SUPREME COURT OF QUEENSLAND

CITATION:	*Thiess v Collector of Customs & Ors* [2013] QCA 54
PARTIES:	**ALAN CHARLES THIESS** (plaintiff) **v** **COLLECTOR OF CUSTOMS** (first defendant) **COMMONWEALTH OF AUSTRALIA** (second defendant) **C-AIR LOGISTICS SERVICES PTY LTD** ACN 102 936 694 (third defendant) **GLOBAL LOGISTICS MANAGEMENT CORP PTY LTD (in liquidation)** ACN 111 486 732 (fourth defendant) **MATTHEW JONES** (fifth defendant) **PAUL STEVENSON** (sixth defendant)
FILE NO/S:	Appeal No 13497 of 2010 SC No 13497 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Reference by a Judge – Civil
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2013
JUDGES:	Chief Justice and Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**The questions set down for determination are answered as follows:** **(a) Were it not for the provisions identified in the answer to question (b), on the facts pleaded in the amended statement of claim and admitted in the amended defence of the first and second defendants, the plaintiff would have a valid cause of action against the first defendant or the second defendant, or against both defendants, to recover the sum of $543,918.93.**

(b) The first and second defendants have a lawful defence to the plaintiff's claim pursuant to s 167(4) of the *Customs Act* 1901 (Cth) so far as the claim relates to import duty and they have a lawful defence to the plaintiff's claim pursuant to s 36 of the *Taxation Administration Act* 1953 (Cth) so far as the claim relates to GST.

(c) Neither of the statutory provisions identified in the answer to question (b) is void as constituting an acquisition of property otherwise than on just terms, contrary to s 51(xxxi) of the Australian Constitution.

(d) No judgment may be recovered by the plaintiff on his claims against the first defendant and the second defendant.

(e) The costs of and incidental to the proceeding as between the plaintiff and the first defendant, and as between the plaintiff and the second defendant, should be paid by the plaintiff on the standard basis.

CATCHWORDS: TAXES AND DUTIES – CUSTOMS AND EXCISE – IMPORTATION OF GOODS – GENERALLY – where the plaintiff purchased a yacht overseas in December 2004 for import into Australia for home consumption – where the third defendant entered the incorrect tariff classification into the COMPILE system – where the customs duty payable under the incorrect tariff classification was five per cent – where the customs duty payable would have been nil per cent had the correct tariff classification been entered – where the plaintiff was not made aware of the third defendant's mistake until October 2006 – where the plaintiff contended that he had no obligation to make the payment and the first and second defendants had no right to receive the payment – where r 126 of the *Customs Regulations* 1926 (Cth) prescribes circumstances where customs duty can be recovered for the purposes of s 163 of the *Customs Act* 1901 (Cth) – where r 126(1)(e) of the *Customs Regulations* 1926 (Cth) provides for the recovery of customs duty where the duty has been paid through 'manifest error of fact or patent misconception of law' – where r 128A(5) required an application for the refund of duty under s 163 to be made within 12 months – where the plaintiff did not apply for a refund within that time – whether the plaintiff was nevertheless entitled to recover the amount of overpaid customs duty

TAXES AND DUTIES – CUSTOMS AND EXCISE – CUSTOMS DUTIES – DISPUTES AS TO DUTY AND RECOVERY OF OVERPAYMENTS – AMOUNT PAID UNDER PROTEST – where s 167 provides a procedure by which an amount of overpaid customs duty can be recovered where it has been paid under protest – where the plaintiff was

not advised of the mistake made by the third defendant until October 2006 – where the plaintiff commenced proceedings for the recovery of the overpaid customs duty in December 2010 – where the plaintiff contended that as the first defendant had not made a demand for payment, it was not possible to pay under protest, and the claim was not within s 167(4) – where the plaintiff argued that this allowed for recovery of the overpaid customs duty at common law – where the plaintiff in a practical sense could not have paid under protest as he was not aware of the third defendant's mistake at the time of payment – where the first and second defendants contended that s 167(4) was a complete answer to the plaintiff's claim – whether s 167(4) was limited to cases in which there was a dispute at the time of payment and the owner had paid the amount under protest – whether the plaintiff's right to recover the overpaid customs duty was precluded by his failure to comply with the requirements of s 167(4)

TAXES AND DUTIES – GOODS AND SERVICES TAX – GENERALLY – OTHER MATTERS – where the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ('GST Act') creates liability for GST where goods are imported into Australia for home consumption – where the amount of GST payable on a taxable importation of goods for home consumption is 10 per cent – where, by s 13-20(1) of the GST Act, a taxable importation includes the customs duty payable in respect of the importation – where the plaintiff contended that if he were entitled to a refund of the customs duty, he would also be liable for a refund of GST – where the plaintiff did not give notice under s 36(1)(d) of the *Taxation Administration Act* 1953 (Cth) within the required period – where the first and second defendants argued that under s 39(1) the plaintiff was not entitled to a refund – whether s 36 of the *Taxation Administration Act* 1953 (Cth) prevents the possibility of recovering at common law an amount of overpaid GST

CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – POWERS WITH RESPECT TO PROPERTY – POWER TO ACQUIRE PROPERTY ON JUST TERMS (CONSTITUTION, S 51(XXXI)) – ACQUISITION OF PROPERTY – PARTICULAR CASES – EXTINGUISHING CAUSES OF ACTION – where the plaintiff contended that if s 167(4) of the *Customs Act* 1901 (Cth) extinguished his right of action to recover the customs duty, it amounted to an acquisition of property other than on just terms – where the plaintiff contended that s 167(4) did not fall within the taxation power or the incidental power – whether s 167(4) contravened s 51(xxxi) of the Constitution

A New Tax System (Goods and Services Tax) Act 1999 (Cth), s 13.5, s 13.20
Commonwealth Constitution (Cth), s 51(xxxi)
Customs Act 1901 (Cth), s 4AB, s 9, s 15, s 16, s 68, s 71L, s 72, s 132AA, s 153, s 163, s 167, s 273GA
Customs Regulations 1926 (Cth) r 126, r 127, r 128, r 128A
Customs Tariff Act 1995 (Cth), Schedule 3
Taxation Administration Act 1953 (Cth), s 36, s 39

A & G International Pty Ltd v Collector of Customs (1995) 129 FLR 23, followed
Avon Products Pty Ltd v Commissioner of Taxation (2006) 230 CLR 356; [2006] HCA 29, cited
Chippendale Printing Co Pty Ltd v Commissioner of Taxation (1996) 62 FCR 347; [1996] FCA 1259, cited
Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 87 ALJR 98; [2012] HCA 55, cited
Comptroller-General of Customs v Kawasaki Motors Pty Ltd [No 2] (1991) 32 FCR 243; [1991] FCA 518, considered
Malika Holdings Pty Ltd v Stretton (2001) 204 CLR 290; [2001] HCA 14, considered
Matchbox Toys Pty Ltd v The Chief Executive of Customs [1997] NSWSC 494, considered
Minister for Primary Industry and Energy v Davey (1993) 47 FCR 151; [1993] FCA 574, cited
Mutual Pools & Staff Pty Ltd v The Commonwealth (1994) 179 CLR 155; [1994] HCA 9, cited
Parks Holdings Pty Ltd v Chief Executive Officer of Customs (2004) 141 FCR 165; [2004] FCAFC 317, considered
Sargood Bros v The Commonwealth (1919) 11 CLR 258; [1910] HCA 45, considered
SCI Operations Pty Ltd v The Commonwealth (1996) 69 FCR 346; [1996] FCA 754, considered
Smith v ANL Ltd (2000) 204 CLR 493; [2000] HCA 26, cited
The Commonwealth v SCI Operations Pty Ltd (1998) 192 CLR 285; [1998] HCA 20, considered
Werrin v The Commonwealth (1938) 59 CLR 150; [1938] HCA 3, cited
Wurridjal v The Commonwealth (2009) 237 CLR 309; [2009] HCA 2, cited
Victoria v Commonwealth of Australia (1996) 187 CLR 416; [1996] HCA 56, cited

COUNSEL: A Morris QC, with L Copley and R Haddrick for the plaintiff
L Kelly SC, with G Del Villar for the first and second defendants
No appearance by the third, fourth, fifth and sixth defendants

SOLICITORS: Walsh Halligan Douglas for the plaintiff
Australian Government Solicitor for the first and second defendants
No appearance by the third, fourth, fifth and sixth defendants

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Fraser JA, with which I agree. I agree with his Honour's proposed answers.

[2] **MUIR JA:** I agree with the orders proposed by Fraser JA for the reasons he has given.

[3] **FRASER JA:** The plaintiff brought proceedings in the Trial Division against the first and second defendants and others. As against the first and second defendants the plaintiff claimed $543,918.93 as monies had and received to the use of the plaintiff, or by way of restitution in equity, or by way of equitable compensation for unjust enrichment.

[4] Pursuant to r 483 of the *Uniform Civil Procedure Rules* 1999 (Qld) a judge of the Trial Division ordered by consent that the following questions be set down for hearing and determination by the Court of Appeal separately from and prior to the hearing and determination of all other questions and issues in this proceeding:

> "a) whether, on the facts pleaded in the Amended Statement of Claim and admitted in the Amended Defence of the First and Second Defendants, the Plaintiff has a valid cause of action against the First and/or Second Defendants to recover the sum of $548,918.93[1] (or any, and if so what, part thereof);
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> b) if so, whether, on the facts pleaded in their Further Amended Defence and admitted in the Plaintiff's Reply thereto, the First and/or Second Defendants have a lawful defence to that claim (or any, and if so what, part thereof):
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> i. pursuant to all or any of the sections of Sections 163 and 167 of the *Customs Act 1901* (Commonwealth) or Regulations 127, 128 and 128A of the *Customs Regulations 1926* (Commonwealth); or
> ii. pursuant to Section 36 of the *Taxation Administration Act 1953* (Commonwealth); or:
> iii. pursuant to the statutory provisions set out in exhibit MEH1 to the affidavit of Martin Hanson sworn 9 May 2012;
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> c) if the First and/or Second Defendants have a lawful defence to the Plaintiff's claim pursuant to any one or more of the said statutory provisions, whether, insofar as each such statutory provision provides such a defence, it is void as constituting an acquisition of property otherwise than on just terms, contrary to s. 51(xxxi) of the Australian Constitution;
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> d) what (if any) judgment may be recovered by the Plaintiff against the First and Second Defendants; and
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> e) how the costs of and incidental to this proceeding, as between the Plaintiff and the First and Second Defendants, should be assessed and paid."

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[1] The amount of the claim is in fact $543,918.93.

[5] There were further orders by consent, including that the defendants other than the first and second defendants were excused from attending or participating in the hearing of those questions and that all defendants should be bound by the Court's determination of those questions, whether or not they elected to attend or participate in the hearing. In the event only the plaintiff, the first defendant (a Collector of Customs) and the second defendant (the Commonwealth) participated in the hearing. The plaintiff served notices under s 78B of the *Judiciary Act* 1983 (Cth) in relation to the constitutional question in (c) of the case. There was no intervention in response to those notices.

[6] At the hearing of the appeal the first and second defendants abandoned reliance upon the statutory provisions mentioned in (iii) of question (b).

Statement of the case

[7] There is no material dispute about the facts and applicable statutory provisions.

[8] The plaintiff bought a yacht overseas. In December 2004 he imported the yacht into Australia for "home consumption" within the meaning of that term in the *Customs Act* 1901 (Cth). Section 132AA of the *Customs Act* required import duty payable on goods for home consumption to be paid by the time of entry of the goods.[2] Duties constitute Crown debts charged upon the goods in respect of which they are payable and are recoverable by the Collector.[3] The amount of the customs duty was fixed by the *Customs Tariff Act* 1995 (Cth).[4] That Act imposed duties of customs on goods imported to Australia[5] on an *ad valorem* basis[6] as a percentage rate of duty worked out by reference to the general rate set out in the applicable tariff classification.[7] The relevant tariff classification was in item 8903 in Schedule 3 of the *Customs Tariff Act*:

"8903	YACHTS AND OTHER VESSELS FOR PLEASURE OR SPORTS, ROWING BOATS AND CANOES:	
8903.92	--Motorboats, other than outboard motorboats:	
8903.92.10	---Not exceeding 150 gross construction tons	5%
8903.92.90	---Other	Free"

The yacht's "gross construction tons" measurement was 160. The yacht therefore fell within 8903.92.90 ("Other") and the plaintiff was not obliged to pay any import duty upon its importation.

[9] Under the *Customs Act*, the plaintiff, as the owner of the yacht was obliged to enter the yacht for home consumption upon its importation, failing which the first defendant would be entitled to move and sell it.[8] The import entry is a statutory document which was required to be made and transmitted to the first defendant using the "COMPILE" computer system.[9] It was required to include specified

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2 *Customs Act*, s 132AA(1), Item 1.
3 *Customs Act*, s 153.
4 *Customs Tariff Act*, Schedule 3.
5 *Customs Tariff Act*, s 15.
6 *Customs Tariff Act*, s 9.
7 *Customs Tariff Act*, s 16.
8 *Customs Act*, ss 68, 72.
9 *Customs Act*, s 71A; *Customs Regulation*, r 128AB.

information, including the yacht's gross construction weight, valuation, and tariff classification.[10] The Collector may verify particulars shown in an entry.[11] If the details of an entry are subsequently changed, it is deemed to be withdrawn.[12]

[10] The importation of the yacht and compliance with customs requirements were attended to by the plaintiff's customs broker, the third defendant, who acted throughout with the plaintiff's authority. The third defendant mistakenly believed that the measure of the yacht's gross construction tons was 108 rather than 160. In that mistaken belief the third defendant mistakenly entered the yacht under tariff classification 8903.92.10, rather than the applicable tariff classification 8903.92.90. The COMPILE system then automatically calculated and displayed the customs duty payable on the yacht based upon the information entered by the third defendant. Under the heading "Australian Customs Entry for Home Consumption", the plaintiff was named as owner, the third defendant was described as "agency", the "GRWT (KG) was specified as "108000.00", and there were references to the tariff classification of 8903.92.10 and the tariff percentage figure of 5. Under the heading "EFT Only" the document set out the following calculation of the amount payable by the plaintiff:

Total Duty	494471.74
Total GST	1094778.85
Total WET	0.00
Other Charges	51.90
Total Amount Payable	1589302.49

[11] On 23 December 2004 the third defendant, on behalf of the plaintiff, paid the "Total Amount Payable" to the first defendant for and on behalf of the second defendant. That amount included $494,471.74 by way of import duty calculated at five per cent in accordance with item 8903.92.10 and GST of $49,447.17 on import duty, totalling the amount of $543,918.91 claimed by the plaintiff.

[12] Liability for the GST amount was created by *A New Tax System (Goods and Services Tax) Act* 1999. A person makes a taxable importation if goods are imported and the person enters them for home consumption.[13] The amount of GST on a taxable importation is 10 per cent of the taxable importation.[14] The value of a taxable importation includes the amount of any customs duty payable in respect of the importation.[15]

[13] The plaintiff was not advised of the mistake made by the third defendant until October 2006. The plaintiff then sought an "act of grace" refund of the customs duty and GST. No payment was made, notwithstanding representations on the plaintiff's behalf during the following four years. Ultimately, on 15 December 2010, the plaintiff commenced these proceedings.

[14] In the plaintiff's written and oral argument his cause of action was put on a quasi-contractual or restitutionary basis. The pleaded bases of that cause of action are that

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10 *Customs Act*, s 71L and CEO Instrument of Approval No 24 of 2000, Commonwealth of Australia Gazette No GN 23, 14 June 2000.

11 *Customs Act*, s 71D.

12 *Customs Act*, s 71F.

13 *A New Tax System (Goods and Services Tax) Act* 1999 ("GST Act"), s 13-5.

14 *A New Tax System (Goods and Services Tax) Act* 1999 ("GST Act"), s 13-20(1).

15 *A New Tax System (Goods and Services Tax) Act* 1999 ("GST Act"), s 13-20(2).

the plaintiff made the payment of $543,918.93 upon a mistake of fact that the measure of the yacht's gross construction tons was 108 rather than 160, the plaintiff was not legally obliged to make any payment by way of customs duty or GST in respect of customs duty, and the first and second defendants had no lawful right to receive that payment.

[15] The first and second defendants admitted that the third defendant, in the course of acting as the plaintiff's customs broker, mistakenly believed that the yacht's gross construction tons measurement was 108 rather than 160. They also admitted that, in the course of acting for the plaintiff, the third defendant concluded that the yacht was not a yacht exceeding 150 gross construction tons, that the rate of customs duty exigible in respect of the yacht was not the rate of nil per cent prescribed by Customs Tariff 8903.92.90 but was the rate of five per cent prescribed by Customs Tariff 8903.92.10, and that $543,918.91 was lawfully payable as duty and GST on duty in respect of the yacht.

[16] The first and second defendants:

(a) denied that when the plaintiff made the payment he had no obligation to pay it, that the first and second defendants had no lawful right to receive it, and that the plaintiff made the payment by mistake. The pleaded explanation for those denials relied upon the alleged effect which provisions of the *Customs Act* and the *Tariff Act* gave to the third defendant's statements in the customs entry in COMPILE;

(b) alleged that s 167(4) of the *Customs Act* precluded the plaintiff from maintaining an action for recovery of the customs duty of $494,471.74 because he did not make that payment under protest and because he did not commence his action within six months after the date of the payment;

(c) alleged that the GST amount of $49,447.17 was correctly levied on the customs duty payable by the plaintiff or that, pursuant to s 36 of the *Taxation Administration Act* 1953, the plaintiff was not entitled to a refund or credit of the GST amount because the plaintiff did not notify the Commissioner of Taxation within four years after the importation of the yacht that the plaintiff maintained that he was entitled to a refund or credit; and

(d) alleged that, because the plaintiff had not made an application for a refund of duty in compliance with r 128 of the *Customs Regulations* 1926 within 12 months of the date of payment of duty as prescribed by r 128A(5) of those *Regulations*, pursuant to r 127 of the *Regulations* no refund of duty may be made to the plaintiff.

[17] The plaintiff replied that:

(a) Section 167(4) did not apply because when the plaintiff paid the customs duty there was no dispute as to the amount or rate of duty payable on the importation of the yacht and the Commonwealth had not demanded payment of the duty.

(b) Section 167 and other provisions relied upon by the first and second defendants did not apply for the further reason that it was not alleged that the plaintiff had applied for a refund under r 127 of the *Customs Regulations* or for a rebate or omission of duty under s 163 of the *Customs Act* or r 128 of the *Customs Regulations*.

(c) If s 167 or the other regulatory provisions upon which the first and second defendants relied were effective to prevent the plaintiff from recovering its payment by mistake, then those provisions contravened s 51(xxxi) of the Australian Constitution and were invalid as appropriations of the plaintiff's property otherwise than on just terms.

(d) The statutory provision relied upon by the first and second defendants as precluding the plaintiff from recovering the GST amount amounted to an invalid appropriation contrary to s 51(xxxi).

(a) The plaintiff's cause of action

[18] The plaintiff's allegation that the plaintiff had no obligation to make the payment and the first and second defendants had no lawful right to receive the payment when it was made cannot be accepted. The legislation established a system of self-assessment under which the amount of duty and GST payable by an owner who imported goods ordinarily depended upon information entered in COMPILE by the owner. The amounts of import duty and GST calculated upon the basis of that information and displayed by COMPILE to the importer's agent, the third defendant, were necessarily payable when the plaintiff made the payment.

[19] As the first and second defendants accepted at the hearing, the import duty and GST were assessed as a consequence of the third defendant's entry of the wrong gross construction ton measurement of the yacht and its consequential entry of the wrong tariff classification for which five per cent, rather than nil, ad valorem duty was imposed. The third defendant's conduct in transmitting the entry to the first defendant via the COMPILE system was infected by that mistake, as were the amount claimed by the first defendant and the subsequent payment. The first and second defendants admitted at the hearing that, were it not for the statutory provisions upon which they relied, on the admitted facts pleaded in the amended statement of claim the plaintiff would have had a cause of action to recover the duty and GST which he had paid. The better view seems to be that liability would have rested with the second defendant alone because the payment was made to and received by the first defendant on behalf of the second defendant, but the parties did not direct submissions to that question and it is not necessary to decide it.

(b) The statutory provisions pleaded by the first and second defendants

[20] Section 167 of the *Customs Act* provided:

> "(1) If any dispute arises as to the amount or rate of duty payable in respect of any goods, or as to the liability of any goods to duty, under any Customs Tariff, or under any Customs Tariff or Customs Tariff alteration proposed in the Parliament (not being duty imposed under the *Customs Tariff (Anti Dumping) Act 1975*), the owner of the goods may pay under protest the sum demanded by the Collector as the duty payable in respect of the goods, and thereupon the sum so paid shall, as against the owner of the goods, be deemed to be the proper duty payable in respect of the goods, unless the contrary is determined in an action brought in pursuance of this section.

(2) The owner may, within the times limited in this section, bring an action against the Collector, in any Commonwealth or State Court of competent jurisdiction, for the recovery of the whole or any part of the sum so paid.

(3) If a documentary import entry has been made in respect of goods, a protest under this section is taken to have been made if, and only if, the owner of the goods or the agent of the owner:
(a) writes on the entry ***Paid under protest***; and
(b) adds to the entry a description of the goods to which the protest relates (where the protest does not relate to all the goods covered by the entry) and a statement of the grounds on which the protest is made; and
(c) signs the statement.

(3A) If a computer import entry has been made by a registered COMPILE user in respect of goods, a protest under this section is taken to have been made if, and only if, the registered COMPILE user transmits to Customs at the time of making payment in respect of those goods following an import entry advice under section 71B:
(a) the entry number; and
(b) the words ***Paid under protest***; and
(c) a description of the goods to which the protest relates (where the protest does not relate to all the goods covered by the entry) and a statement of the grounds on which the protest is made.

(4) No action shall lie for the recovery of any sum paid to the Customs as the duty payable in respect of any goods, unless the payment is made under protest in pursuance of this section and the action is commenced within the following times:
(a) In case the sum is paid as the duty payable under any Customs Tariff, within 6 months after the date of the payment; or
(b) In case the sum is paid as the duty payable under a Customs Tariff or Customs Tariff alteration proposed in the Parliament, within 6 months after the Act, by which the Customs Tariff or Customs Tariff alteration proposed in the Parliament is made law, is assented to.

(5) Nothing in this section shall affect any rights or powers under section 163."

[21] Section 273GA(2) provided an alternative remedy to the action authorised by s 167(2). It authorised an owner to apply to the Administrative Appeals Tribunal for a review of the decision by the Collector to make the demand mentioned in s 167(1) where the owner has paid the sum demanded under protest after a dispute has arisen.

[22] So far as is presently relevant, s 163 provided:

> "**Refunds etc. of duty**
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> (1) Refunds, rebates and remissions of duty may be made:
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> (a) in respect of goods generally or in respect of the goods included in a class of goods; and
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> (b) in such circumstances, and subject to such conditions and restrictions (if any), as are prescribed, being circumstances, and conditions and restrictions, that relate to goods generally or to the goods included in the class of goods.
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> …
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> (1AA) Subject to subsection (1AD), the regulations may prescribe:
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> (a) the manner of making application, either by document or by computer, for such refunds, rebates or remissions; and
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> (b) the procedure to be followed by Customs in dealing with such applications, including procedures for requesting further information in relation to issues raised in such applications.
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> …
>
> (1AD) The regulations may identify circumstances where a person is entitled to a refund, rebate or remission of duty:
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> (a) without making an application at all;[16] or
>
> (b) on making an application in respect of which a refund application fee is not payable.
>
> …"

[23] Regulation 126(1) of the *Customs Regulations* prescribed numerous circumstances for the purposes of s 163 including, in paragraph (e), where "duty has been paid through manifest error of fact or patent misconception of the law". The plaintiff's senior counsel accepted in the course of argument that r 126(1)(e) describes the circumstances of this case. Regulation 127(1) provided that "[a] refund of duty shall not be made unless an application for the refund in accordance with regulation 128 is delivered in accordance with that regulation within the period within which that application may, by virtue of regulation 128A, be made." Regulation 128A specified different time limits for applications for refunds of duty in relation to the other different circumstances prescribed under r 126. The time limit applicable to the circumstance prescribed in r 126(1)(e) was "12 months after the date on which duty was paid": see r 128A(5). The plaintiff did not apply for a refund within that time or at all.

[24] The first and second defendants argued that because the plaintiff did not pay under protest and he did not commence this action within six months of his payment s 167(4) was a complete answer to the plaintiff's claim. The plaintiff argued that the first defendant had not made any demand for the payment, there was therefore no occasion for any dispute or payment under protest, and his claim was therefore not within s 167(4). This construction of s 167(4), that it applied only when the

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[16] The plaintiff did not submit that there was any regulation dispensing with the requirement for an application.

Collector had demanded payment and a dispute had arisen between the owner and the Collector at the time of payment, was submitted to be required by the context supplied by ss 167(1) and (2), the absence of a rationale for requiring a protest or imposing the six month limitation period where there was no demand for payment or dispute at the time of payment, and the unjust consequence of the first and second defendants' construction that all claims to recover payments of duty made by mistake would be extinguished.

[25] The construction propounded by the plaintiff was rejected by Ormiston J in *A & G International Pty Ltd v Collector of Customs*.[17] Ormiston J pointed to the marked contrast between the text in s 167(4) "No action shall lie for the recovery of any sum paid to the Customs as the duty payable in respect of any goods…" and the reference in s 167(2) to "the sum so paid", a reference which unequivocally describes the payment under protest of a sum demanded by the Collector. That contrast militates against the construction which treats s 167(4) as doing nothing more than specifying a time limit for the commencement of the action authorised by s 167(2) where the owner paid under protest. Such a result could readily have been achieved by a conventional provision, such as "an action under s 167(2) must be brought within the following times…" As Ormiston J observed, a construction which limited the application of s 167(4) to cases in which an owner had paid under protest would render s 167(4) "almost nugatory";[18] where the circumstances described in s 167(1) exist, it is likely that the owner would in any event bring the action authorised by s 167(2) within the relevant time, or bring an application for review under s 273GA(2) within the same time, as required by s 273GA(5).

[26] In that case there was also no disagreement between the parties at the time of the importation as to the owner's liability for the customs duty. As is the case here, the duty had been calculated, upon the basis of information supplied on behalf of the owner. Ormiston J rejected an argument that s 167(4) was confined to cases where a dispute arose at the time the duty was payable. His Honour held that:

> "…s 167(4) imposes a restriction consistent with the purpose of the statute to prevent late disputes and claims relating to overpaid duty. The terms of subs (4) are unqualified because, subject to the implication which necessarily flows from the later passing of s 273GA(2), it was intended that no action should lie for such overpaid duty unless the conditions of the subsection were complied with, namely that the payment was in fact made under protest and the action was commenced (for relevant purposes) within six months of the time the sum was paid. If the court were to conclude that an importer could refrain from raising a dispute and likewise fail to make a protest at the time of entry of the goods, then for all practical purposes no importer would take those steps since adopting that course would immediately restrict its capacity to raise the validity of the duties imposed",[19]

and that,

> "… a dispute of the kind referred to in subs (1) is a necessary factual precondition to a payment under protest and the bringing of any action disputing the amount of duty paid. But to make it a condition

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17 (1995) 129 FLR 23.

18 (1995) 129 FLR 23 at 36.

19 (1995) 129 FLR 23 at 34.

> of payment under protest for the purposes of subs (1) and consequentially for the bringing of an action pursuant to subs (2) says nothing as to the operation of subs (4) which is clearly designed to deny a right of action, except in specified circumstances. To say, as the plaintiff appeared to contend, that the limitation in subs (4) is confined to events and circumstances where there has been a dispute at the time of payment (and, so it was further said, also at the time when the action was brought), would be to render subs (4) almost nugatory, containing at best restrictions confined to cases where there had been a continuing dispute."[20]

[27] Ormiston J concluded accordingly that s 167(4) was not confined to circumstances in which there was a dispute at the time of the payment; "the clear purpose of subs (4), as construed in the cases by which I am bound, is to prevent actions from being brought disputing customs duty unless the requirements of that section have been satisfied …".[21]

[28] Furthermore, although it was not necessary for the decision in that case, Ormiston J also concluded that s 167(4) applied even where a protest would not have been possible.[22] In that respect, I respectfully observe that because s 167(4) imposes a condition that the payment was made under protest pursuant to s 167, and because s 167(1) contemplates a protest only against a payment demanded by the Collector, it is arguable that s 167(4) applies only where the Collector has made a demand. It is not necessary to pursue that issue because I would not accept the plaintiff's argument that there was no demand. Subject to any subsequent recovery action under s 167(2) or other proceeding under the *Customs Act*, the plaintiff's liability to pay the duty and GST upon importing the yacht was established by the "Australian Customs Entry for Home Consumption" published by COMPILE, which was based upon information entered on the plaintiff's behalf. The plaintiff's yacht remained under the control of customs until the plaintiff paid the amount of duty and GST claimed by the first defendant, or paid it under protest pursuant to s 167(1). In this context, the first defendant's statement under the heading "EFT Only" of the "Total Amount Payable" (see [8] of these reasons) amounted to a demand for payment for the purposes of s 167(1). The plaintiff did not identify what legislative purpose might be served by denying to owners in the plaintiff's position the facility for paying disputed duty under protest in a case of this kind. That would usually be unnecessary in view of the self-assessment system, but in some such cases the right to pay under protest would be beneficial. The plaintiff relied upon the absence of any express authority given by the *Customs Act* or the *Customs Regulations* to demand payment, but no express legislative authority was necessary to authorise the Collector to demand money which was then payable under the legislation. In a practical sense, the plaintiff could not pay under protest because he was not aware of the mistake made by the third defendant, but as a matter of construction of s 167 the first defendant had made a demand for payment and the plaintiff was entitled to pay under protest.

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20 (1995) 129 FLR 23 at 35-36.

21 (1995) 129 FLR 23 at 36.

22 (1995) 129 FLR 23 at 37.

[29] In *SCI Operations Pty Ltd v The Commonwealth*,[23] Sackville J, who was in dissent, found it unnecessary to decide whether an action at common law to recover the relevant duty was foreclosed by s 167(4) of the *Customs Act*, but he nonetheless discussed a submission to that effect. The plaintiff relied upon Sackville J's observation that in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd [No 2]*[24] Hill and Heerey JJ "appeared to have accepted (at 264) that if no dispute had arisen as to the amount or rate of duty, or as to the liability of any goods to duty, the limitations imposed by s 167(4) did not apply". In fact, Hill and Heerey JJ held in the cited passage that an action at common law might be outside s 167(4) "where no protest was possible".[25] It appears from Sackville J's subsequent analysis that he intended to convey only so much, namely, that s 167(4) did not apply in a case in which no question could arise about the liability to pay duty at the time of importation. In that case, after the owner had paid without protest duty which was then due and payable on imported goods, a Commercial Tariff Concession Order was made. It imposed an obligation upon the Commonwealth to refund duty paid before the order was made. If s 167(4) applied in that case, the importer would have been required to commence proceedings before it had a cause of action. Sackville J observed that such a situation was not one to which s 167(4) was directed; it "is concerned to ensure that an importer who wishes to dispute liability to pay duty at the time of importation follows the stringent statutory procedure". Sackville J distinguished *Comptroller-General of Customs v Kawasaki Motors [No 2]*[26] and *A & G International Pty Ltd v Collector of Customs* on the ground that the contest in those cases concerned the liability for duty at the time of importation, and added that "Ormiston J made some observations about the interrelationship between s 167(1) and (4) which may require some qualification to take account of a case such as the present."[27] Such a qualification would except from s 167(4) cases when no legitimate protest could be made because the duty paid was then due and payable.

[30] It is not necessary to attempt to define the limits of that qualification. It would not cover this case. Ormiston J observed in relation to a mistake of law in *A & G International Pty Ltd v Collector of Customs* that the mistake did not mean that a protest by the plaintiff was not possible: "Despite the plaintiff's ignorance all the factual and legal matters existed so as to permit the making of a protest."[28] Similarly, in *Matchbox Toys Pty Ltd v The Chief Executive of Customs*[29] Rolfe J said:

> "I also consider that on a proper construction of s 167 there is an obligation on the owner, at the time of paying duty, to satisfy himself that the duty demanded is payable. If this were not so then, arguably, the provisions of s 167 would be circumvented by an owner not bothering to consider or to consider properly whether such an obligation arose at the time of payment, but later concluding that the duty was not properly payable. Of course it may be that all the

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23 (1996) 69 FCR 346. The decision was reversed in the High Court on grounds which did not include any reference to the construction issue in this case: *Commonwealth of Australia v SCI Operations Pty Limited* (1998) 192 CLR 285.

24 (1991) 32 FCR 243.

25 (1991) 32 FCR 243 at 264.

26 (1991) 32 FCR 243.

27 (1996) 69 FCR 346 at 392.

28 (1995) 129 FLR 23 at 37.

29 [1997] NSWSC 494.

> relevant facts and circumstances are not known to the owner and could not have been known even with the exercise of due diligence. In such circumstances it may be, depending on the facts, appropriate to say that "no protest was possible". But it is not possible to say that if the owner has simply failed to direct his mind to the issue properly."

[31] The same is true in this case. The plaintiff did not submit that he could not readily have ascertained the facts upon which his liability for customs duty depended. The plaintiff knew the facts before August 2004, when he applied to register the vessel with the Registrar of Ships, Cayman Island Shipping Registry, Grand Cayman. His signed application described the approximate tonnage of the ship as "160 gross". The third defendant's mistake may have had its source in the subsequent loading survey report of 29 October 2004, which described the "[d]isplacement" of the vessel as being approximately 108 tonnes, but an appropriate inquiry should have elicited the gross construction tonnage. This is not a case in which it was impossible, or even difficult, for the owner to know the relevant facts upon which duty was calculated.

[32] In *A & G International Pty Ltd v Collector of Customs* Ormiston J rejected a submission that s 163, by providing an alternative means of recovery of overpaid duty, showed that s 167(4) should not be regarded as necessarily precluding an action for recovery of overpaid customs duty in the absence of protest under s 167(1) and the bringing of an action within the time limited by s 167(4)(a).[30] The plaintiff did not advance any similar submission, but the first and second defendants argued that s 163 was consistent with the view that the prohibition in s 167(4) is not confined to cases in which there was a demand by the Collector and a dispute. It is right to take s 163 into account in this respect, particularly because of the provision in s 167(5) which makes it plain that s 167 is not intended to affect rights under s 163. Furthermore, s 273GA(1)(haaa) provides that "… applications may be made to the Administrative Appeals Tribunal for review of … a decision of a Collector under section 163 in relation to an application for a refund, rebate or remission of duty". Decisions under s 163 are therefore not left entirely with the executive. In this context, the conferral by s 163 of a broad power to make regulations which define the circumstances in and conditions upon which refunds of duty may be made on application,[31] or which must be made without any application,[32] and the existence of regulations which comprehended this kind of case and imposed a limitation period for the necessary application, weaken the force of the plaintiff's argument that the first and second defendants' construction of s 167(4) produces unjust results.

[33] I would add that, whilst the significance of the potential for unjust consequences flowing from the first and second defendants' construction is real, it should not be exaggerated. Common law claims for the recovery of money paid by mistake are in

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30 (1995) 129 FLR 23 at 29-33.

31 Subject to completion of the prescribed procedural steps, there may be no discretion to refuse a refund when a prescribed circumstance has been established in the case of overpaid duty: see *The Commonwealth of Australia v SCI Operations Limited* (1998) 192 CLR 285 per Gaudron J at [40] and per McHugh and Gummow JJ at [63] – [64].

32 Section 163(1AD) (introduced by *Customs Legislation Amendment Bill (No 2)* 1999, to which assent was given on 3 November 1999) authorised regulations conferring an entitlement to a refund without the necessity for making an application.

any event barred where the mistake is not discovered before the expiry of an applicable limitation period; and whilst the opportunity to correct such mistakes is reduced substantially by the requirement for a payment under protest, self-interest would encourage importers to take care to avoid mistakes favouring the revenue.

[34] Finally in relation to contextual matters, s 273GA(5)[33] supplies limited, additional support for the first and second defendants' construction, insofar as it is consistent with a legislative policy of protecting the revenue from old claims.

[35] It remains necessary to mention some other decisions cited by the parties in support of their competing constructions of s 167(4). In *Comptroller-General of Customs v Kawasaki Motors Pty Ltd [No 2]*[34] Hill and Heerey JJ accepted a submission that, because the *Customs Act* did not expressly take away the common law right to recover overpaid duty paid under compulsion to a statutory officer, the question was whether there was a necessary implication to that effect in the legislation. After an extensive review of the legislative history and the authorities, they held that s 167 excluded any alternative common law remedy by way of action for recovery of overpaid duty in the case of a dispute about liability between the owner and the Collector.[35] That supports the first and second defendants' construction. The plaintiff challenged one of the reasons advanced by Hill and Heerey JJ for their conclusion, namely, that a rationale for s 167(4) was that the Commonwealth would be given prompt notice, by the procedure for a protest and by the provision for timely action in s 167(4), what duty may become liable to refund. Hill and Heerey JJ referred to in *Sargood Bros v The Commonwealth*[36] in which Isaacs J (who dissented) observed that to allow a claim in restitution merely on the ground that the payer paid the duty demanded "would throw the finances of the country into utter confusion" and might "unexpectedly require the return of enormous sums of money, and quite disorganize the public treasury". The plaintiff argued that this rationale was unconvincing where, as in the present case, the payment was made by mistake so that there was no dispute at the time of the payment and there was no policy or opinion about it formed by the Commonwealth.

[36] Because in this case the legislative purpose is inferred only from the statutory text, I accept that it would be circular reasoning to invoke the inferred legislative purpose as independent support for the first and second defendants' construction. It remains the case, however, that their construction accords with the text and the statutory purpose derived from it. Furthermore, the plaintiff's construction would produce the distinctly odd result that owners who take care to ascertain that a claim for duty by the Collector is wrong and pay only under protest to secure their imported goods must sue within six months, but owners who pay too much because they do not discover their own or their agents' mistakes in entering information upon which an assessment is based are not bound by that limitation period.

[37] The plaintiff submitted that the construction of s 167 propounded by the Commonwealth was inconsistent with Gummow and Callinan JJ's observation in *Malika Holdings Pty Ltd v Stretton*[37] that the right conferred upon an owner by

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33 Section 273GA(5) provides "[a]n application may not be made to the Tribunal under subsection (2) unless the application is made within the time specified in paragraph 167(4)(a) or (b), whichever is appropriate".

34 (1991) 32 FCR 243 at 258.

35 (1991) 32 FCR 243 at 263.

36 (1919) 11 CLR 258 at 303.

37 (2001) 204 CLR 290 at 319 [91].

s 167 to establish in a court exercising the judicial power of the Commonwealth that the duty demanded is excessive or not warranted at all "has attached to it conditions and qualifications designed to balance the interests of the owner with those of the Revenue". The plaintiff argued that s 167 could not be regarded as balancing the interests of the owner and the Revenue if "a man, through no fault of his own, although the mistake was made by his agent, voluntarily makes a payment [and] the Commonwealth hangs on to the money and says, 'You can't have it back because when you made that mistake you didn't make it under protest.'" I note that Gummow and Callinan JJ also observed that s 167(4) "exclude[ed] what otherwise would be an action for which would lie at common law (for example, for money had and received) to recover any sum paid to the Customs as the duty payable in respect of any goods"[38] and "[w]hat is presently of importance is that the common law rights referred to above are replaced by a statutory action against the Collector conferred upon owners of goods by s 167 if the conditions spelled out in the section are satisfied"[39]. Gummow and Callinan JJ went on to refer to the conditions for the statutory action stated in s 167(1) and (3) and the requirement that the action be commenced within the time specified in s 167(4), but they made it quite plain that questions concerning the operation of s 167(4) did not arise because the case concerned an action by the Collector for duty allegedly payable by the importer, rather than a claim by the importer.[40] It is apparent that none of their Honours' observations were directed to the issue in the present case. McHugh J did advert to the present issue, citing *Comptroller-General of Customs v Kawasaki Motors Pty Ltd [No 2]* for the conclusion that the enactment of s 167 "plainly" means, by necessary implication, "that it provides the only means by which the owner of goods can recover overpaid customs duty in a court of law…". That considered observation supports the first and second defendants' construction.

[38] The plaintiff argued that the analysis by the Full Court of the Federal Court (Black CJ, Sackville and Sundberg JJ) in *Parks Holdings Pty Ltd v Chief Executive Officer of Customs*[41] demonstrated that s 167 was not designed to confer windfalls on the Commonwealth or to give it the benefit of payments which were not required by the legislation, and that s 167(4) has no application where there was no demand by the Collector and no dispute. The question in that case was whether the fact that a purported demand for customs duty was not authorised by the provision pursuant to which it purported to be made (s 165) meant that it was incapable of triggering a dispute such as to empower the Administrative Appeals Tribunal to review the decision to make the demand under s 273GA(2). No question arose about the scope of s 167(4). The Court's conclusion that s 167 was drafted "on the assumption that for a dispute to have arisen as to the amount of duty payable or the liability of goods to duty, the Collector must have demanded that the owner pay a sum 'as the duty payable in respect of the goods'"[42] concerned the nature of a "dispute". It did not convey anything about the proper construction of s 167(4).

[39] The High Court recently affirmed that, whilst context and legislative history may be significant in ascertaining the proper construction of a legislative provision, the exercise of construing legislation must begin and end with consideration of the

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38 (2001) 204 CLR 290 at [92].
39 (2001) 204 CLR 290 at [95].
40 (2001) 204 CLR 290 at [95]-[99].
41 (2004) 141 FCR 165 at [51]-[55].
42 (2004) 141 FCR 165 at [55].

statutory text.[43] The clarity of the language in s 167(4), the amelioration by s 163 and regulations made under it of what otherwise might be unjust consequences of a literal construction, and the odd consequences which would result from the plaintiff's construction, combine to require rejection of that construction. The plaintiff's claim for recovery of the import duty was barred by s 167(4).

[40] In relation to the claim for GST, the first and second defendants also relied upon s 36 of the *Taxation Administration Act*. It provides that a taxpayer is not entitled to a refund under s 39(1) of an amount of indirect tax relating to an importation unless one of three conditions is satisfied, the applicable condition here being that the taxpayer notifies the Commissioner of the taxpayer's entitlement to the refund within four years after the end of the tax period: s 36(1)(d). The plaintiff did not give such a notice within the four year period. Section 39 of that Act provided:

> "(1) This section applies to:
>
> (a) so much of any net amount or amount of indirect tax as you have overpaid; and
>
> (b) so much of any net amount that is payable to you under section 35-5 of the GST Act as the Commissioner has not paid to you or applied under Division 3 of Part IIB of this Act.
>
> …
>
> (3) The Commissioner need not give you the refund, or apply the amount under Division 3 or 3A of part IIB, if:
>
> (a) you overpaid the amount, or the amount was not refunded to you, because a supply was treated as a taxable supply to any extent; and
>
> (b) the supply is not a taxable supply to that extent (for example, because it is GST-free);
>
> unless:
>
> (c) the Commissioner is satisfied that you have reimbursed a corresponding amount to the recipient of the supply; and
>
> (d) the recipient is neither registered nor required to be registered."

[41] I accept the first and second defendants' submission that s 36 excludes any common law action to recover an overpayment of indirect tax. It necessarily implies the extinguishment of common law actions because it both confers a new statutory remedy to recover an overpayment in all cases of overpayments, some of which were actionable at common law and some of which were not, and it subjects that entitlement to restrictions that did not apply at common law.[44] The restrictions in s 39(3)(c) and (d) do not seem apt in this case, where there is apparently no recipient of a supply to whom reimbursement might be made, but it seems an unlikely legislative purpose that common law actions survive only in this atypical kind of case; and in any event the notice provision in s 36(1)(d) restricts the statutory remedy to a refund in a way which seems inconsistent with the survival of a common law action which would not be so restricted.[45]

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43 *Commissioner of Taxation v Consolidated Media Holdings* [2012] HCA 55 at [39].

44 See *Chippendale Printing Co Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 347, approved in *Avon Products Pty Ltd v Commissioner of Taxation* (2006) 230 CLR 356.

45 See *Chippendale Printing Co Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 347, especially at 358F-G (Tamberlin J) and at 367D – G, 368F-369A (Lehane J).

[42] It should also be noted that, in the way in which the case was presented for the plaintiff, his claim to the recovery of GST stood or fell upon the issue whether he was entitled to recover the import duty. That reflects the legislative scheme in relation to GST payable on customs duty. The plaintiff was liable to pay GST upon the amount of duty payable by him[46] "at the same time, at the same place and in the same manner as customs duty is payable on the goods in question…".[47] It follows from my conclusions that the customs duty was payable by the plaintiff at the time when he paid it, and that he did not acquire a right to recover that duty, that he has no entitlement to recover GST paid on that duty.

(c) Constitution s 51(xxxi)

[43] The plaintiff contended that if, contrary to his case, s 167(4) of the *Customs Act* extinguished his right of recovery, it contravened s 51(xxxi) of the Constitution in that it amounted to an "acquisition of property" otherwise than "on just terms". He argued that s 167(4) of the Act, as construed by the Commonwealth had such an effect because the extinguishment of the plaintiff's action would amount to a transfer to the Commonwealth of property, the plaintiff's chose in action, in circumstances in which the transfer was not supported by any head of legislative power other than s 51(xxxi). The plaintiff submitted that s 167(4) was not within the taxation power or incidental to that power because the collection of tax due to the Commonwealth did not require a law to deprive a person who had erroneously paid money to the Commonwealth of a chose in action to recover that money when there was no tax in fact due and payable at any time.

[44] I accept the Commonwealth's submission that the plaintiff's contention that s 167(4) is not a law with respect to taxation or authorised by the incidental power is inconsistent with authority which is binding upon this Court.[48] The proposition that s 167(4) effected an acquisition of the plaintiff's property contrary to s 51(xxxi) of the Constitution is also inconsistent with binding authority. In *Victoria v The Commonwealth of Australia*,[49] Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ stated:

> "There is no acquisition of property involved in the modification or extinguishment of a right or interest that has not yet accrued. To put the contrary is to propose an acquisition of something that does not exist."

[45] Thus s 51(xxxi) is not inconsistent with a limitations law which is otherwise within Federal power and operates prospectively.[50] Section 167(4) is such a law. Whatever rights the plaintiff might have acquired to a refund of duty and GST depended upon fulfilment of the conditions in s 167(4), neither of which was fulfilled. It is therefore not necessary to consider the Commonwealth's further argument that, if s 167(4) did provide for the acquisition of the plaintiff's cause of

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46 *A New Tax System (Goods and Services) Act* 1999, s 13-20(2)(c).

47 *A New Tax System (Goods and Services) Act* 1999, s 13-5(1)(a).

48 *Werrin v The Commonwealth of Australia* (1938) 59 CLR 150 at 161 (Rich J), 163 (Starke J), 164-165 (Dixon J); *Mutual Pools & Staff Pty Ltd v Commonwealth of Australia* (1994) 179 CLR 155 at 166-168 (Mason CJ, Brennan J agreeing at 175), 182-183 (Deane and Gaudron JJ), 204-205 (Dawson and Toohey JJ), 217-218 (McHugh J).

49 (1996) 187 CLR 416 at 559.

50 *Smith v ANL Limited* (2000) 204 CLR 493 at 514 [52] (Gaudron and Gummow JJ), 530 [105] (Kirby J).

action, it nevertheless could not be characterised as the law to which s 51(xxxi) applied.[51]

[46] Finally, it is necessary to note that s 4AB of the *Customs Act* provided:

> "(1) If:
>
> (a) this Act would result in an acquisition of property; and
>
> (b) any provision of this Act would not be valid, apart from this section, because a particular person has not been compensated;
>
> the Commonwealth must pay that person:
>
> (c) a reasonable amount of compensation agreed on between the person and the Commonwealth; or
>
> (d) failing agreement – a reasonable amount of compensation determined by a court of competent jurisdiction."[52]

Section 4AB(3) provides that the term "acquisition of property" has the same meaning as in s 51(xxxi) of the Constitution.

[47] If s 167(4) otherwise would have infringed s 51(xxxi) of the Constitution, s 4AB would have saved s 167(4) from invalidity on that account and the plaintiff would have been entitled to a reasonable amount of compensation determined by a court of competent jurisdiction.[53] It follows from my reasons that there was no scope for the application of s 4AB.

The stated case procedure

[48] The reason why the stated case procedure was adopted in this matter was not expressed in any submission or in any material placed before us. It therefore seems appropriate to observe that in the ordinary case it is undesirable that questions in proceedings in the Trial Division be referred to the Court of Appeal. The fundamentally important role of the Trial Division in adjudicating upon disputes before it should not be undermined by too frequent adoption of this procedure, and that holds true even where there is no material factual dispute. In some cases the parties assert that whichever of them loses at first instance will certainly appeal, but experience demonstrates that such predictions are unreliable. Many difficult and important cases are finalised either by judgment at first instance or by compromise after such a judgment, despite uniformly pessimistic predictions beforehand. Referring a case to the Court of Appeal where that otherwise would have been unnecessary involves the litigants and the community in avoidable delay and expense. It should also not be thought that the apparent inevitably of an appeal, even in a case where there is no material factual dispute, is necessarily a sufficient justification for stating a case for the Court of Appeal's decision. A judgment in the Trial Division tends to sharpen the parties' focus on the critical issues in any

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51 See *Mutual Pools & Staff Pty Ltd* (1994) 179 CLR 155 at 171, 180-181, 189.

52 Section 4AB(3) provides that the term "acquisition property" has the same meaning as in s 51(xxxi) of the Constitution.

53 *Minister for Primary Industry v Energy v Davey* (1993) 47 FCR 151 at 167 (Black CJ and Gummow J); *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 389 [196] (Gummow and Hayne JJ), 428-430 [321]-[327] (Heydon J), 470 [462] (Kiefel J).

subsequent appeal and otherwise to assist in the just and efficient disposition of the appeal.

[49] In future cases, it would be helpful if the reasons why the stated case procedure was adopted were expressed, even if only in very succinct terms, and, if not otherwise in the record, recorded in the moving party's outline of submission. In this case there was no such record, but having heard full argument it was appropriate to proceed to answer the questions set down for determination.

Proposed orders

[50] I would answer the questions set down for determination as follows:

(a) Were it not for the provisions identified in the answer to question (b), on the facts pleaded in the amended statement of claim and admitted in the amended defence of the first and second defendants, the plaintiff would have a valid cause of action against the first defendant or the second defendant, or against both defendants, to recover the sum of $543,918.93.

(b) The first and second defendants have a lawful defence to the plaintiff's claim pursuant to s 167(4) of the *Customs Act* 1901 (Cth) so far as the claim relates to import duty and they have a lawful defence to the plaintiff's claim pursuant to s 36 of the *Taxation Administration Act* 1953 (Cth) so far as the claim relates to GST.

(c) Neither of the statutory provisions identified in the answer to question (b) is void as constituting an acquisition of property otherwise than on just terms, contrary to s 51(xxxi) of the Australian Constitution.

(d) No judgment may be recovered by the plaintiff on his claims against the first defendant and the second defendant.

(e) The costs of and incidental to the proceeding as between the plaintiff and the first defendant, and as between the plaintiff and the second defendant, should be paid by the plaintiff on the standard basis.