acquitted if it had been given certain additional evidence.

71. Franki J also considered it in Trade Practices Commission v TNT Management Pty Ltd (see paragraph 65 above) and while not attempting to define the word as it was not necessary to do so, noted that

> "... it is clear that it must mean, perhaps except in extraordinary circumstances, at least 'not important' or 'not insignificant'." (page 50)

72. Foster J in ACI Pet Operations and Collector of Customs [1990] FCA 398; (1990) 26 FCR 531 examined the word "significant" in the context of section 269C as it was previously enacted and in the context of there being "no significant part of Australia in which there would be significant cross-elasticity of demand between the goods". His Honour said

> "The word 'significant' has acquired a number of shades of meaning in common parlance. For instance, it is not infrequently used as a substitute for 'substantial'. It is, however, clearly important that it be given as precise a meaning as possible in this legislative provision, as its use imports a major guiding consideration into the determination by the Comptroller of whether goods serve 'similar functions'. I turn, therefore, to the dictionaries for guidance and find that the Oxford English Dictionary (2nd ed) defines the word (where relevant) as 'full meaning or import; important, notable; and having or conveying a meaning', and that the Macquarie Dictionary defines it as 'important; of consequence; expressing a meaning; indicative'.
> I derive assistance also from considering that the word is the opposite

> of 'insignificant' which word is defined in the Macquarie Dictionary as meaning 'unimportant, trifling or petty' and as 'too small to be important'. Looked at from this point of view 'significant' may be regarded as meaning 'not unimportant or trivial' or as 'sufficiently large to be important'.
> One could no doubt multiply meanings by recourse to other dictionaries. One thing is very clear, namely that there is necessarily a fair degree of value-judgment involved in attributing significance to something. Significance must also depend upon context. The very use of the term must frequently involve the subsidiary question 'significant for what?'. Where the word is used in connection with the holding of an inquiry or the making of a decision then, in my view, it conveys the notions of importance, meaningfulness and relevance to the enquiry or decision." (pages 551-552)

73. That brings us to the words "adverse effect". We are not aware of any authorities in relation to these and so have had regard to the ordinary meanings. The word "adverse" is defined, in so far as the definition is relevant, in the Shorter Oxford Dictionary (3rd edition) as "opposing anyone's interests; hence unfavourable, injurious, calamitous" and in the Macquarie Dictionary (1st edition) as "opposing one's interests or desires". The word "effect" needs no further explanation.

74. Having looked at the words individually, we now need to have regard to their meaning as part of the whole expression "not likely to have a significant adverse effect" (on the market for substitutable goods). In doing so, we bear in mind that we are concerned not with a penal provision but with a tariff scheme which takes account both of the need to protect local industry and the need to ensure that additional costs are not imposed on consumers. We are concerned with what is essentially a balancing exercise between two different interest groups. In light of that, we consider that we should not adopt anything other than the ordinary meaning of the words. By adopting the ordinary meaning of "likely" as being "probable" or "as seeming as if it would happen" we are reflecting that balance. If we were to adopt Mr Hegarty's submission that it means "more probable than not", we would be reading into the word an additional component of mathematical measurement and that is not a component reflected in the word's ordinary meaning or in the even balance which appears to have been struck by the Parliament between the granting of the TCO and the effect on the market for substitutable goods. Unlike Franki J in Trade Practices Commission v TNT Management Pty Ltd, we do not consider that we should vary from the ordinary meaning in light of the word "significant" in the expression with which we are concerned. That word can be given its full meaning but we have concluded that, had Parliament intended that the significant effect on the market be more probable than not, it would have stated that requirement or at least used the words "more likely than not".

75. We can see no reason why the words "significant adverse effects" should not be given their ordinary meanings. Taking the expression overall, we consider that it means we must consider whether the granting of the TCO will probably have an important unfavourable or injurious effect on the market for substitutable goods.

76. In order to determine whether the granting of the TCO is likely to have an effect (significant, adverse or otherwise) on the market for substitutable goods, we need to consider the factors which may affect that market.

77. We do not consider that we can set out a comprehensive list of those factors but will set out those which we consider to be relevant in this case. Some factors overlap but we have attempted to separate them. The first relates to the size of the market for the substitutable goods and to the size of that market relative to the wider market for both substitutable goods and goods which are not substitutable within the meaning of the Act but which are used for the same purpose i.e. domestic space or room heating. Also relevant is the size of the share of the wider market occupied by the TCO goods and likely to be occupied by them if the TCO is granted.

78. The second relates to the consumers' demands for the TCO goods and the substitutable goods. This requires an examination, in so far as it is possible, of their preferences. The third has some relevance to the second as it is concerned with the variations in consumer demand caused by seasonal demands. In the heating industry, a warm or cold winter can affect consumer demand to a marked degree and so should be considered separately. The fourth factor also has some relevance to the second in that it is concerned with the relative prices of the TCO goods and of the substitutable goods and with the variations in those relative prices which may flow from the TCO. The fifth factor relates to any increased advertising campaign which may follow the granting of the TCO and which may affect the market for substitutable goods. Again, this factor is related to the second but is of sufficient note to warrant separate consideration. We have considered whether we should consider the relative powers of Dimplex and of those engaged in the market for substitutable goods. In this case at least, there is no evidence that any such relative powers would have any bearing in determining whether the granting of the TCO has any effect on the market for substitutable goods.

79. The first factor relates to the size of the market for substitutable goods. Comprised in that market are goods produced in Australia used for domestic space and room heating. We have concluded that both gas and electrical heating units as well as solid fuel heaters come within that description. We have excluded those products which are used as central heaters as they are used to heat more than one room at a time and so do not have a use corresponding with that of domestic space and room heating. The evidence as to the number of substitutable goods is not precise and we accept that it cannot be so due to seasonal variations leading to variations in demand. On the evidence, we find that the average production or gas and electrical heaters, which are substitutable goods, is in the order of 400,000 units per year. Of these, Vulcan manufactures in the region of 200,000 units per year and that figure may vary by plus or minus 10% depending on the demand generated by seasonal variations. The total number of solid fuel products, which are substitutable goods, is in the order of 50,000 units per year. The total number of substitutable goods sold in Australia is, therefore, approximately 450,000 per year.

80. We accept that Dimplex is the only importer of goods to which the TCO would apply. We find that it imported 4760 kerosene heaters in 1991 and decreased this number to a little over 4200 in

1993-94. This number dropped markedly in 1992. In the current year, it is expected to import 4400 units. We note that in the letter written to Vulcan by Dimplex's customs brokers, it was stated that the customs brokers

> "... estimat(ed) that the Australian market would buy 7000 units per year, and the majority would be sold to people in the outback of NSW, Queensland and WA, who do not have gas or electricity." (T documents, page 37)

We regard the figure of 7000 as an estimate only and accept that the actual number of kerosene heaters that have been imported is as we have found. Notwithstanding the 7000 units per year ultimate distribution estimate, to the Australian market, we found that the total annual distribution has not increased from 1991 when 4760 kerosene heaters were imported. We regard the annual total imports of kerosene heaters to be inconsequential to the total Australian market which is in the order of 800,000 units per year.

81. Although we are required to consider the effect of the TCO on the market for substitutable goods, that market will be affected by the wider market for goods not produced in Australia in the ordinary course of business but which are sold in Australia for the same use as the substitutable goods. Goods sold in that market and the competition between the goods in the wider market and the market for substitutable goods which is effectively a sub-market of that wider market will have an effect on the latter. We will, therefore, also have regard to the number of domestic space and room heaters sold in Australia regardless of whether they are substitutable goods or whether they are imported. The evidence is largely based on estimates. Estimates of the total number of gas and electrical heaters sold in Australia vary by about 300,000. As we have only evidence of estimates, we have decided to adopt a conservative course and have found that the total number of gas and electrical heaters sold in Australia is in the order of 800,000 units per year. In relation to solid fuel stoves, there is evidence only of a total of 60,000 units per year and so we adopt that figure. This means that we have found the total size of the market for domestic space and room heaters is approximately 860,000 units per year.

82. In approximate terms, we find that the market for substitutable goods represents approximately 52% of the wider market for domestic space and room heaters. The kerosene heaters imported by Dimplex represent approximately 0.51% of that wider market in the current year and, at the height of their being imported, represented approximately 0.57%.

83. We do not have a great deal of evidence as to the competition between the goods in the wider market and that for the substitutable goods. The only finding of fact that we can make is based on the evidence of Mr McKay and Mr Gibb and it is that the competition is very intense between the two. On the basis of that, we are also satisfied that the kerosene heaters will be competing not only with the substitutable goods but also with other imported goods having the same use. The sale of a kerosene heater has, therefore, the potential to affect either the sale of other imported goods or of

substitutable goods. That sale does not automatically mean that one fewer of the Australian produced heaters will be sold for the consumer may have preferred the kerosene heater to an imported product.

84. Mr Adams' evidence as to the attractiveness or otherwise of a kerosene heater to the consumer is accepted and preferred to that of Mr Gibb and Mr McKay. We have taken that view as Mr Gibb and Mr McKay showed only a very limited familiarity with kerosene heaters and their past and present operation. We find that technical advances with kerosene heaters have led to their burning much more effectively and cleanly than in the past. Despite that, we are satisfied that there continues to be a perception in the community that they are not clean and are smelly in their operation. This perception will be a factor which discourages consumers from purchasing kerosene heaters and which will lead them to look at other forms of domestic space and room heating.

85. We do not have any precise evidence of the operating costs of various heaters. On the basis of Mr Adams' evidence, we find that the operating costs of a kerosene heater are generally higher than those of a gas or electric heater. Operating costs will influence the choice of heater made by the consumer and its higher operating cost would influence him or her against a kerosene heater. Another factor influencing the choice of heater made by a consumer will be the availability of gas or electricity. Where neither gas nor electricity is available other than perhaps in the form of bottled gas or from electricity supplied by a private generator, it may be arguable that a kerosene heater or a solid fuel heater may possibly be more attractive to a consumer than a gas or electricity powered heater. We cannot go beyond that for to do so would be to speculate. In any event, we do not think that we need to for people in such areas are already in the market and the choices they make are unlikely to have any perceptible, let alone significant, effect on the market for the substitutable goods.

86. The market for heating products generally, and not simply those for the substitutable goods, will be affected by seasonal conditions. We find that the production of Vulcan's goods may rise by 10% in a cold Winter and fall by 10% in a warm Winter. We have no reason to believe that the whole market is not similarly affected by seasonal conditions. Vulcan has been able to alter its production schedules and to adjust its production of other goods to cater for what can be as great as a 20% variation in its production of heaters. It has been able to do so without having to cease its activities in the heating market.

87. The area in which Vulcan would seem to have the greatest concern is in the built up areas where mains electricity is available and gas is readily available either through the mains supply or in bottled form. This concern was based on the advertisement for the kerosene heaters which had appeared in the metropolitan newspaper "The Sun Herald", when they had been described in the application for a TCO as for use for "space heating when gas or electricity is not available" (T documents, page 11). The emphasis upon their use in such areas was underlined when the application stated in the general comments in support of its application that "there are no portable space heaters made in Australia that can be used in areas that do not have gas or electricity" (T documents, page 13). Mr Gross invited us to find that, despite the evidence that Dimplex is only importing 4,400 units per year, and despite his acknowledgment that such importation affects only "a very, very small amount of

market", Dimplex is quite likely to import far larger numbers and to embark upon a much wider advertising campaign directed at consumers who have ready access to reticulated gas and electricity supplies.

88. As to the aspect of a major campaign of advertisement, certainly the advertisement in The Sun Herald in June 1993 appeared in a metropolitan newspaper. There is, however, no evidence that any further advertisements have appeared. One advertisement does not make a major campaign or even herald a major campaign. What that advertisement does indicate is an intention to market the heaters in areas where gas and electricity are available. It follows from this that Dimplex are bringing their kerosene heaters to the attention of a far greater number of people than those who live in remote areas without access to reticulated gas and electricity. What effect is this likely to have on the number of kerosene heaters to be imported and placed on sale? Although we have found that kerosene heaters have been advertised in the metropolitan press and are available in metropolitan shops, we have also taken into account that there is no evidence of an advertising campaign. These aspects, together with Mr Adams' evidence that he does not consider there is room for growth in the sale of kerosene heaters, leads us to find that Dimplex is not intending any notable increase in the level of its importation.

89. The kerosene goods are already being imported under the TCO and so are free of duty. We find that Dimplex has made no reduction in the wholesale price to reflect the reduction in duty. Evidence of the pricing structure for kerosene heaters was given in confidence by Mr Adams. The pricing structures and margins involve consideration of the fluctuations in the Australian dollar against the Japanese yen. On the basis of his evidence we find that there is some margin for a wholesale price reduction by Dimplex but that it is unlikely to be a price reduction in 1994. As to the future, we cannot make any finding either as to the likelihood or lack of likelihood of a price reduction. We do find, however, that the savings which could be passed to the seller and ultimately to the consumer would be very small when compared with retail prices currently being charged for kerosene heaters. Those prices, we find, currently are in the range of $275 to $399 depending on the model.

90. At that price range, we find that they compete directly with the Vulcan Quasars which retail in a similar price bracket. We have not had any evidence as to the substitutable products manufactured by other Australian manufacturers and falling within the same price bracket. We have not had any evidence as to the products coming within the same price bracket but coming within the wider heating market as they are not substitutable goods. Even so, we do not think that it follows logically that the only product with which the kerosene heaters are competing are Vulcan's products. As Mr Adams pointed out, they are also competing with column heaters imported by Dimplex. They must also be competing with substitutable goods made by manufacturers other than Vulcan with other heating products in the wider market. Even though we are not considering the effect on the wider market, such competition with goods in that wider market must have an effect on the market for substitutable goods. With this in mind, we cannot conclude that it necessarily follows or is even likely that the sale of a kerosene heater will result in one fewer of Vulcan's heaters' being sold. The sale of a kerosene heater may result in one fewer sales of substitutable goods of a competitor of both Vulcan and Dimplex or one fewer sales of a heating product in the wider market.

91. Bearing in mind all of the evidence on findings of fact, we find that any effect which the granting of the TCO may have on the market for substitutable goods will not be adverse. Furthermore, we do not consider that there will be, or is likely to be, any significant effect at all. Therefore, we consider that the granting of the TCO is not likely to have any significant adverse effect on the market for substitutable goods. In view of our earlier conclusions, the application for a TCO meets the core criteria as required by sub-section 269P(1).

92. For the reasons we have given, we affirm the decision under review.
