IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

NO B 57 OF 2013

On Appeal from the Supreme Court of Queensland, Court of Appeal Division

BETWEEN: **ALAN CHARLES THIESS**
Appellant

AND: **COLLECTOR OF CUSTOMS**
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

C-AIR LOGISTICS SERVICES PTY LTD ACN 102 936 694
Third Respondent

GLOBAL LOGISTICS MANAGEMENT CORP PTY LTD ACN 111 486 732 (IN LIQUIDATION)
Fourth Respondent

MATTHEW JONES
Fifth Respondent (Not Party to appeal)

PAUL STEVENSON
Sixth Respondent

SUBMISSIONS OF THE FIRST AND SECOND RESPONDENTS

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Date of this document: 10 December 2013

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. The appeal, and the proposed notice of contention, raises three issues:

   2.1. Does s 167 of the *Customs Act 1901* (Cth) (**Customs Act**)[1] exclude any common law right of action that the Appellant would otherwise have for the recovery of an amount mistakenly paid as customs duty?

   2.2. Does s 163 of the Customs Act (read with the *Customs Regulations 1926* (Cth) (**Customs Regulations**)[2]), either alone or in combination with ss 167 and 273GA, exclude any common law right of action that the Appellant would otherwise have for the recovery of an amount mistakenly paid as customs duty?

   2.3. Did ss 36 and 39 of the *Taxation Administration Act 1953* (Cth) (**TAA**) exclude any common law right of action that the Appellant would otherwise have for the recovery of goods and services tax (**GST**) that had been overpaid?

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The grant of special leave to appeal was limited to the effect of the relevant statutory provisions. The First and Second Respondents consider the issue of a 78B notice to be unnecessary.

PART IV FACTS

4. The First and Second Respondents reject the Appellant's claim that 'no demand' was ever made by any of their servants or agents.[3] That is not fact but a legal conclusion, and it was rejected by the Court of Appeal.[4]

5. A more accurate summary of the relevant facts is set out below.

6. In December 2004, the Appellant imported a yacht into Australia. It was entered for 'home consumption' within the meaning of the Customs Act. By reason of the Customs Act, import duty payable on goods for home consumption had to be paid at the time of the entry of the goods.

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1 References are to the Customs Act in force at the relevant time (reprint as at 13 December 2004).

2 References are to the Customs Regulations in force at the relevant time (reprint as at 6 October 2004).

3 Appellant's submissions, para 9.

4 [2013] QCA 54 at [28].

7. At the time, importers had to use the COMPILE computer system. They were required to transmit to Customs, via the COMPILE system, information in the form of an 'import entry'. That document mandated the inclusion of certain details; in the case of the yacht, these included the gross weight, the valuation and the tariff classification.[5]

8. The *Custom Tariff Act 1995* (Cth) (**Customs Tariff Act**) imposed duties of customs on goods imported into Australia,[6] with such duties being on an *ad valorem* basis[7] and worked out by reference to the tariff classification of the goods.[8] Schedule 3 to the Customs Tariff Act relevantly provided:

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

10 9. The Third Respondent[9] was the Appellant's customs broker. It mistook the yacht's gross construction tonnes for 108 instead of 160. It entered the incorrect tariff classification of 8903.92.10 in the COMPILE system, with the result that the yacht became subject to duty at a rate of 5%. The COMPILE system then automatically assessed the amount of customs duty payable as $494,471.74 and 'populated' the import entry with this amount.

10. The importation of the yacht was a 'taxable importation' within s 13-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (**GST Act**). Pursuant to s 13.20 of the GST Act, the value of the yacht for GST purposes included the customs duty. The COMPILE system automatically assessed the amount of
20 GST payable as $49,447.17 and again populated the import entry with this amount.

11. After the Third Respondent submitted the import entry via the COMPILE system, the Appellant paid the amounts of duty and GST. In accordance with the Customs Act,[10] he was, as required, given an 'authority to deal' – being an authority to take the goods into home consumption – and he did so.

PART V LEGISLATIVE PROVISIONS

12. The Appellant's statement of applicable legislation is incomplete.

13. A list of the applicable legislation is set out in the appendix to these submissions.

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5 See CEO Instrument of Approval No 24 of 2000, *Commonwealth of Australia Gazette No GN 23*, 14 June 2000.

6 Customs Tariff Act, s 15.

7 Customs Tariff Act, s 9.

8 Customs Tariff Act, s 16.

9 The Appellant's Customs broker's declaration in the entry is 'deemed to be made with the knowledge and consent of the owner'. See Customs Act, s 183A.

10 Customs Act, s 71B(4).

PART VI ARGUMENT

Section A: summary of argument

14. In summary, the First and Second Respondents submit as follows:

14.1. Within the meaning of s 167(1) of the Customs Act, the monies paid by the Appellant to the Collector of Customs (**Collector**) were a payment of 'the sum demanded by the Collector as the duties payable in respect of the goods'. Specifically, the COMPILE system automatically assessed the amounts of Customs duty and GST payable and populated the import entry with these amounts. In the context of the system of 'Customs control' described below – particularly that the yacht could not be released until the relevant amounts were paid – the COMPILE system's automatic assessment of the duty and GST payable was the relevant 'demand' against which the Appellant made the payment he now seeks to recover. The Court of Appeal was correct so to find (see **Section B** below).

14.2. Section 167 creates a statutory cause of action subject to the conditions spelled out in the section (see **Section C** below).

14.3. Subsection 167(4) has a double operation: it not only specifies the time limit for the bringing of the statutory cause of action for recovery created by ss 167(1) and (2), but further operates to preclude the bringing of any common law actions for recovery of duty which might otherwise be available on the facts and circumstances governing liability as exist at the time of payment (see **Section D** below).

14.4. The above construction achieves the statutory purpose of recognising and striking a balance between the interests of the importer and of the revenue (see **Section E** below). The importer has the ability to pay under protest and have the goods released from Customs so as not to have them held up while the correct amount of duty is finally determined, whereas Customs knows that, where the duty demanded has been paid, the revenue is secure from claims for repayment except where protest has been attached to the payment and the claim is made within 6 months (or, in cases of mistake, where the limited circumstances of s 163 and the Customs Regulations are triggered: see **Section F**, to be discussed next).

14.5. The only true exception to the preclusionary effect of s 167(4) is that recognised by s 167(5); namely, the preservation of the ability of the importer to pursue a refund under s 163 and the Customs Regulations (relevantly, where there is a manifest error of fact or patent misconception of law and the refund is sought within the specified time period) (see **Section F** below).

14.6. There are other situations – not true exceptions – where the correct amount of duty payable may be permitted to be reopened outside the avenues of ss 167 and 163. Specifically, s 167 operates as a bar on an action by the importer for recovery. Thus it has no application where the

importer raises defences to actions by the Collector to recover unpaid duty. Secondly, if facts or circumstances arise after the date of importation which alter the duty payable as at the date of importation – for example the passing of a new Tariff Concession Order – such facts or circumstances were incapable of being made the subject of a protest at the date of the payment and so the bar in s 167(4) is incapable of operation (see **Section G** below).

14.7. Separately to the above, and irrespective of the outcome of the above dispute, ss 36 and 39 of the TAA render the GST irrecoverable as notice was not given within 4 years of payment (see **Section H** below).

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Section B: Customs made a relevant 'demand'

15. Section 167 of the Customs Act, and its concept of a 'demand', must be understood against the background of the powers that Customs could exercise over imported goods.

16. Under the Customs Act, goods[11] were subject to the 'control of customs'[12] from the time of their importation until they were delivered into home consumption or exported.[13] If the goods were not entered, the Collector could move them and sell them.[14]

17. Under s 71A, the import entry was a statutory document 'concerning goods ... that [were] intended to be entered for home consumption'[15] transmitted to Customs using the COMPILE system. It was required to 'communicate such information as was set out in an approved statement'.[16]

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18. At the relevant time, the COMPILE system operated to assess automatically the amounts of Customs duty and GST payable and to populate the import entry with these amounts.

19. Under s 71B, when the import entry was given to the Collector, the Collector was required to give to the importer an 'import entry advice' relating to the goods in the import entry'.[17] It was only when the import entry advice was given by the Collector that the import entry was 'taken to have been communicated to Customs'.[18]

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11 Customs Act, s 4, meaning 'movable personal property of any kind and, without limiting the generality of the expression, includes documents, vessels and aircraft'.

12 In *Wing-On v Collector of Customs* (1938) 60 CLR 97 at 109, Dixon J described this concept as 'liable in law to the exercise of physical control by the officers of the revenue and to be dealt with so as to insure payment of the duty'.

13 Customs Act, s 30.

14 Customs Act, s 72.

15 Customs Act, s 71A.

16 Customs Act, s 71L; see also CEO Instrument of Approval No 24 of 2000, *Commonwealth of Australia Gazette No GN 23*, 14 June 2000.

17 Customs Act, s 71B(3).

18 Customs Act, s 71L.

20. The Collector could verify the particulars of the 'goods shown in the [import] entry'[19] and where the person changed the details of the entry, it was deemed to be withdrawn.[20]

21. The import entry advice would include a statement that the goods were cleared for home consumption or warehousing or directed for further examination.[21]

22. Only when the duty (and GST) assessed by the COMPILE system on the import entry – being duty (and GST) 'payable at the time of entry'[22] – was paid would Customs issue the authority to deal (that is, the authority to take the goods into home consumption or to warehouse them).[23]

10 23. The duties constituted Crown debts charged upon the goods in respect of which the same were payable and were payable by the owner of the goods and recoverable 'at any time in any court of competent jurisdiction by proceedings in the name of the Collector'.[24]

24. Given these provisions, a sum shown on the COMPILE system as customs duty payable for importation of goods was clearly a 'demand' within s 167(1). If it was not paid, the goods could be retained or moved and sold; and, in any event, the Collector could institute proceedings to recover the amount of duty payable. Accordingly, on the facts set out in Part IV above, the Collector made a 'demand' that enlivened s 167(1). The Court of Appeal's findings on this point
20 were correct.[25]

Section C: s 167 of the Customs Act creates a statutory cause of action

25. Subsection 167(1) of the Customs Act relevantly enables the owner of goods, if any dispute arises as to the amount or rate of duty payable in respect of any goods, or the liability of any good to duty under any Customs Tariff, to pay the sum demanded by the Collector under protest. The sum so paid is then deemed, or adjudged,[26] to be the proper duty payable in respect of the goods unless the contrary is determined in an action brought in pursuance of s 167.

26. Subsection 167(1) is facultative. In terms, it confers an option on the importer and specifies legal consequences if the option is taken.

30 27. A 'dispute' within the meaning of s 167(1) involves the notion that there is some element of the Collector's 'demand' with which the importer wishes, or might wish, to take issue. No narrow view should be taken of the ambit of a 'dispute'.

28. Subsection 167(2) provides that the owner may, within the times limited in the section, bring an action against the Collector in any court of competent jurisdiction for the recovery of the whole or any part of the sum so paid. That is,

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19 Customs Act, s 71D.

20 Customs Act, s 71F.

21 Customs Act, s 71B(3)(c).

22 Customs Act, ss 71B(4)(b) and 132AA.

23 Customs Act, s 71B(4).

24 Customs Act, s 153.

25 [2013] QCA 54 at [28].

26 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 (***Malika Holdings***) at 320 [96] (Gummow and Callinan JJ).

s 167(2) affirmatively creates the statutory cause of action foreshadowed in s 167(1). To find the time limits to which the action is subject, one turns to s 167(4) (addressed below).

29. Subsection 167(3A) provides that an importer is taken to make a payment under protest if, and only if, it transmits a message with the words 'paid under protest' using the COMPILE system at the time of making payment in respect of the goods. It thus fleshes out how payment is made 'under protest'. Paragraph 167(3A)(c), in requiring the protest to include a statement of the grounds on which the protest is made, casts further light on the concept of a 'dispute' in s 167(1). The importer, if it wishes to trigger the capacity to pursue the statutory cause of action, cannot simply 'wave around' a 'protest'. The importer must protest on articulated grounds. The protest will reflect the crystallisation of the dispute referred to in s 167(1).

30. Subsection 167(4) then provides:[27]

> 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.

31. Subsection 167(4) completes the specification of the statutory cause of action to which ss 167(1) and (2) refer. It at least goes as far as providing the time limit foreshadowed in s 167(2) for the bringing of the statutory action. In so doing, it reaffirms, although probably redundantly, the condition that the payment must have been made under protest, a protest which, by reason of s 167(3A), needed to articulate grounds of protest.

32. The critical questions concern the additional effect, if any, of s 167(4). When it says 'no action shall lie for the recovery of any sum paid to Customs as the duty payable in respect of any goods' unless two conditions are met – one as to protest and the other as to time – is the 'bar' doing no more than identifying elements which go the constitution of the statutory cause of action or identifying procedural requirements for it,[28] or does the 'bar' negative the bringing of common law actions which might otherwise be available? If the latter, how broad is the preclusionary effect?

33. We turn now to those questions.

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[27] The whole of s 167 was repealed and substituted in 1910. Subsection 167(4) has no equivalent in the original version of 167.

[28] See the alternatives identified in *Malika Holdings Pty* (2001) 204 CLR 290 at 320 [95] (Gummow and Callinan JJ).

Section D: the double operation of s 167(4)

34. The narrowest view of s 167(4) – that it speaks only to the statutory cause of action created under ss 167(1) and (2) and says nothing about the continued availability of common law actions – should be rejected.

35. The common law would ordinarily recognise a range of situations in which a person who pays money to a government authority under demand may later be able to recover of it. This was originally a species of quasi-contract, and now is categorised by some under the law of restitution or unjust enrichment. Cases were sometimes framed as claims for repayment of monies demanded under colour of office or other relevant compulsion,[29] or mistake of fact. Later, as the divide between mistakes of law and fact was dissolved, the claims could be framed as one in mistake simpliciter.[30] Yet again, depending on the facts, the claimant might be able to assert a claim based on a failure of consideration.[31] Attaching a protest to a payment might provide some evidence that the payment was not voluntary.[32] In all cases, an underlying element was that the duty paid exceeded that which was strictly due.

36. The common law would also recognise a range of defences to a prima facie claim for recovery, such as change of position.[33]

37. In the United Kingdom and European contexts, there has been discussion about whether, in claims for recovery involving the Revenue, the juridical nature of the recovery claim is that of a public law claim, or a hybrid claim governed by rules deriving both from constitutional/administrative law and the common law of unjust enrichment,[34] or indeed whether there are separate, overlapping public and common law claims.[35] These debates need not be resolved here. In what follows, for convenience, there will simply be references to 'common law' actions.

38. The common law actions would have time limits attached to them – usually the general time limit attaching to common law actions, almost invariably 6 years.[36]

39. In using the language 'no action shall lie...', s 167(4) conveys that a double operation is intended. This is not just the specification of the time limit for the

[29] *Mason v State of New South Wales* (1959) 102 CLR 108 (***Mason***), especially at 140-142 (Windeyer J).

[30] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (***David Securities***).

[31] *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

[32] *Mason* (1959) 102 CLR 108 at 143 (Windeyer J); *Woolwich Equitable Building Society v Commissioners of Inland Revenue* [1993] AC 70, especially at 172-177 (Lord Goff), 198 (Lord Browne-Wilkinson) and 203 (Lord Sylnn); *Atchinson, Topeka & Santa Fe Railway Company v O'Connor* 223 US 280 at 285-286 (Holmes J) (1912).

[33] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

[34] See C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (8th ed, 2011) at 614-617.

[35] See *Deutsche Morgan Grenfell* [2007] 1 AC 558.

[36] See, eg, *Limitation of Actions Act 1974* (Qld).

bringing of the statutory cause of action created in ss 167(1) and (2). If that was all that was intended, s 167(4) would have said 'the times limited for the bringing of the action under this section shall be …' or 'an action under s 167(2) must be brought within the following times …'.[37]

40. And if that was all that was intended, it is difficult to see what sensible statutory purpose was being achieved by s 167 at all. Why specially create a statutory cause of action for the importer, with strict conditions as to the nature of the protest and the time within which an action must be commenced, if the intention was to allow the importer to retain the option to pursue what was in substance
10 the same cause of action, but at common law freed from those constraints?

41. The dicta of this Court in *Malika Holdings* correctly recognise that s 167(4) has a form of double operation by precluding common law actions and replacing them with a statutory action if certain conditions are satisfied. In that case, Gummow and Callinan JJ said:[38]

> Section 167(4) excludes 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.

42. Their Honours then explained that s 167 would give rise to a statutory cause of action in defined circumstances:[39]

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> What 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 <u>if the conditions spelled out in the section are satisfied</u>. The conditions for the statutory action require (i) there be a dispute which has arisen as to the amount or rate of duty payable in respect of any goods or as to the liability of any goods to duty (the opening words of s 167(1)); (ii) payment of the sum demanded by the Collector be made 'under protest' in accordance with the requirements of s 167(3); and (iii) the action be commenced within the times specified in s 167(4). <u>Section 167(4) states that '[n]o action shall lie for the recovery of any sum paid to the Customs as the duty payable in respect of any goods' unless conditions (ii) and (iii) be satisfied.</u>

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43. In the same case, McHugh J said:[40]

> Plainly, the enactment of s 167 means – by necessary implication – that it <u>provides the only means</u> by which the owner of goods can recover overpaid customs duty in a court of law.

44. Section 167(4) is thus a provision which, in its second layer of operation, works like s 44 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth).[41] The language in s 44 is '<u>an action</u> or other proceeding for damages <u>does not lie</u>' in the circumstances prescribed in the section. In s 167(4), the language is '<u>[n]o action shall lie</u> for the recovery of any sum paid to the Customs as the duty

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37 See, eg, [2013] QCA 54 at [25].

38 *Malika Holdings* (2001) 204 CLR 290 at 319 [92].

39 *Malika Holdings* (2001) 204 CLR 290 at 319-320 [95] (emphasis added).

40 *Malika Holdings* (2001) 204 CLR 290 at 306 [53] (emphasis added).

41 This provision was considered by the Court in *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

payable' unless the circumstances prescribed in the section are satisfied. In each case, the right to pursue certain common law actions is removed.

45. The real area for debate then is this: is the preclusionary effect of s 167(4) on the maintenance of common law actions limited to the case where a dispute has in fact crystallised between the importer and the Collector? Or is the preclusionary effect a larger one; namely, that s 167(4) operates to preclude the bringing of any common law actions for recovery of duty which might otherwise be available on the facts and circumstances governing liability as exist at the time of payment, with that bar lifted where (and only where) two specified conditions are met? On the larger view, anything which is capable of being made the subject of a dispute as at the date of payment must be so made, if the importer is to have the ability to pursue later an action for recovery.

46. The larger view is correct, for the following reasons.

47. First, one has the generality and exhaustiveness of the language used to erect the statutory bar. Use of the language 'no action shall lie for the recovery of any sum paid to the Customs as the duty payable in respect of any goods unless [two specified conditions are met]' naturally invites the conclusion that the bar speaks to any form of action which the law might otherwise recognise in the circumstances. The circumstances are defined by the context – the importer has paid an amount as duty in respect of particular goods, and seeks its recovery on the ground that the true liability under the Customs Act was to duty of a lesser amount.

48. As seen above, at common law, the action for recovery might have been framed in various ways, and often in overlapping ways. But what those actions had at their heart as a necessary element was that the amount in fact paid was greater than the true liability. Subsection 167(4) erects a bar that naturally invites the interpretation that it speaks to the preclusion of the common law action, however the ground for recovery might have been framed.

49. Secondly, this explains the true role of the two conditions specified within s 167(4). Those conditions form the essential elements of the statutory action (or, viewed otherwise, the procedural requirements for it[42]). The condition of protest has already been stated in ss 167(1) and (3A). The time limitation was foreshadowed in s 167(2). Those two conditions together specify when it is that the bar which has already been imposed on action will be lifted, and in so doing, define the statutory action that may then proceed. What the two conditions do not do is define the scope of the bar on common law actions.

50. Thirdly, insofar as lower court authorities have touched on the point, they have correctly preferred the view that s 167(4) precludes all common law actions in the area identified above; that is, where the action seeks recovery based on facts and circumstances governing liability as existed at the date of payment.

[42] See para 32 above.

Whether one views this as the effect of the express words of s 167(4), or of the necessary implication of the provision, the result is the same.

51. In *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 2)* (***Kawasaki***), for example, the Full Federal Court considered whether s 167 prevented the respondent from claiming interest on overpaid customs duty that had been refunded. It was common ground that there had been no written protest by the respondent.[43] Despite this, Hill and Heerey JJ rejected the submission that s 167 did not apply. Their Honours said:[44]

> It may be conceded that s.167 confers upon an importer, who is in a relevant dispute with the Collector, a choice whether or not to pay under protest, but it does not follow from that, that it also confers upon the importer a choice not to comply with the terms of the section but rather to take action freed from its limitations. Equally, of course, the owner of the goods is not required to bring an action against the Collector under sub-sec.(2). He may elect, for whatever reason, to bring no action at all. But if he does bring an action, that action will be governed by sub-sec.(4). The wording of sub-sec.(4) is in the widest form. It precludes any action for the recovery of any sum paid as customs duty unless the requisite protest has been made under sub-sec.(1) and further, unless the action is taken within the time limited by sub-sec.(4)(a).

52. Their Honours added:[45]

> If s.167 were but an alternative procedure, it is hard to see, assuming that an action for money had and received could be brought against the Comptroller, why any person would adopt the procedure in s.167, which would seem to be greatly more restrictive than that applicable at common law.

53. In *A&G International*, Ormiston J said:[46]

> 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.

54. His Honour specifically rejected the submission that it would only apply if there was a dispute:[47]

> Nor do I accept that subs (4) [of s 167] only applies, as was contended, where a protest had been made. Indeed, the submission was qualified so that it was contended that the exclusive code related only to 'proceedings of this kind where protest had been possible'. I would not accept this qualification, but in any event the factual basis for it in this case was absent. It was asserted that no protest had been possible because the plaintiff, and its customs agent, had not been aware of the alternative classification and were thus...under a mistake of law. However, being under a mistake of law does not lead to a conclusion 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. The absence of protest has no effect upon the exclusionary provisions of subs (4) of s 167.

[43] *Kawasaki* (1991) 32 FCR 243 at 257 (Hill and Heerey JJ).

[44] *Kawasaki* (1991) 32 FCR 243 at 263 (emphasis added).

[45] *Kawasaki* (1991) 323 FCR 243 at 263.

[46] (1995) 129 FLR 23 at 34.

[47] (1995) 129 FLR 23 at 37 (emphasis added).

55. Similarly, in *Matchbox Toys Pty Ltd v Chief Executive of Customs* (***Matchbox Toys***), Rolfe J said:[48]

> 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 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.

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56. His Honour summarised his views in this way:[49]

> The true question is whether, on a proper consideration of all the relevant facts and circumstances, the owner should have disputed the obligation to pay and thereby raised a dispute, which was supported by a protest.

57. As these authorities demonstrate, when s 167(4) is read in context with s 167(1) and (2), then an importer will be precluded from pursuing any common law remedy for duty paid if, in the circumstances, the importer could have disputed the amount payable as customs duty. That was plainly the case here.[50]

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58. Finally, none of the authorities on which the Appellant relies supports his construction.

59. *Kawasaki* and *Matchbox Toys* do not, for the reasons indicated earlier.[51]

60. *SCI Operations Pty Ltd v Commonwealth* (***SCI Operations***)[52] does not, for reasons explained in **Section G** below.

61. The Victorian Court of Appeal's judgment in *Stretton v Malika Holdings Pty Ltd*,[53] from which the Appellant quotes, was overturned by this Court on appeal.[54] No reliance can be placed upon it.

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62. Furthermore, as the Court of Appeal observed,[55] the decision of the Full Federal Court in *Park Holdings Pty Ltd v Chief Executive Officer of Customs* (***Park Holdings***) was not directed to the scope of s 167(4). The issue that the Full Court had to consider was whether a 'demand' in s 167(1) could only be made pursuant to an express power under the Customs Act.[56] The Full Court held that this was unnecessary. So understood, *Park Holdings* has nothing to say about the proper construction of s 167(4).

48 Supreme Court of New South Wales, unreported judgment, BC9708145 at p 10

49 Supreme Court of New South Wales, unreported judgment, BC9708145 at p 11 (emphasis added).

50 See [2013] QCA 54 at [31].

51 Paras 51-55 and 55-56 above.

52 (1996) 69 FCR 346.

53 [1998] VSCA 127 at [27]-[28].

54 *Malika Holdings* (2001) 204 CLR 290.

55 [2013] QCA 54 at [38].

56 (2004) 141 FCR 165 at 178-179 [50].

Section E: statutory purpose

63. The above construction achieves the statutory purpose of recognising, and striking a balance between, the interests of the importer and of the revenue.

64. As with analogous provisions in British and colonial statutes,[57] s 167 ensures that an importer who pays under protest can have the goods entered for home consumption, and taken out of the control of Customs,[58] without the need to take action against Customs in order to establish the amount of duty payable.[59] In other words, an importer will have prompt access to the goods and will not suffer consequential losses from having those goods remain in Customs' control while the dispute as to liability is determined. No less importantly, however, s 167 gives certainty to the revenue authorities. It ensures that Customs and the Commonwealth have immediate access to the sum paid and that they know, by the formal procedure of protest and the bringing of an action within six months, what duty may be recoverable by an importer.[60]

65. To construe s 167 so as to permit a plaintiff to bring common law actions to recover customs duty years after the payments were made, and to bring such actions without any formal protest having been made at the time of payment, would totally undermine certainty for the Revenue. To put it another way, it would be incongruous for the legislature to impose strict requirements as to the content of the necessary protest and as to the time for bringing action in s 167, but to have no restriction on the right to recovery for payments made without protest or without follow-up action within the specified time limit.

66. To summarise the First and Second Respondents' argument to this point (and subject to the point dealt with in **Section F** below), it does no violence to the text, context or statutory purpose of s 167 to construe it as having the effect that, if the importer seeks to have the benefit of immediate release of its goods from Customs' control, but also to preserve the ability later to have a dispute about the correct liability to duty, it is incumbent on the importer to identify, upfront, by reference to all matters then ascertainable, what may be the ambit of any such dispute, and then to make the payment attaching the appropriately articulated protest. If the importer chooses, whether through carelessness, oversight, mistake, indifference or otherwise to make the payment without identifying that there is an area of possible dispute, and thus without attaching an articulated protest to the payment, Customs is entitled by s 167(4) to treat the payment as final and irrevocable. It can then deal with the payment as such. It need not wait six years for certainty. It need not reserve for

57 *Customs Act 1853* (UK), ss 29 and 30. Colonial legislatures adapted the *Customs Act 1853* (UK) almost in its entirety: see Cooper, *Customs and Excise Law* (1984) at para 105.

58 Customs would otherwise retain control of the goods pursuant to s 30 of the Customs Act.

59 *Sargood v The Queen* (1878) 4 VLR 389 at 393-395 (Stawell CJ), 397 (Barry J); *Sargood Brothers v Commonwealth* (1910) 11 CLR 258 at 300-301 (Isaacs J); *Malika Holdings* (2001) 204 CLR 290 at 302 [42] (McHugh J). See also *Park Holdings* (2004) 141 FCR 165 at 177-178 [49.5].

60 *Kawasaki* (1991) 32 FCR 243 at 263 (Hill and Heerey JJ). In its current form, s 167(4) differs from the original version of s 167. It is not simply that money paid is on deposit but rather it is paid outright subject to Customs knowing through the protest mechanism that the money may have a contingency attached to it.

contingencies, save in those cases where a protest has in fact been attached and the follow-up action is brought within time.

67. Nothing in the Appellant's reference to this being a 'self-assessment' scheme alters this outcome. Section 167 is structured on the assumption that the COMPILE system may be utilised. That system accommodates a 'demand' as seen in **Section B** above. Part of the self-assessment function lies in the importer having to take the steps outlined in the previous paragraph if it wants its payment to be potentially recoverable.

Section F: the exception to s 167(4) – s 163

10 68. The only true exception to the preclusionary effect of s 167(4) is that recognised by s 167(5); namely, the preservation of the ability of the importer to pursue a refund under s 163 and the Customs Regulations (relevantly where there is a manifest error of fact or patent misconception of law and the refund is sought within the specified time period).

69. As the First and Second Respondents contend in their Notice of Contention, when ss 163 and 167 are considered together with s 273GA, the conclusion is confirmed that the Customs Act exhaustively identifies the means by which payments of duties can be recovered. The Customs Act thereby leaves no room for common law recovery actions freed of the conditions of the statutory
20 actions.

70. The elements of the larger scheme are as follows.

71. First, as already discussed, s 167 relevantly provides that no action will lie for the recovery of a sum paid to the Customs as duty payable to be made under protest in accordance with that section and brought within the periods specified in s 167(4).

72. Then, s 273GA(2) provides for an alternative administrative review remedy to the court action permitted by s 167(4).[61] It allows the owner of the goods who paid <u>under protest</u> the sum demanded by the Collector to apply to the Administrative Appeals Tribunal (**the AAT**) for review of the decision to make
30 the demand and other decision-forming part of the process of making the decision.[62] However, by virtue of s 273GA(2) and (5), the right is only available if duty has been paid under protest under s 167(2) and the period for applying for review is the same as in s 167(4). If an owner has made an application for review under s 273GA(2), then the owner is not entitled to bring an action under s 167(4).[63]

73. As is apparent, the restrictions on bringing an action in a court under s 167 and on bringing an application for merits review under s 273GA are the same. The

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[61] *Park Holdings* (2004) 141 FCR 165 at 178 [49.7].

[62] Subsection 273GA(7) also provides that the proper duty payable in respect of the goods concerned is deemed to be the sum determined to be the proper duty in accordance with the decision of the AAT or a court on appeal from that decision or the sum paid (whichever is the less).

[63] Customs Act, s 167(6).

right to bring an action in a court and the alternative right to merits review in the AAT do not exist unless a payment is first made under protest.

74. In addition, s 163, which is not limited by s 167,[64] provides for refunds of duty in respect of goods generally or in respect of goods included in a class of goods, subject to such conditions and restrictions as are prescribed.

75. The relevant regulations at the time of the entry were regs 126(1)(e), 127(1), 128 and 128A of the Customs Regulations. An application for refund for duty paid through 'manifest error of fact or patent misconception of law'[65] could be made by the procedure set out in reg 128, within 12 months after the date on which duty was paid.[66] Satisfaction of those conditions would create an enforceable statutory right to payment or a statutory debt.[67] But no refund could be made unless the application was made within the 12 month period.[68]

76. Given the detailed provisions of s 167, s 273GA and s 163, Parliament could hardly have intended to allow for the continuation of common law causes of action for the recovery of sums paid as duty, particularly without identifying anywhere that such rights at common law existed or continued to exist. Such causes of action would not be subject to any of the temporal or other limitations imposed under the Customs Act under those provisions.[69]

77. To further summarise the First and Second Respondents' argument to this point, the importer who wishes to pay to obtain release of the goods knows that there are two (and only two) possible circumstances in which customs duty might be refunded or recovered:

77.1. by attaching a protest under s 167, which generates a statutory right which, if pursued within the time limited, may be determined either by a court or the AAT; and

77.2. whether or not a protest has been attached, by claim brought within the time limited which satisfies the hurdle of 'manifest error of fact or patent misconception of law' (or another relevant hurdle) under the regulations made under s 163.

78. It would be inconsistent with this scheme to allow for the continuation of common law actions for recovery, particularly on the ground of mistake. Why

[64] Customs Act, s 167(5).

[65] Customs Regulations, reg 126(1)(e).

[66] Customs Regulations, reg 128A(5).

[67] *Commonwealth v SCI Operations Pty Limited* (1998) 192 CLR 285 at 305 [40] (Gaudron J), 312-313 [63]-[65] (McHugh and Gummow JJ).

[68] Customs Regulations, reg 127(1): 'A refund of duty shall not be made unless an application for the refund in accordance with reg 128 is delivered in accordance with that regulation within the period within which that application may, by virtue of reg 128A, be made.'

[69] Compare *Chippendale Printing Co Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 347 (***Chippendale Printing***) at 348-349 (Sheppard J): 'It would seem to me to be an odd state of affairs if the legislature...intended to restrict the right to recover under the statute as it has and yet to allow an unrestricted right deriving from the common law to remain available at the same time. I think that the legislation reflects a sufficiently clear intention to warrant the conclusion that it did not intend there to be available for an overpayment such as was made in this case any remedy other than the statutory one for which the legislation provides'; see also at 367 (Lehane J).

require the heightened standard of s 163 and the Customs Regulations ('manifest', 'patent'), the strict time limit (12 months) and the creation of a statutory debt without common law defences if the intent were to allow the importer the option to continue to pursue the common law action free of these limitations?

79. It follows that the scheme of the Customs Act precludes any common law cause of action by the Appellant for recovery of the sum mistakenly paid to Customs. For that reason also, the appeal should be dismissed.

Section G: other situations to which s 167 does not speak

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80. There are other situations – not true exceptions – where the correct amount of duty payable may be permitted to be reopened outside the avenues of ss 167 and 163. First, in terms, s 167 operates only as a bar on an action by the importer for recovery. Accordingly, it has no application where the importer raises defences to actions by the Collector to recover unpaid duty.[70]

81. Secondly, if facts or circumstances arise <u>after</u> the date of payment, which alter the duty payable as at the date of payment, such facts or circumstances necessarily would be incapable of being made the subject of a protest as at the date of the payment, and so the bar in ss 167(4) would be incapable of operation. The key authority relied on by the Appellant – *SCI Operations* – is in this category, quite distinguishable from the present case.

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82. In *SCI Operations*, Sackville J suggested – albeit only in *obiter dicta* observations – that s 167(4) might not apply to a case where a person had applied for a Commercial Tariff Concession Order. That was because the importer's entitlement to a refund depended solely on events subsequent to payment, which might not occur until well outside the six month period for bringing an action under s 167(4). The situation which his Honour had in mind is completely inapposite in the circumstances of this case. Here, the Appellant could have ascertained, without difficulty, the facts on which his liability to customs duty depended at the time of payment. The Court of Appeal was therefore correct in finding that the observations of Sackville J about s 167 were not applicable.[71]

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Section H: s 36 of the TAA would preclude recovery of the GST paid on the importation

83. Section 36 of the TAA prescribes when a person is entitled to a refund. It relevantly provides that a person is not entitled to a refund under s 39(1) of an amount of indirect taxation relating to an importation unless he or she notifies the Commissioner within 4 years of the entitlement to the refund.

84. Subsection 39(1) applies to so much of any amount of net amount or amount of indirect tax as the person overpaid.

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70 See *Malika Holdings* (2001) 204 CLR 290.

71 See [2013] QCA 54 at [29]-[31].

85. Sections 36 and 39[72] create an entitlement to a refund of the amount of indirect tax that was overpaid. The reason for the overpayment is irrelevant: there is, for example, no need to establish any mistake on the part of the taxpayer. As a result, the statutory entitlement overlaps with any remedy that would be available at common law but is subject to a restriction that does not apply to actions at common law.

86. The situation is like that considered by the Full Federal Court in *Chippendale Printing*. The Full Court held that Commonwealth sales tax legislation precluded any common law action to recover the overpayment. All members of the Court found that the Commonwealth legislation had replaced the common law with an exhaustive statement of statutory rights. Their Honours said that the contrary view could not be reconciled with the detailed provisions restricting the circumstances in which the statutory right to a refund was available. As Tamberlin J pointed out:[73]

> The detailed express and specific provisions would be unnecessary if a claimant was entitled to claim a refund of overpaid sales tax under the general law right, freed of the specific constraints referred to...

87. This reasoning, approved by this Court in *Avon Products v Commissioner of Taxation*,[74] applies equally to ss 36 and 39 of the TAA. It indicates that those sections should be read as an exhaustive statement of statutory rights to recover GST overpaid.

88. The Appellant did not notify the Commissioner within 4 years as required by s 36 of the TAA. It follows that the TAA would not permit him to recover the overpayment of GST under s 36 or otherwise.

89. It is noteworthy that the Appellant has offered no express argument as to why he should be entitled to pursue a common law action in the face of ss 36 and 39 of the TAA and his failure to notify the Commissioner within 4 years.

90. The appeal in relation to the overpayment of GST should therefore be dismissed. This conclusion should be reached irrespective of the conclusion reached on the recovery of the amount paid as customs duty.

PART VII ESTIMATED HOURS

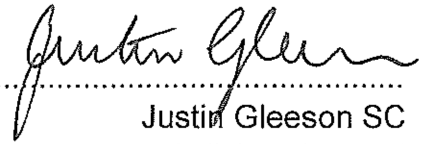
91. It is estimated that 2 hours will be required for the presentation of the oral argument of the First and Second Respondents.

Dated: 10 December 2013

[72] Sections 36 and 39 of the TAA, and other provisions of Pt VI of the TAA, were repealed by the *Fuel Tax (Consequential and Transitional Provisions) Act 2006* (Cth) with effect from 1 July 2006. They were replaced by similar provisions with the same four year time limit in s 105-55 of Sch 1 to the TAA. Any notification under the former provisions was continued as if under s 105-55.

[73] *Chippendale Printing* (1996) 62 FCR 347 at 358; see also at 348 (Sheppard J) and 367 (Lehane J).

[74] (2006) 230 CLR 356.



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APPENDIX
APPLICABLE LEGISLATION (PARAGRAPH 13)

LEGISLATION			
No.	**Citation**	**Relevant sections, regulations or rules & page numbers**	**Available Medium**
1.	*Customs Act 1857* (Vic) Note: The document provided is *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No. 2)* (1991) 32 FCR 243 at 259 which sets out the relevant sections.	ss 21 and 22	
2.	*Customs Act 1901* (Cth)	ss 4 (definition of "goods"), 68, 71A, 71B, 71D, 71F, 71L, 72, 132AA, 153, 163, 167, 183A and 273GA	Official hard copy reprint as at 13 December 2004
3.	*Customs Regulations 1926* (Cth)	Regs 126, 127, 128 and 128A	Official hard copy reprint as at 6 October 2004
4.	*Customs Tariff Act 1995* (Cth)	ss 6, 9, 10, 15, 16 and schedule 2, and chapter 89 of section XVII of schedule 3	Official hard copy reprint as at 2 December 2004
5.	*A New Tax System (Goods and Services Tax) Act 1999* (Cth)	ss 13-5, 13-20 and 33-15	Official hard copy reprint as at 15 December 2004
6.	*Taxation Administration Act 1953* (Cth)	ss 36, 39 s 105-55 schedule 1 (After 1 July 2006)	Official hard copy reprint as at 15 December 2004