HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

MALIKA HOLDINGS PTY LTD APPELLANT

AND

VIRGINIA STRETTON RESPONDENT

Malika Holdings Pty Ltd v Stretton [2001] HCA 14
15 March 2001
M14/2000

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders made by the Court of Appeal of the Supreme Court of Victoria on 4 December 1998 and in place thereof, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of Victoria

Representation:

B J Shaw QC with M A Dreyfus QC for the appellant (instructed by Vann Fisher & Associates)

G T Pagone QC with M M Gordon for the respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Malika Holdings Pty Ltd v Stretton

Customs and excise – Duty – Proceeding by Collector of Customs for recovery of unpaid duty after goods released to owner – Dispute as to whether duty owed – Whether s 167 *Customs Act* 1901 (Cth) prevents owner of goods from disputing indebtedness other than by paying duty "under protest" and then commencing action against Collector of Customs for recovery of duty.

Statutes – Construction – Presumption that legislation does not erode fundamental rights – Relevance and contents of presumption.

Customs Act 1901 (Cth), ss 153, 165, 167, 273GA(2).

1 GLEESON CJ. I agree that the appeal should be allowed, and with the reasons given by Gummow and Callinan JJ.

2 To ask whether s 167 of the *Customs Act* 1901 (Cth) ("the Act") constitutes the only means by which a person may challenge the amount and rate of, and the liability of goods to, customs duty invites consideration of the circumstances in which a person might need or wish to make such a challenge.

3 The manner in which the system of imposition of duties of customs operates, and the requirements affecting an entry of goods for home consumption, may well mean that, in most circumstances, a challenge of the kind mentioned will be made by a person who is compelled, in order to have the goods released, either to pay duty under protest pursuant to s 167, or to enter into an agreement upon terms and conditions satisfactory to the Customs authorities. Such an agreement might have the same practical effect as s 167.

4 However, as the facts of the present case illustrate, circumstances could arise in which the authorities are not in such a position of advantage. Because of the chain of events leading up to the dispute, the Collector of Customs found it necessary to commence an action to recover a debt. In part, the action was based upon an agreement made by the appellant. There is a dispute as to the meaning and effect of that agreement. It does not arise in the present appeal. There was also a claim based upon a demand made under s 165 of the Act; but there is a dispute as to whether a valid demand was made. Again, that issue does not presently arise. The statement of claim alleges that the amount of duty payable in respect of the subject goods was $44,540.77 which constitutes a debt due and payable to the Crown. That allegation is to be read in the light of s 153 of the Act.

5 The general rule in adversarial litigation is that it is for the party alleging a material fact, when that fact is put in issue, to prove the fact. In the case of an alleged debt, there may be a statutory provision which facilitates such proof. A familiar example in the area of revenue law is s 177 of the *Income Tax Assessment Act* 1936 (Cth), which provided that the production of a notice of assessment is conclusive evidence of the due making of the assessment and (except in proceedings on appeal against the assessment) that the amount and all the particulars of the assessment are correct[1]. Or there may be a contractual provision in aid of proof, such as one which makes a certificate conclusive evidence of indebtedness, as in *Dobbs v National Bank of Australasia Ltd*[2].

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1 *McAndrew v Federal Commissioner of Taxation* (1956) 98 CLR 263 at 279 per Taylor J. See also *F J Bloemen Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 360.

2 (1935) 53 CLR 643.

Here, the respondent has alleged the debt, but (subject to whatever might be found to be the effect of the agreement earlier mentioned) cannot point to any provision which expressly relieves her of the necessity of proving the allegation, or which facilitates such proof. The argument must be that, by implication, s 167 produces such a result.

6 The argument was not put in those terms. It was submitted that s 167 constitutes a code concerning the manner of disputing liability to duty. It was said that there was no right given by any other provision of the Act to put in issue an allegation that duty was owing to the Collector. Yet, if the Act, in certain circumstances, puts the Collector in a position of having to allege that an amount is due, what need is there of a statutory "right" to dispute such an allegation? Litigants who are met with allegations in civil actions do not need to point to any statutory right to dispute such allegations. The capacity to make and dispute allegations is an ordinary incident of the adversarial process. To say that s 167 is a code concerning disputing liability to duty must, upon analysis, mean that, by implication, s 167 not only provides (as in terms it does) that a taxpayer may take a certain course but, also, that, unless the taxpayer takes that course, an allegation by the Collector that a certain amount of duty is owing must be taken to be proved.

7 That seems to me to throw upon s 167 more weight than it will bear.

8 The provisions of s 273GA of the Act cannot be called in aid in support of the construction of s 167 for which the respondent contends. Those provisions were included in the Act many years after ss 153, 165 and 167. It was not suggested that ss 153, 165 and 167 changed their meaning when s 273GA was included. It follows that, whatever their meaning, it existed before s 273GA was enacted, and s 273GA cannot be used in an attempt to discover that meaning.

9 McHUGH J. Where a dispute arises as to the amount or rate of customs duty payable in respect of goods or the liability of goods to duty, s 167 of the *Customs Act* 1901 (Cth) ("the Act") permits the owner of the goods (1) to take possession of them after paying under protest the sum demanded and (2) within six months, to bring an action for the recovery of that sum. But what if the owner takes possession of the goods without paying duty and is later sued for the duty allegedly payable? Can the owner challenge the validity of the rate or the accuracy of the amount demanded? That is the issue in this appeal which is brought by the owner of goods against an order of the Court of Appeal of Victoria holding that the owner could not challenge the rate without first paying the sum demanded under protest.

10 In my opinion, in an action by the Collector of Customs to recover the amount of duty allegedly payable in respect of goods, the owner is permitted to challenge the rate or amount of duty or the liability of goods to duty. Moreover, the owner may do so, irrespective of whether or not it has paid the duty under protest under s 167. Because that is so, the appeal must be allowed.

The material facts

11 On or about 23 September 1986, the owner imported cotton garments[3]. It lodged an entry for home consumption with accompanying invoices which described the goods as "handcrafted cotton garments". No duty was payable on handcrafted cotton garments. Consequently, the goods imported were entered as having "Nil" duty payable on them.

12 Seven days later, the goods were released to the owner after it gave a written "guarantee" or undertaking to pay "any additional duty charges applicable"[4]. During October and November 1986, Customs officials, who had earlier taken samples of the goods for testing, obtained advice that the garments were machine-made. If that was so, the goods attracted duty.

13 With the possible exception of a demand for additional duty in December 1986 – which is in dispute – the respondent ("the Collector") took no steps to recover the duty until late in 1988. In April 1989, Customs officials made a formal demand for payment of the amount now claimed, stating that the sum claimed could be paid under protest pursuant to s 167 of the Act. The owner failed to pay the sum claimed under protest or otherwise.

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3 *Stretton v Malika Holdings Pty Ltd* [1999] 2 VR 38 at 40 [8].

4 [1999] 2 VR 38 at 40 [9].

Section 167

14 At the relevant time[5], s 167 of the 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, 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) A protest in pursuance of this section shall be made by writing on the entry of the goods the words 'Paid under protest' and adding a statement of the grounds upon which the protest is made, and, if the entry relates to more than one description of goods, the goods to which the protest applies, followed by the signature of the owner of the goods or his agent.
>
> (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:
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> (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

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5 It was common ground between the parties that the relevant time is 1986, and so the relevant version of the Act is Reprint No 4. Since then, the Act has been amended several times. The parties did not direct the Court to any subsequent transitional or other provision affecting the legislation which applies. In addition, as in the court below ([1999] 2 VR 38 at 46 [23]), the parties did not refer the Court to any regulations which could affect the question. **For the sake of convenience, I will generally use the present tense when referring to the provisions of the Act, even if they have been amended or repealed since 1986**.

(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." (emphasis added)

Section 163 provides for refunds, rebates and remissions of duty to be made.

15 In addition to the remedy given by s 167, s 273GA, which was introduced in 1980 and amended prior to September 1986, empowered the Commonwealth Administrative Appeals Tribunal to review a dispute arising under s 167 of the Act.

16 In March 1990, the Collector filed the writ and statement of claim in the present proceeding[6]. The Collector alleged that the owner owed $44,540.77 plus interest on one of three alternate bases:

(1) as "a debt due and payable to the Crown", which presumably is a reference to s 153 of the Act;

(2) by virtue of the "guarantee" which the owner provided to the Collector on 30 September 1986;

(3) by virtue of s 165 of the Act.

17 The owner filed a defence, in which it denied that any duty was payable. The Collector filed a reply, the amended version of which asserted:

"Insofar as the Defence disputes the amount or rate of duty payable in respect of the goods the subject of the action or the liability of the goods to such duty, then the same cannot be raised or relied upon by way of defence in the present proceedings by virtue of the provisions of Section 167 of the *Customs Act* 1901 (as amended)."

18 In May 1993, Master Wheeler referred the following question to the Supreme Court ("the question"):

"Is the Defendant entitled to dispute:

(a) the amount of duty;

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6 [1999] 2 VR 38 at 40 [9].

(b) the rate of duty; or

(c) the liability of the goods the subject of the action to duty

where the Defendant has neither:

(i) paid under protest pursuant to subsection 167(1) of the *Customs Act* 1901 the sum demanded by the Collector as the duty payable in respect of the goods; nor

(ii) brought an action pursuant to subsection 167(2) of the *Customs Act* 1901 for recovery of the sum so paid?"

19 In October 1994, Gray J answered "yes" to each part of the question[7].

The Court of Appeal's decision

20 In December 1998, the Court of Appeal unanimously answered "no" to each part of the question[8]. Batt JA gave the leading judgment. President Winneke agreed with the judgment of Batt JA[9]. Charles JA, in a short judgment, also agreed with Batt JA[10]. The judgment of Batt JA can therefore be taken as the judgment of the Court of Appeal. The Court held that, unless and until the owner paid the duty claimed under protest, the owner was not entitled to challenge the claim in the Collector's writ and statement of claim that the goods which the owner imported were liable to duty. It said that, if the duty has not been paid under protest, then the owner can plead only three matters in defence[11]:

(a) that he or she was not the "owner" of the goods (as defined by s 4(1) of the Act);

(b) that any demand under s 165 of the Act relied on by the Collector was not made within the 12 month time limit provided by s 165;

(c) a constitutional defence.

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7 [1999] 2 VR 38 at 39 [6].

8 [1999] 2 VR 38 at 61 [51].

9 [1999] 2 VR 38 at 39 [1].

10 [1999] 2 VR 38 at 39 [5].

11 [1999] 2 VR 38 at 54-55 [36].

21 The Court of Appeal said such a construction[12]:

> " … does not prevent a defendant who has not paid the duty sued for from litigating with the collector the rate or amount of duty or the dutiability of the goods in question. But it does require the owner to do that in a separate action in which the owner is the plaintiff."

22 The Court held that this construction of the Act did not remove a fundamental common law right or depart from the general system of law because[13]:

> "An owner who is sued under s 153 for duty claimed and who, by hypothesis, has not to that time paid the duty may immediately pay it under protest and then, as a complete answer to the collector's claim, plead payment as a defence since action brought. … The owner may then sue the collector for recovery of the amount so claimed in a separate action. So, the owner *can* mount a complete defence (namely, payment) to the collector's action. The principle in [*Potter v Minahan*[14] and *Bropho v Western Australia*[15]] is not infringed by the [Collector's] construction, though the clear language effects a change of onus." (original emphasis)

23 The Court said[16]:

> "[T]he word 'may' in s 167(1) does not confer a discretion, but rather an authorisation or permission, as though the relevant part of the subsection read, ' … it shall be lawful for the owner of the goods to pay under protest …'."

24 On this construction, if the owner of goods disputes the duty demanded, s 167(1) gives him or her the option of, but does not require, payment under protest. However, the Court went further[17]:

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12 [1999] 2 VR 38 at 55 [38].

13 [1999] 2 VR 38 at 54 [36].

14 (1908) 7 CLR 277.

15 (1990) 171 CLR 1.

16 [1999] 2 VR 38 at 49 [31].

17 [1999] 2 VR 38 at 50 [31].

> "[T]he provision, although in form permissive or facultative, is, in my view, in effect peremptory or exclusive. That is, if an owner of goods wishes to maintain a dispute which has arisen as to one of the specified subject matters the owner must follow the statutable procedure."

25 The Court also said[18]:

> "[T]he words 'may pay under protest ...' state exclusively the course open to an owner who wishes to continue a dispute and that in consequence the word 'may' operates as 'shall'."

Section 167 does not apply to an action by the Collector to recover duty

26 The owner submitted that neither expressly nor by necessary implication did s 167 take away its ordinary right in a civil action to dispute the elements of the Collector's claim to recover the duty. In the forefront of the owner's argument was the claim that "fundamental common law rights are not to be taken to have been removed or departed from without the clearest language". It contended that the Court of Appeal had erred in holding that s 167 did not take away the fundamental common law rights of the owner.

27 Courts have long held that a statute should not be construed as amending fundamental principles, infringing common law rights or departing from the general system of law unless it does so with "irresistible clearness"[19]. The legislative intention to do so, it is often said, must be "unambiguously clear"[20]. Thus, in *Potter v Minahan*[21], O'Connor J said:

> "It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness."

28 But times change. What is fundamental in one age or place may not be regarded as fundamental in another age or place. When community values are undergoing radical change and few principles or rights are immune from legislative amendment or abolition, as is the case in Australia today, few principles or rights can claim to be so fundamental that it is unlikely that the

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18 [1999] 2 VR 38 at 54 [35].

19 *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J.

20 *Bropho v Western Australia* (1990) 171 CLR 1 at 18.

21 (1908) 7 CLR 277 at 304. Justice O'Connor quoted these words from *Maxwell on Statutes* with obvious approval.

legislature would want to change them. No doubt there are fundamental legal principles – a civil or criminal trial is to be a fair trial, a criminal charge is to be proved beyond reasonable doubt, people are not to be arrested or searched arbitrarily, laws, especially criminal laws, do not operate retrospectively, superior courts have jurisdiction to prevent unauthorised assumptions of jurisdiction by inferior courts and tribunals are examples. Clear and unambiguous language is needed before a court will find that the legislature has intended to repeal or amend these and other fundamental principles. But care needs to be taken in declaring a principle to be fundamental. Furthermore, infringement of rights and departures from the general system of law are in a different category from fundamental principles. Some rights may be the corollaries of fundamental principles. In that sense, they are fundamental rights which are presumed to continue unless the legislative language is clear and unambiguous. But nearly every session of Parliament produces laws which infringe the existing rights of individuals. Given the frequency with which legislatures now amend or abolish rights or depart from the general system of law, it is difficult to accept that it is "in the last degree improbable" that a legislature would intend to alter rights or depart from the general system of law unless it did so "with irresistible clearness".

29 Hallowed though the rule of construction referred to in *Potter v Minahan* may be, its utility in the present age is open to doubt in respect of laws that "infringe rights, or depart from the general system of law". In those areas, the rule is fast becoming, if it is not already, an interpretative fiction. Such is the reach of the regulatory state that it is now difficult to assume that the legislature would not infringe rights or interfere with the general system of law. In *Bropho*[22], six Justices of this Court said:

> "Thus, if what was previously accepted as a fundamental principle or fundamental right ceases to be so regarded, the presumption that the legislature would not have intended to depart from that principle or to abolish or modify that right will necessarily be undermined and may well disappear."

30 Speaking generally, a much surer guide to the legislative intention in areas of legislation dealing with ordinary rights or the general system of law is to construe the language of the enactment in its natural and ordinary meaning, having regard to its context – which will include other provisions of the enactment, its history and the state of the law – as well as the purpose which the enactment seeks to achieve.

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22 *Bropho v Western Australia* (1990) 171 CLR 1 at 18.

31 The Act, even on the construction adopted by the Court of Appeal, does not interfere with fundamental legal principles or rights derived from those principles. On that construction, it merely suspends the right of a person to challenge the rate of duty until the person allegedly liable pays under protest the sum demanded. The Court of Appeal was correct, therefore, in finding that the rule in *Potter v Minahan* did not apply to s 167 of the Act. But in my opinion it erred in construing s 167.

32 The natural meaning of s 167 and its context, history and purpose make it clear, in my opinion, that it gives the owner of goods the option to pay the duty claimed and to recover the amount of duty instead of seeking declaratory relief concerning the validity of the imposition of duty. The section is not intended to and does not affect the defences available to the owner when sued by the Collector. It states that the owner "may pay under protest the sum demanded". Sub-section (2) then states that the owner "may ... bring an action" to recover the sum so paid.

33 The ordinary meaning of "may" is authorise or permit. *Prima facie*, it is a permissive or facultative expression. There is a presumption that in a statute it has this *prima facie* meaning[23]. That presumption is often rebutted when the word is used to give a power to a court or judicial officer. As this Court said in *Ward v Williams*[24], jurisdiction and powers are usually conferred on judicial bodies to enable them to enforce rights and protect interests. Permissive language is often used, therefore, in conferring powers or jurisdiction on courts[25]:

> "because, although it is intended or contemplated that persons interested will be entitled to the remedy the tribunal is empowered to give, it is also intended, or at all events taken for granted, that the existence of the interest and the validity of the claim to the remedy of a person seeking it will be for the tribunal to determine."

34 But s 167 is far removed from this class of case.

35 On its face, the words "may pay under protest" in s 167 give to the owner of goods who disputes the duty demanded the right to obtain the goods by paying the duty under protest and then recovering the sum so paid, subject to the conditions of the section. The section deals with the special case where the

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23 *Ward v Williams* (1955) 92 CLR 496 at 505. See also s 33(2A) of the *Acts Interpretation Act* 1901 (Cth), which does not apply here because of the date on which that section commenced.

24 (1955) 92 CLR 496 at 507.

25 (1955) 92 CLR 496 at 507.

owner has paid the sum claimed by the Collector and seeks to recover it. The section provides that the owner can only do so if it brings the action within a limited time period. Moreover, the money must have been paid "under protest in pursuance of this section"[26]. Further, the "protest in pursuance of this section [must] be made by writing on the entry of the goods the words 'Paid under protest' and adding a statement of the grounds upon which the protest is made"[27].

36 Why, then, should the section be read as governing the procedure in actions where the claimant is the Collector? Nothing in the section expressly affects such actions. Moreover, s 167(4) strongly suggests that the only curial action with which the section is concerned is one by the owner for the recovery of duty paid. There is nothing in s 167 that indicates that it was intended to have any bearing on actions brought by the Collector. There are also a number of indications in the Act that it could not have been so intended.

37 Section 18 of the *Customs Tariff Act* 1982 (Cth) provided that duties are to be paid on all goods imported. Section 153 of the Act makes those duties "Crown debts charged upon the goods in respect of which the same are payable and payable by the owner of the goods". Section 153 also provides that the duties are "recoverable at any time in any court of competent jurisdiction by proceedings in the name of the Collector". Thus, duties become immediately payable upon the importation of goods. What constitutes an importation will depend upon all the facts and circumstances of the case in question. But ordinarily, as Dr Wollaston, the first Permanent Head of the Department of Trade and Customs and Comptroller-General of Customs, wrote in respect of s 153[28]:

> "Goods are imported when they have been brought into any port or other place within Australia from parts beyond the seas with the intention of consuming them there or of adding them to the general stock of the country so as to be available for consumption.
>
> The intention is the important thing, but until the contrary is shewn, the intention is presumed from the fact of the goods coming into a port of entry, or being landed, and may be inferred from other circumstances, such as hovering on the coast, etc."

38 Whether or not the owner or importer elected to take delivery of imported goods on which duty was payable, s 153 of the Act entitles the Collector "at any time in any court of competent jurisdiction" to sue for the duty as a debt owing to

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26 Section 167(4).

27 Section 167(3).

28 *Customs Law and Regulations* (1904) at 91.

the Crown. The Collector would be doing no more than enforcing his or her strict legal rights if he or she sued for the duty immediately the goods were imported. Furthermore, goods might be imported or entered for home consumption as duty free and consumed long before the Collector became aware that they were dutiable. If that occurred, s 153 entitles the Collector to recover the duty "at any time" although the Collector seems to accept that some at least of such cases are subject to the condition that a demand for payment has been made within the twelve months time limitation in s 165(1). That section provides:

> "When any duty has been short levied or erroneously refunded the person who should have paid the amount short levied or to whom the refund has erroneously been made shall pay the amount short levied or repay the amount erroneously refunded on demand being made by the Collector within twelve months from the date of the short levy or refund."

39 In *Carter Holt Harvey Manufacturing Group Pty Limited v Comptroller-General of Customs*[29], Pincus JA said:

> "The expression 'short levied' in s 165(1) … might at first sight be thought capable of referring only to instances in which some amount of duty, but not enough, has been charged on the relevant goods, but as excluding instances in which no duty at all has been charged. But the parties are agreed that duty may be 'short levied' although the amount charged is nil, ... and I think we should accept that view of the provision."

40 As in *Carter Holt*, the parties to this appeal agreed that "short levied" included instances when no duty at all has been charged. That being so, it is unnecessary to express a concluded opinion on the subject. But even if s 165 applies or applied to some cases where "the amount charged is nil", I am far from convinced that s 165 governs a case where no duty has been paid by reason of fraud or negligent description. In such cases, I can see no reason why the Collector cannot rely on s 153 without the time limit restriction imposed by s 165[30].

41 Whether or not s 165 applies to cases where the amount charged is nil, it seems clear enough that there may be many cases where the Collector may sue for duty long after the goods have been imported. Indeed, he or she may sue for the duty long after they have ceased to exist. And the person the Collector sues need not be the original owner or the person who imported the goods. Any

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29 [1997] 1 Qd R 1 at 4-5.

30 cf Wollaston, *Customs Law and Regulations* (1904) at 106.

person who is in possession or control of goods on which duty is payable, but unpaid, can be sued under s 153 for that duty[31].

42 Historically, s 167 operated on the assumption that the payment under protest had to be made before the goods were released to the owner. Goods were subject to the control of the Customs from the time of importation until they were dealt with "in accordance with an entry of the goods for home consumption"[32]. An entry was "made by the owner of the goods giving to an appropriate Collector in a manner prescribed by the regulations an entry in respect of the goods containing the particulars required by the regulations"[33]. On the giving of the entry, "the goods [were], for the purposes of this Act … taken to be entered"[34]. Any "protest in pursuance of [s 167]" had to "be made by writing on the entry of the goods"[35]. The demand of which s 167(1) spoke, therefore, was a demand made before the goods were released to the owner. It was not a demand made at any time by the Collector, as the Court of Appeal appears to have thought. Further, the protest was an essential step in a claim for the recovery of the amount paid by the owner. It would therefore require drastic rewriting of ss 153, 165 and 167 to make the provisions of s 167 apply to actions by the Collector to recover duty. And the Court of Appeal did not suggest that it did apply to those actions.

43 Instead, their Honours thought that s 167 impliedly prevented an owner disputing the amount or rate or liability of the goods to duty otherwise than in accordance with the procedure laid down in that section and that the owner could still have the benefit of the section after taking delivery of the goods and being sued for the duty alleged to be owing. Thus, their Honours thought that an owner sued under s 165 could pay the money under protest and then bring an action for the recovery of that sum. Presumably, on this construction, the owner must attend at the place of importation and comply with the terms of s 167(3) before he or she could commence the action for recovery. But in many cases that would come within s 165, for example, the entry would contain an amount that the owner did not dispute. In other cases under s 153 and perhaps s 165, the entry would contain the statement "Nil" under the heading "Duty Payable". Again this would be a sum that the owner did not dispute. In either of these cases, to write "Paid under protest" on the entry would be nonsensical.

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31 *Wing On & Co Ltd v Collector of Customs (NSW)* (1938) 60 CLR 97.

32 Section 30(a).

33 Section 36(1).

34 Section 36(1).

35 Section 167(3).

44 The theory of the Court of Appeal concerning s 167 in cases where the goods have been released and the Collector has commenced an action requires construing the section as imposing an obligation on the owner to withdraw the entry and to make an amended entry in accordance with the demand of the Collector before the owner can defend the action. Nothing in s 167 appears to contemplate such a procedure. It is true that s 38 entitles the owner to withdraw an entry given under s 36. But the issue is not whether an entry can be withdrawn. It is whether s 167 requires the owner to withdraw the entry and pay the duty under protest before it can defend an action brought under s 153 or s 165. The lack of any indication in s 167 that it contemplates such a step confirms the conclusion that the demand of which s 167(1) speaks is a demand made before the goods were entered for home consumption. Moreover, the power of withdrawal conferred by the successor to s 38, s 71F, can only be exercised before the goods are dealt with in accordance with the entry. The Court of Appeal thought that ss 7 and 165 of the Act[36] impliedly authorised the owner to withdraw the entry after the Collector had commenced an action to recover duty. But the general powers conferred by these sections cannot be used to achieve the same result as could be achieved by exercising the power conferred by s 71F but "free from the conditions and qualifications prescribed by [that] provision"[37].

45 Once it is accepted that the demand to which s 167 is referring is one made before the entry, it is clear that there will be many cases where an owner sued under s 153 or s 165 would not be able to rely on s 167 to dispute its liability[38].

46 Further, assuming that "short levied" includes the case where no duty was paid at all, s 165 only applies "[w]hen any duty has been short levied …". By its defence, the owner seeks to assert that *there was no short levy* in this case, because no duty whatsoever is owed. If this assertion is made out, s 165 does not apply. It would be surprising, therefore, if the Parliament intended that the owner had to pay the amount claimed and recover it in accordance with s 167 before it could defend the s 165 action by showing that there was no short levy.

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36 [1999] 2 VR 38 at 59 [46].

37 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 8; *R v Wallis* (1949) 78 CLR 529 at 549-550.

38 It is unnecessary, for the purpose of this case, to determine whether the enactment of s 132AA of the Act inserted in 1999 and amended in 2000 requires any modification or extension of the foregoing analysis of the rights of the Collector under ss 153 or 165.

Indeed, if s 167 prevents the owner from showing that there was no short levy under s 165 without complying with s 167, that section would have to be read as containing a declaration that the owner could not raise the short levy issue unless it first complied with the procedure laid down in s 167. Otherwise the owner could never dispute the applicability of s 165.

47 The history and purpose of s 167 support a construction that it simply gives the owner of goods an option to pay first and recover later and that it was not intended to take away rights of the owner that would exist if the section had not been enacted. The Court of Appeal appeared to regard s 167 both as a key provision of the Act and as a section designed to protect the revenue. But the history of the section shows that it was enacted for the benefit of the owner and that the rights of action of the Collector are in no way dependent upon it.

48 Prior to the enactment of s 167 and its predecessors in Customs legislation, an owner of goods, the subject of a dispute over customs duty, could not obtain possession of the goods until the dispute was settled[39]. This had the potential to cause great injustice because the goods might perish before the dispute was settled or demand for the goods might drop or even disappear. To overcome these potential injustices[40], from 1853[41] Customs legislation provided that, if any dispute arose as to the duty payable, the owner might deposit the sum claimed with the Collector and then bring an action to recover the money paid together with interest[42]. Given the mischief at which s 167 was aimed, it is clear that s 167, when enacted in 1901, and its predecessors were not intended to change the then existing procedures for determining a dispute as to duty. The liability to pay duty arose under the *Customs Tariff Act* 1902 (Cth)[43], and the duty was a debt owed to the Collector and enforceable at any time in a court of competent jurisdiction[44].

49 Thus, instead of waiting to be sued or seeking a declaration that no duty was owed or that the amount or rate charged was erroneous, s 167 gave the owner the option of paying the sum claimed, getting the goods and then suing to

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39 *Sargood v The Queen* (1878) 4 VLR (L) 389 at 393 citing Hamel, *Laws of the Customs* at 93.

40 *Sargood v The Queen* (1878) 4 VLR (L) 389 at 393-394.

41 *Customs Consolidation Act* 1853 (16 & 17 Vict c 107) (UK), s 29.

42 cf *Customs Act* 1857 (Vict), s 21; *Customs Act* 1901 (Cth) s 167.

43 See also the *Customs Tariff Act* 1908 (Cth).

44 Section 153.

recover the whole or part of the moneys paid. In *Sargood Bros v The Commonwealth*[45], O'Connor J referred to the procedure under s 167 as being optional. Moreover, until 1910, the terms of s 167 made it clear that it applied only while the goods were under the control of the Customs. Until that year, s 167(1) stated that the owner "upon making proper entry shall be entitled to delivery of the goods". Once the goods were released, the Collector had to sue for the duty in accordance with s 153 of the Act. If the Collector released the goods and then sued, nothing in the Act gave the slightest ground for thinking that the owner could not put in issue the Collector's entitlement to recover the amount or impose the rate of duty.

50 Upon what basis, then, can it be suggested that the amendments in 1910 inferentially took away rights of the owner that existed up to that time? The Court of Appeal said that when *Sargood* was decided in this Court, "most importantly s 167 then contained no equivalent of the later sub-s (4)"[46]. But I am unable to see how the enactment of that sub-section altered the rights of the parties that had existed up until that time. It declared and still declares that "No action shall lie for the recovery of any sum paid to the Customs as the duty payable in respect of any goods, unless" etc. The sub-section makes it clear that duty cannot be recovered by the owner in a court of law without following the procedure that it lays down. But it has nothing to say about an action brought by the Collector.

51 Moreover, it is doubtful whether s 167(4) added anything to the inference to be drawn from the original s 167(2). That sub-section provided that "[t]he deposit shall be deemed the proper duty unless by action commenced by the owner … within six months after making the deposit the contrary shall be determined …".

52 Central to the reasoning of the Court of Appeal was the conclusion that s 167(1), "although in form permissive or facultative" was "in effect peremptory or exclusive"[47]. Having reached that conclusion, the Court construed other provisions of the Act, present and past, in a manner that was consistent with this central conclusion. The Court thought that s 167 was "analogous to the provisions in the *Transfer of Land Act* 1890 to the effect that 'the proprietor of land … may transfer the same by a transfer in one of the forms' in a schedule"[48].

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45 (1910) 11 CLR 258 at 277.

46 [1999] 2 VR 38 at 50 [31].

47 [1999] 2 VR 38 at 50 [31].

48 [1999] 2 VR 38 at 49-50 [31].

The Court of Appeal pointed out that in *Crowley v Templeton*[49], this Court had held that the mode of transfer of land under the statute was exclusive and not optional[50]. Griffith CJ said[51]:

> "But … the only way of dealing with land which is under the provisions of the Act is by alteration of the register, and modes by which such alteration can be procured are prescribed by the Act. No other mode is authorized. These provisions, therefore, although in form permissive or facultative, are in effect peremptory and exclusive."

53 But the provisions of the *Transfer of Land Act* 1890 (Vic) are far removed from s 167 and the provisions of the Act. Under the *Transfer of Land Act*, land could not be transferred except in accordance with the statutory provisions. Here the very different question is whether the enactment of s 167 inferentially took away the ordinary right of a defendant in civil litigation to put the plaintiff to proof of every element of the plaintiff's cause of action. Plainly, the enactment of s 167 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[52]. But it provides no ground for concluding that it also takes away the ordinary right of a person sued for debt to require the plaintiff to prove the title to the debt.

Conclusion

54 Nothing in s 167 indicates that the result of non-compliance with the "obligation" to pay under protest is that the owner cannot challenge the matters referred to in s 167(1) *in its defence to an action by the Collector for a Crown debt constituted by the duty*. Where, as in the present appeal, the owner of goods has not paid any duty at all, it obviously cannot commence proceedings to recover duty paid: by hypothesis, there is nothing to recover. Where the owner has paid the duty *without* protest, no action for recovery lies: s 167(4). Where either no duty has been paid at all, or the duty has been paid without protest, the owner cannot apply to the Administrative Appeals Tribunal for review of the decision to demand the duty: s 273GA(2). The Act makes all of these consequences clear. However, it is far from clear that the Parliament also intended that not paying the duty demanded had the further consequence that the

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49 (1914) 17 CLR 457.

50 [1999] 2 VR 38 at 50 [31].

51 (1914) 17 CLR 457 at 463.

52 *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 2)* (1991) 32 FCR 243. An owner who has paid under protest pursuant to s 167 may also make an application for review to the Administrative Appeals Tribunal: s 273GA.

owner could not challenge the matters referred to in s 167(1) in its defence to an action under ss 153 or 165. Section 167 simply does not advert, either expressly or by necessary implication, to the situation in which the owner in this appeal finds itself. In addition, the terms of s 167 and its history suggest that it was not intended to affect the rights and liabilities of the Collector and the owner in an action brought under ss 153 or 165.

55 The appeal must be allowed with costs. The question should be answered as follows:

Question:

Is the Defendant entitled to dispute:

(a) the amount of duty;

(b) the rate of duty; or

(c) the liability of the goods the subject of the action to duty

where the Defendant has neither:

(i) paid under protest pursuant to subsection 167(1) of the *Customs Act* 1901 the sum demanded by the Collector as the duty payable in respect of the goods; nor

(ii) brought an action pursuant to subsection 167(2) of the *Customs Act* 1901 for recovery of the sum so paid?

Answer:

(a) Yes.

(b) Yes.

(c) Yes.

56 GUMMOW AND CALLINAN JJ. At the relevant time for this litigation, s 18 of the *Customs Tariff Act* 1982 (Cth) ("the Tariff Act") imposed duties of Customs on goods imported into Australia. Section 3 of the Tariff Act stated that the *Customs Act* 1901 (Cth)[53] ("the Act") was incorporated, and was to be read as one, with the Tariff Act[54]. The issue in this appeal is whether, in an action for the recovery from the appellant of a debt representing unpaid duties of Customs, it is open to the appellant to defend the action by contesting its liability in respect of the duties in question.

57 The respondent contends that, in the circumstances of this case, it would be open to the appellant to obtain a judicial decision in its favour only by the appellant bringing a successful action instituted in accordance with s 167 of the Act. Section 167 provides for the determination of disputes by payment under protest of the amount demanded by the Collector followed by an action under s 167(2) to recover that amount. However, as will appear, the appellant itself has not paid any sum demanded by the Collector and it has brought no action against the Collector; rather, the Collector has sued the appellant to recover a debt created by operation of the Tariff Act and the Act and the appellant seeks to dispute the operation against it of the criteria giving rise to the debt.

58 The Collector of Customs[55] by action in the Supreme Court of Victoria sued the appellant claiming recovery of a debt of $44,540.77. The debt was claimed as an amount of duty payable by the appellant in respect of certain goods imported into Australia and released by the Collector into home consumption. By its defence, the appellant denied this liability and asserted that the goods were properly rated for duty as "free".

59 A preliminary question was stated and ordered to be tried before the trial of the action. This asked whether the appellant was entitled in the action to dispute the amount of duty, the rate of duty, or the liability of the goods the subject of the action to duty, where it had neither paid under protest pursuant to s 167(1) nor brought an action under s 167(2) to recover the sum so paid. Gray J answered these questions in the affirmative, but an appeal to the Court of Appeal

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53 The parties accept that the text of the Act relevant to the present proceedings is Reprint No 4, which includes amendments made up to those introduced by the *Customs and Excise Legislation Amendment Act* 1986 (Cth).

54 The Tariff Act was repealed by s 28 and Sched 6 of the *Customs Tariff Act* 1987 (Cth). This in turn was repealed by s 21 of the *Customs Tariff Act* 1995 (Cth).

55 The action was instituted by the Collector, Victoria, Australian Customs Service, who, by force of s 8 of the Act, is to be considered as "the Collector".

was successful[56]. The Court of Appeal (Winneke P, Charles and Batt JJA) ordered that the questions be answered in the negative[57]. It is against the orders of the Court of Appeal that the appellant appeals to this Court.

60 Evidence was admitted before the primary judge and its effect is summarised as follows by Batt JA, who gave the leading judgment in the Court of Appeal. His Honour said[58]:

> "On or about 23 September 1986 the [appellant] imported into Australia certain cotton garments from India and lodged with Customs an entry for home consumption in respect of them. The entry was accompanied by invoices describing the goods as 'handcrafted cotton garments'. There was no duty payable on handcrafted cotton garments by reason of concessions under Pt II of Sch 4 to [the Tariff Act] for 'handicrafts' (as defined in note 1 to that part), whereas there was substantial duty payable on machine-made garments. Given the description of the goods, they were entered as duty-free.
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> On 26 September 1986 Customs queried the importation and directed that two samples of each type of garment be taken from the bulk to enable checks to be made as to the eligibility of the garments for exemption. On 30 September the goods were released to the [appellant] upon the giving by the latter of a written 'guarantee' or undertaking to pay 'any additional duty charges applicable'. During October and November 1986, expert opinion was provided to Customs that the garments were machine-made and thus Customs decided that they attracted duty. … On 24 April 1989 Customs wrote to the [appellant] enclosing a formal demand for payment by 8 May 1989 of the amount now claimed. The letter stated that the sum could be paid under protest pursuant to s 167 of the Act. The [appellant] did not pay the sum claimed either under protest or otherwise. On 2 March 1990 the writ in the present proceeding was filed."

61 Batt JA identified s 153[59] as an important provision but did not identify the action, before the trial of which the preliminary question had been isolated for determination, as one instituted under s 153. In the formulation of preliminary

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56 *Stretton v Malika Holdings Pty Ltd* [1999] 2 VR 38.

57 [1999] 2 VR 38 at 61.

58 [1999] 2 VR 38 at 40.

59 [1999] 2 VR 38 at 42.

questions care is required lest the utility of the procedure be prejudiced[60]. Here the text of the preliminary question directed attention away from s 153 by posing an abstract question of entitlement to dispute where there had been no payment under protest pursuant to s 167(1) nor an action brought pursuant to s 167(2) to recover the amount paid under protest. Further, as his Honour recorded it, the issue for determination by the Court of Appeal had been stated by the Collector (then the appellant) as being[61]:

> "Does s 167 constitute the only means by which an importer (or, more generally, the owner of goods imported) may challenge the amount and rate of, and the liability of goods to, Customs duty?"

Batt JA noted that the contention was that s 167 "constitutes a code for the resolution of *any* dispute as to duty", and that, whilst the owner accepted that s 167 formed "a code", it saw the issue as one as to "the content of that code"[62].

62 References to s 167 as a "code" are unhelpful and apt to mislead. Section 167 comprises Div 4 of Pt VIII of the Act and is headed "Disputes as to Duty". Part VIII contains four Divisions. It is headed "THE DUTIES". Division 1 (ss 131A-153) is headed "The Payment and Computation of Duties generally" and Div 3 (ss 162-166) "Deposits, Abatements, Remissions, Refunds and Rebates of Duties".

63 The Act as a whole is not a "code" in the sense that it wholly replaces the common law upon a particular subject. Taxes are imposed and levied by statutes. Where there is a code replacing the common law, a particular and important rule of construction applies. This was identified by Mason CJ in *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd*. His Honour said[63]:

> "It is a well-settled rule of construction that in the case of a statute being a code intended to replace the common law, its meaning is to be ascertained in the first instance from its language and the natural meaning of that language is not to be qualified by considerations derived from the antecedent law: *Brennan v The King*[64]; *Bank of England v Vagliano*

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60 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 358 [53].

61 [1999] 2 VR 38 at 46.

62 [1999] 2 VR 38 at 46.

63 (1987) 163 CLR 236 at 243-244.

64 (1936) 55 CLR 253 at 263.

> *Brothers*[65]. But an appeal to earlier decisions can be justified if the language of the statute is itself doubtful or if some other special ground is made out, eg, if words used have previously acquired a special meaning which differs from their ordinary meaning: *Sungravure Pty Ltd v Middle East Airlines Airliban SAL*[66]."

The point of present concern is that s 167 is to be construed not in isolation, thereby risking its severance from the body of the statute, but as part of the legislative scheme respecting the recovery of sums due and payable as duties.

64 Before coming to the text of the provisions which are critical to this appeal, it is convenient to note some features of the revenue system established by the Act. The Act has been amended on various occasions since 1901 but, in broad outline, the structure remains the same. Significantly, the Act does not include a provision such as s 177 of the *Income Tax Assessment Act* 1936 (Cth) rendering the production of a notice of assessment conclusive evidence that the assessment has duly been made and, except in proceedings on appeal against the assessment, that the amount and all the particulars in the assessment are correct[67].

65 An appreciation of the operation of the legislation in the Australian colonies, before the exclusive occupation of the field by the Commonwealth, assists an understanding of the construction of the Act. In *Sargood Bros v The Commonwealth*, O'Connor J observed that[68]:

> "Customs control over goods imported may be exercised in support of illegal as well as of legal demands of duty".

His Honour continued[69]:

> "The principle of law applicable in such cases is well recognized. Where an officer of Government in the exercise of his office obtains payment of moneys as and for a charge which the law enables him to demand and

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65 [1891] AC 107 at 144-145.

66 (1975) 134 CLR 1 at 22.

67 See *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168.

68 (1910) 11 CLR 258 at 276.

69 (1910) 11 CLR 258 at 276-277. See also *Mason v New South Wales* (1959) 102 CLR 108.

> enforce, such moneys may be recovered back from him if it should afterwards turn out that they were not legally payable even though no protest was made or question raised at the time of payment. Payments thus demanded *colore officii* are regarded by the law as being made under duress. The principle laid down in *Morgan v Palmer*[70], *Steele v Williams*[71], and adopted in *Hooper v Exeter Corporation*[72] clearly establish that proposition."

However, it should be added that, where the officer had paid over and accounted for moneys received in this way, the appropriate defendant was the Executive Government, not that officer[73]. On the other hand, in some cases an action might lie in tort, in trover or detinue. There, at common law, the appropriate defendant was not the Crown but the individual officer; in a proper case the Crown would defend the officer and become responsible for any damages awarded[74]. An example of such an action in tort was *Stevenson v Tyler*[75]. However, as that case also illustrates, in many instances legislation, in *Stevenson* s 227 of the *Customs Act* 1857 (Vic), required the giving of notice before such an action was brought against the officer[76]. Protective provisions of that kind are now found in Div 2 (ss 220-227) of Pt XII of the Act.

66 Section 30 of the Act and its operation upon the circumstances of the present litigation provided that the goods imported were to be subject to the control of Customs until they were dealt with in accordance with an entry of the goods for home consumption. Section 36(1) required the making of an entry in respect of goods that were eligible for entry to be made by the owner of the goods giving to an appropriate Collector in the prescribed manner an entry in respect of the goods which contained the particulars required by the Regulations;

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70 (1824) 2 B & C 729 [107 ER 554].

71 (1853) 8 Ex 625 [155 ER 1502].

72 (1887) 56 LJ QB 457.

73 *Sargood Bros v The Commonwealth* (1910) 11 CLR 258 at 303, 310.

74 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 543.

75 (1865) 2 W W & A'B (L) 179.

76 A further notice provision was contained in s 274 of the *Customs Act* 1890 (Vic); see Wollaston, *Trade, Customs and Marine Law*, (1892) at 112-113, where reference is made to English decisions construing such notice provisions in a range of legislation in England.

on the giving of the entry the goods were, for the purposes of the Act, to be taken as entered. The rate of import duty payable on the goods was the rate of duty in force when the goods were entered for home consumption (s 132(1)). Sections 42-48 provided for the taking of security for the ultimate payment of duty found to be due. Pending the provision thereof, the Customs might refuse to deliver any goods subject to the control of the Customs (s 42(1)).

67 In *R v Lyon*[77], Griffith CJ described the system adopted by the Act as one whereby the value was to be declared and the duty paid at the time of passing the entry. His Honour continued[78]:

> "In the case of goods imported for home consumption the course of procedure is first getting the goods passed and paying the duty, and then taking the goods out of the Customs into consumption."

In the same case, O'Connor J referred to an underlying principle of the Act as being that, at the time of importation until the payment of duty, the Customs were not to lose control of the articles imported. His Honour said that this was indicated directly in s 30 and continued[79]:

> "The object of that provision, if it were necessary to give any reasons for its enactment, is obvious; if once goods go into home consumption, that is, into circulation, it becomes almost impossible to trace them. The only security the customs authorities could have in such a case for the payment of duty would be in most cases the personal security of the importer. Therefore it is, if the Act is to be effective, that all through the dealings with the goods, from the time they are first imported until duty is paid, they must be kept under customs control."

68 In *Carmody v F C Lovelock Pty Ltd*, Gibbs J, after referring to the judgment of O'Connor J in *Lyon*, said of s 30 of the Act[80]:

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77 (1906) 3 CLR 770 at 777-778.

78 (1906) 3 CLR 770 at 778.

79 (1906) 3 CLR 770 at 784.

80 (1970) 123 CLR 1 at 22-23. Section 30 was thereafter recast, by s 4 of the *Customs Amendment Act* 1981 (Cth), but with no significant consequences for the purposes of this litigation.

> "'Delivery for home consumption' in this provision means lawful delivery by the customs authorities[81] and it appears from ss 33, 36, 39, 40 and 68 that as a general rule goods entered for home consumption would be lawfully delivered for home consumption, and would pass out of customs' control, forthwith upon an entry being passed. Although the [Act] does not expressly so provide, the duty would normally be paid at the time of passing the entry[82]. If the duty was short levied the person who should have paid it is liable to pay the amount short levied on demand made within twelve months from the date of the short levy (s 165)."

69 Although it did not loom large in submissions to this Court or, it would appear, those to the Court of Appeal or to Gray J, the principal provision for this litigation is s 153 of the Act. This both creates a right in the Commonwealth and provides the method of its enforcement, including the forum for that enforcement[83]. Section 153 states:

> "All duties shall constitute Crown debts charged upon the goods in respect of which the same are payable and 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."

The phrase "all duties" is to be read in its natural sense "as meaning duties which have been imposed by law"[84]. Read in this way, the debt spoken of in s 153 is not an arbitrary exaction but an obligation imposed by reference to criteria which, if the alleged debtor can show not to have been satisfied, provides a defence to the action[85].

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81 *Wing On & Co Ltd v The Collector of Customs (NSW)* (1938) 60 CLR 97 at 104.

82 See *R v Lyon* (1906) 3 CLR 770 at 777-778, 784.

83 Section 277A(1) of the Act so operated that State courts were invested with jurisdiction in relation to matters arising under s 153, without limitation as to locality, but otherwise subject to the limitations in s 39(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). This was without prejudice to the jurisdiction of this Court under s 75 of the Constitution; see *D & R Henderson (Mfg) Pty Ltd v Collector of Customs for the State of New South Wales* (1974) 48 ALJR 132; affd (1975) 49 ALJR 335; 7 ALR 104.

84 *Sargood Bros v The Commonwealth* (1910) 11 CLR 258 at 273.

85 cf *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639-641, 658.

70 One advantage to the Revenue in framing s 153 so as to treat the duties as Crown debts was that until recently[86] priority was accorded to such obligations and administrations in bankruptcy and insolvency. In addition, at common law Crown debts were assignable and the writ of extent provided a summary process for the recovery of Crown debts[87]. Further, the statement in s 153 that the debt is "recoverable at any time" may, consistently with the reasoning in *Deputy Commissioner of Taxation v Moorebank Pty Ltd*[88], leave no room for the operation or combination of ss 64 and 79 of the Judiciary Act to "pick up" any State or Territory law respecting limitation of actions.

71 The term "Owner" is defined in s 4(1) of the Act as including, in respect of goods:

> "any person (other than an officer of Customs) being or holding himself out to be the owner, importer, exporter, consignee, agent, or person possessed of, or beneficially interested in, or having any control of, or power of disposition over the goods".

The reach of this definition is not limited to persons having control and custody of the goods at the time of importation. The defendant in *Wing On & Co Ltd v Collector of Customs (NSW)*[89] had purchased goods which, with the knowledge of the defendant, had been imported without entry at Customs and the defendant had then resold them to a third party; the defendant bore a personal liability[90] for recovery of the duty charged upon the goods and payable by the "owner" thereof under s 153 of the Act. In the present case, the goods entered Australia without payment of what is now claimed to be the duty exigible in respect of them, but the appellant was the importer. As a result, no question arises here concerning the scope of the decision in *Wing On*, for example, to catch bona fide purchasers of goods bearing the charge imposed by s 153[91].

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86 With the exception specified in s 4 thereof, the *Crown Debts (Priority) Act* 1981 (Cth) subjected the Commonwealth to State and Territory laws respecting priority of payment of debts.

87 See, now, s 67 of the Judiciary Act and *Ling v Commonwealth of Australia* (1994) 51 FCR 88 at 92-94.

88 (1988) 165 CLR 55.

89 (1938) 60 CLR 97.

90 (1938) 60 CLR 97 at 106.

91 See *Wing On* (1938) 60 CLR 97 at 107, 109-110.

72 Section 165 limits what otherwise would be the operation of s 153. So far as presently material, s 165(1) states:

> "When any duty has been short levied … the person who should have paid the amount short levied … shall pay the amount short levied … on demand being made by the Collector within twelve months from the date of the short levy …"

In the present action, one plea by the appellant is that the recovery action against it was instituted beyond the 12 month period applicable under s 165(1).

73 There is some apparent disharmony between s 165(1) and s 153. Duties which are exigible upon the proper operation of the legislation constitute the Crown debts recoverable under s 153. Those debts would appear to remain due and payable notwithstanding that the goods were released into home consumption as a consequence of an error whereby something less than the full amount due was levied by the authorities, and paid by the owner.

74 The reconciliation between the provisions turns upon the meaning of the term "short levied". The understanding of that term when the Act was passed was indicated by Dr H N P Wollaston, the first Comptroller-General of Customs[92] in his work, published in 1904, *Customs Law and Regulations*[93]. Of s 165, the learned author wrote[94]:

> "This section applies only to cases where the Customs have short levied, ie made a mistake and charged less duty than was properly due. It does not refer to cases where duty has been short paid from any other cause, such as fraud or careless misdescription on the part of the importer. Such cases are covered by Section 153 and are not affected by this section, which was inserted in order to protect persons from being called on to pay money at any subsequent date which had not been short-collected through any fault of theirs, but through that of the Department. It would be unjust on an importer if the Customs claimed from him, for instance, years after he had sold the goods."

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92 See *Markell v Wollaston* (1906) 4 CLR (Pt 1) 141 at 142.

93 Dr Wollaston had previously been Collector of Customs in Victoria and author of the work *Trade, Customs and Marine Law* referred to above.

94 *Customs Law and Regulations* (1904) at 106.

75 In *Carter Holt Harvey Manufacturing Group Pty Ltd v Comptroller-General of Customs*[95], the Queensland Court of Appeal accepted, in our view correctly, that there may be a "short levy" where no duty was collected. However, the Court answered in the affirmative the question whether s 165 precluded the Comptroller-General from recovering duty in respect of goods entered for home consumption and assessed for duty more than 12 months before demands for payment of duty were made.

76 The Court rejected the argument for the Comptroller-General that the statute relied on the honesty and diligence of importers in describing goods so that they may be assessed for duty and that an assessment of less than the correct amount of duty may or may not be a "short levy" depending on whether or not Customs had been apprised of all relevant facts before making the assessment. It follows from what has been said above that this argument should have been accepted.

77 Section 165 has no application where Customs has been misinformed by the importer; rather, the provision is concerned with the redressing of errors made by Customs, giving it 12 months to repair its own mistakes. Section 165 did not qualify the operation of s 153 in the action instituted by the Collector in the Supreme Court of Victoria against the appellant.

78 The relationship between s 153 and s 165 did not fall for a full examination in the Court of Appeal, given the manner in which the appeal to that Court had been presented. Batt JA observed[96]:

> "During argument s 165 was referred to more than once and its relationship with s 153 was touched upon. That relationship, however, was not fully explored in argument. Without detailed argument on questions such as whether ss 153 and 165 confer upon the collector … separate entitlements to sue and, if not, whether proceedings under s 153 must always be preceded by a demand under s 165(1) (as to each of which the judgments of the Queensland Court of Appeal in *Carter Holt Harvey Manufacturing Group Pty Ltd v Comptroller-General of Customs* are relevant), I consider it undesirable to say more than I have said in passing about s 165 except that, in my view, as was accepted in *Carter Holt Harvey*, 'short levy' includes the case where no amount of duty was paid."

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95 [1997] 1 Qd R 1.

96 [1999] 2 VR 38 at 60-61.

79 It remains to consider whether s 167 operated in the manner suggested by the Collector in submissions upheld by the Court of Appeal. If so, the appellant may not, in the action instituted against it in the Supreme Court, contest the entitlement of the Collector on the footing that the duty claimed as the debt is not truly exigible.

80 Section 167 states:

> "(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, 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) A protest in pursuance of this section shall be made by writing on the entry of the goods the words 'Paid under protest' and adding a statement of the grounds upon which the protest is made, and, if the entry relates to more than one description of goods, the goods to which the protest applies, followed by the signature of the owner of the goods or his agent.
>
> (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."

81 Section 167 is to be read with s 273GA(2). This states:

"Where a dispute referred to in sub-section 167(1) has arisen and the owner of the goods has, in accordance with that sub-section, paid under protest the sum demanded by the Collector, an application may be made to the [Administrative Appeals] Tribunal for review of the decision to make that demand and of any other decision forming part of the process of making, or leading up to the making of, that first-mentioned decision."

Where the owner of goods has made an application to the Administrative Appeals Tribunal ("the AAT") under that provision, the owner is not entitled to bring an action under s 167(2). This follows from s 273GA(6).

82 It also should be noted that when the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) was enacted, there were excluded from its operation decisions making or forming part of the process of making of calculations of duty under the Act and the Tariff Act[97].

83 The reference in s 167(5) to s 163 is to the provision for refunds, rebates and remissions there made. Section 163 was considered in *The Commonwealth v SCI Operations Pty Ltd*[98]. It was held in that case by Gaudron J, and by McHugh and Gummow JJ[99] that the reasoning in *Mallinson v Scottish Australian Investment Co Ltd*[100] applied. The result was that the refund provisions gave rise to a cause of action against the Commonwealth in debt if the procedure in the Regulations for applying for a refund was followed.

84 In the present litigation, the roles are reversed and the debt and its recovery at the suit of the Collector is specifically provided for in s 153. The question is whether there is a concurrent or qualified operation of s 153 required by the terms of s 167.

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97 See *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 2)* (1991) 32 FCR 243 at 252-253.

98 (1998) 192 CLR 285.

99 (1998) 192 CLR 285 at 305 [40], 313 [65] respectively.

100 (1920) 28 CLR 66 at 70.

85 The legislative history of s 167 was considered in the judgments in the Full Court of the Federal Court in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 2)*[101]. In that case, the Full Court was concerned with an action instituted to recover over-paid duty where the payment had not been made under protest within the meaning of s 167(3) and the plaintiff relied for its recovery upon its common law rights. By majority, the Full Court held that there had been a "dispute … as to … duty" within the meaning of s 167(1), that s 167 had been engaged and the section displaced what otherwise would have been any common law rights to recovery of the over-payment. In this Court *Kawasaki* was not challenged by the appellant as it did not stand in its path.

86 In *Sargood Bros v The Commonwealth*[102], Griffith CJ characterised a law for "the extinguishment of a debt due by the Crown in respect of money unlawfully demanded and never made payable by any law" as a provision of a character "for which no precedent has been found in any English or Australian Statute" and, a child of his time, added that such a law "is more like the Oriental mode of raising revenue by seizing property and refusing to return it than the mode usually adopted in British communities". Isaacs J identified s 167 as a law "for the relief of importers, and to enable them to obtain their goods without payment of duties they dispute"[103].

87 After the decision in *Sargood Bros*, s 167 was replaced by a provision which, so far as is presently relevant, is in the form applicable to this litigation[104]. As enacted in 1901, s 167 had stated:

> "If any dispute shall arise as to the amount or rate of duty or as to the liability of goods to duty the owner may deposit with the Collector the amount of duty demanded and thereupon the following consequences shall ensue:
>
> (1) The owner upon making proper entry shall be entitled to delivery of the goods.

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101 (1991) 32 FCR 243 at 247-253, 258-262.

102 (1910) 11 CLR 258 at 273.

103 (1910) 11 CLR 258 at 300.

104 The amendment was effected by the *Customs Act* 1910 (Cth). The words now appearing in s 167(3) were added by the *Customs Act* 1923 (Cth) after the decision in *Smith v Hudson* (1921) 21 SR (NSW) 557.

(2) The deposit shall be deemed the proper duty unless by action commenced by the owner against the Collector within six months after making the deposit the contrary shall be determined, in which case any excess of the deposit over the proper duty shall be refunded by the Collector to the owner with Five pounds per centum per annum interest added.

The provisions of this section shall not apply to any goods which may be detained or seized for undervaluation or in respect to which any attempt to evade the payment of duty may have been made."

This provision differed from that which replaced it in various respects. In particular, the replacement requires a protest, not merely a deposit by the owner.

88 The Collector submits that the provisions of s 167 and s 273GA provide an exhaustive prescription of the means whereby the owner of goods may recover sums paid to the Customs as duty where there has been a dispute as identified in *Kawasaki*. That, for present purposes, may be accepted. However, it is then submitted that in any case of a dispute as to the liability of goods to duty or the amount of duty, including a dispute which arises in an action brought by the Collector under s 153, the owner must pay the amount claimed under protest before, in the action in question, the owner can plead any issue concerning those matters.

89 In the Court of Appeal, Batt JA referred to the absence of any decision where, in a defence to a proceeding for the recovery of Customs duty, an owner had put in issue the rate or amount or dutiability[105]. However, the wide operation of the definition of "owner" means that there will be cases, of which *Wing On* is one, where actions will be brought under s 153 after the goods in question have been entered for home consumption. It would be an odd result in a case such as *Wing On* were the defendant to be denied the opportunity to resist the recovery action on the grounds that the duty was not clearly exigible, because an earlier owner had not taken the point and paid under protest to obtain release of the goods.

90 The decisions of this Court in *R v Comptroller-General of Customs; Ex parte Woolworths Ltd*[106] and *R v Collector of Customs (Vict); Ex parte Berliner*[107] established that s 167 in its post-1910 form is a provision for the

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105 [1999] 2 VR 38 at 50-51.

106 (1935) 53 CLR 308.

107 (1935) 53 CLR 322.

benefit of the owner; to the owner the section gives a right to establish in a court exercising the judicial power of the Commonwealth that the duty demanded is excessive or not warranted at all. Further, those authorities decided that the importer could not be deprived of the substance of this right by Customs refusing to release goods unless the importer furnished security under s 42 of the Act on a condition that the security should belong to the Commonwealth if the importer failed to demonstrate to the satisfaction, not of a court but of the Collector, that the importer had correctly stated the value. *Woolworths* and *Berliner* were successful applications for mandamus obliging the Collector to determine the value of the goods in question, to demand duty therefor, to accept payment thereof under protest pursuant to s 167, and to pass an entry accordingly.

91 It is true that the right identified in these cases has attached to it conditions and qualifications designed to balance the interests of the owner with those of the Revenue. To this, further reference will be made hereunder. However, the essential flow in the submissions for the Collector in this case is clear enough. The Collector seeks to turn s 167 on its head so that it limits the rights of owners in situations to which s 167 is not addressed.

92 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. This provision has no application to the present litigation. The appellant has paid no sum in respect of the duty claimed by Customs, so no question arises respecting any action by the appellant to recover such a sum.

93 The exclusion effected by s 167(4) in respect of actions for recovery of moneys paid does not affect rights or powers under the rebate provisions of s 163. Section 167(5) so states. Those rebate provisions may give rise to an action in debt against the Commonwealth in the circumstances considered in *The Commonwealth v SCI Operations Pty Ltd*[108]. The rebate provisions have no operation in the present case.

94 In *Dahlia Mining Co Ltd v Collector of Customs*[109], Giles J held that the procedures under s 167(2) and s 273GA(7) are true alternatives and that, where the AAT determines that duty is not payable, the duty paid under protest may be recovered in an action for money had and received and the prohibition imposed by s 167(4) upon a common law action does not apply. It is unnecessary for this appeal to determine whether this construction of the Act was or was not correct. No question respecting review by the AAT arises here.

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108 (1998) 192 CLR 285 at 302-305 [31]-[41], 309-314 [56]-[67].

109 (1989) 17 NSWLR 688.

95 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 if the conditions spelled out in the section are satisfied. 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). 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. A question arises, which it is unnecessary to answer in this litigation, respecting the nature and operation of these conditions. Are they elements which go to the constitution of the statutory cause of action, as statements in *Smith v Hudson*[110] would indicate, or are they procedural requirements, failure to comply with which may be waived by the Collector or asserted by way of defence[111]?

96 If there is a dispute as to the amount or rate of duty payable in respect of any goods or as to the liability of any goods to duty, and if the owner pays under protest the sum demanded by the Collector as the duty payable, then, as against the owner of the goods, the sum so paid is "deemed to be the proper duty payable in respect of the goods" (s 167(1)). The term "deemed" is used here in the sense of "adjudged"[112]. That determination of the legal relations between the owner and the Collector stands unless a successful application be made to the AAT pursuant to s 273GA(2) or the owner brings the statutory recovery action within the times limited by s 167(4) and in that action the owner obtains a contrary determination.

97 The terms in which s 167 is cast distinguish between a dispute between the owner of goods and the Collector respecting the sum demanded by the Collector and actions for the recovery of moneys paid which lie at common law and under the statute. Here there was a dispute between the appellant and the Collector respecting the sum demanded as a debt due and payable by the appellant for duty. However, that dispute did not lead to the taking by the

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110 (1921) 21 SR (NSW) 557 at 562, 563, 564.

111 See *Harding v Lithgow Corporation* (1937) 57 CLR 186 at 193, 194-195, 198-199; *Scoles v Commissioner for Government Transport* (1960) 104 CLR 339 at 343-345; *Rudolphy v Lightfoot* (1999) 197 CLR 500 at 507-508 [10]-[11].

112 *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 at 65.

appellant of the step necessary to trigger the operation of s 167 in any of its aspects, namely payment under protest. Why, it might be asked, would the appellant be expected to take that initiative and thereby give rise to the adverse legal relationship presumed against it by s 167(1) where it had no need of the advantage in other situations this might bring to the owner, namely the release of goods under the control of Customs?

98 The dispute took a quite different course, the institution of a recovery action by the Collector. In that action, the Collector pleaded an agreement that the appellant pay "any additional duties demanded by the [Collector]" and asserted that it was upon this undertaking the Collector had agreed to release the goods into home consumption. The appellant denies the making of that agreement. This presents an issue for the trial of the action. The Collector may succeed at trial in establishing a contractual term that the additional duties demanded be paid, whether or not legally exigible. If that term survives any challenge to it made on the ground that it "is an indirect means of imposing a tax other than that authorized by the statute"[113], the appellant will suffer recovery on this contractual basis. If the Collector does not succeed in contract, the appellant will be left with its defence to the recovery action that the debt claimed is not due and payable because it is not in respect of a revenue liability imposed by law.

99 The operation of s 167 has not been engaged. Upon its proper construction, that provision does not require an owner sued by the Collector for the recovery of a debt for due and owing but unpaid duty, to place that indebtedness in issue, not by its defence to that action, but by payment "under protest" followed by institution of a recovery action against the Collector under s 167.

100 The appeal should be allowed with costs. The orders of the Court of Appeal should be set aside and in place thereof it should be ordered that the appeal to that Court be dismissed with costs.

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113 *R v Comptroller-General of Customs; Ex parte Woolworths Ltd* (1935) 53 CLR 308 at 320.

101 KIRBY J. In this appeal[114] this Court is once again faced with a contested issue of statutory construction. The statute in question is the *Customs Act* 1901 (Cth) ("the Act"), as read with the *Customs Tariff Act* 1982 (Cth).

102 The question in contest has not been the subject of any authoritative determination by this Court. In a recent appeal it was mentioned in passing. But it did not then have to be decided and I expressly reserved it[115]. It now requires decision. The fact that the issue has not previously arisen for determination, in the operation of an Act that has applied during virtually the entire history of the Commonwealth, was itself a matter of comment. Indeed, the absence of prior authority, on a question so basic to the rights and liabilities of those subject to customs duties under the Act, was said to be an argument in favour of the correctness of the decision now under appeal.

The proper approach to contested statutory interpretation

103 The correct approach to problems of the present kind involves an appreciation of the fact that, in cases of statutory ambiguity such as reach this Court, there are ordinarily strong arguments that can be marshalled for the competing points of view. Rarely is a single construction clearly applicable: "The judicial task is to seek out and to declare the preferable construction ... Only then does it become the one interpretation which the law holds to be correct."[116]

104 Differences of opinion often arise in giving meaning to statutory language. This is because different readers approach the task of construction differently[117]. They may or may not be inclined to examine the contested words in a wider context, having regard to perceived considerations of policy. In my view, the task is to be informed by an endeavour to uphold the purpose of the legislation, derived from a search that goes beyond a study of its words viewed in isolation

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114 From a judgment of the Court of Appeal of the Supreme Court of Victoria: *Stretton v Malika Holdings Pty Ltd* [1999] 2 VR 38.

115 *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 328, n 165(c).

116 *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 140; see also *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 189 CLR 407 at 441, 463; *Cannane v J Cannane Pty Ltd (In Liq)* (1998) 192 CLR 557 at 591 [92].

117 For a history of, and current approaches to, the textualist interpretive method in the United States see Manning, "Textualism and the Equity of the Statute", (2001) 101 *Columbia Law Review* 1 especially at 115-119 ("Manning").

from matters of policy and object[118]. People, including lawyers, do not ordinarily communicate with each other by segmented words and phrases. There is no reason for judges to impose such an approach on statutory construction[119]. The usual unit of communication in the English language is the sentence. But even a sentence must be understood in the context of surrounding sentences, the subject matter of discussion and any shared understandings of those in communication[120]. Whilst it is natural, in argumentation, to direct a court's attention to particular words and phrases, the ultimate task of construing legislation invokes a more complex judgment. It is one that is only reached when all applicable provisions have been viewed in their totality and a conclusion derived as to the meaning that best achieves the imputed object of the legislation.

105 In the Supreme Court of Victoria, the primary judge favoured one construction of the meaning of the Act[121]. The Court of Appeal upheld the other[122]. I accept that each opinion is arguable. In the result, however, I, along with the other members of this Court, have reached the same conclusion as the primary judge. I will explain the main considerations that have brought me to that conclusion. But to demonstrate that the outcome was disputable, I will acknowledge a number of considerations which, in my view, favour the opposite result.

The facts, litigation and relevant legislation

106 The facts concerning the dispute between Malika Holdings Pty Ltd ("the appellant") and Ms Virginia Stretton, in her capacity as Regional Director of the Australian Customs Service for the State of Victoria ("the respondent") are set out in the reasons of the other members of the Court[123]. So is the history of the

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118 *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423-426 per McHugh JA.

119 *R v Brown* [1996] AC 543 at 561 per Lord Hoffmann, applied in *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 397.

120 cf *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285.

121 *sub nom Griffiths v Malika Holdings Pty Ltd* unreported, Supreme Court of Victoria, 20 October 1994, Gray J.

122 *Stretton v Malika Holdings Pty Ltd* [1999] 2 VR 38, Batt JA (Winneke P and Charles JA concurring).

123 Reasons of McHugh J at [11]-[13]; reasons of Gummow and Callinan JJ at [57]-[58].

litigation, including the commencement by the respondent of a claim for duty alleged to be payable by the appellant to the respondent. The duty is described as a "debt due and payable to the Crown" or alternatively as a debt payable by virtue of "an agreement" made between the parties pursuant to which the respondent agreed to release the goods in question into "home consumption upon the [appellant's] undertaking to pay any additional duties demanded by the [respondent]"[124].

107 The history of the proceedings in the Supreme Court of Victoria is sufficiently recounted and there is no need for me to repeat it[125]. Likewise, the applicable provisions of the Act, as they appeared before[126] and after[127] relevant amendments (but ignoring minor changes that have occurred since the events in question[128]), are all contained in the reasons of my colleagues. I incorporate them by reference.

108 The most important provisions of the Act to be considered for the purposes of this appeal are those of ss 153 and 167, as they stood at the time applicable to these proceedings[129]. The fundamental question presented is whether s 167 of the Act constituted the only means by which the owner of goods imported could challenge the amount, and rate, of the liability of such goods to customs duty[130]. Or, if not, whether the proceedings brought by the respondent are to be viewed as nothing more than an action to recover "[a]ll duties ... constitut[ing] Crown debts charged upon the goods in respect of which the same are 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"[131].

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124 Statement of claim.

125 Reasons of McHugh J at [16]-[25]; reasons of Gummow and Callinan JJ at [58]-[61], [78], [89].

126 The Act, s 167, as originally enacted, is set out in the reasons of Gummow and Callinan JJ at [87].

127 s 167, as amended by *Customs Act* 1910 (Cth). The method of "Pay[ing] under protest" required by s 167(3) was amended by the *Customs Act* 1923 (Cth). See reasons of McHugh J at [14] and reasons of Gummow and Callinan JJ at [80].

128 See *Stretton v Malika Holdings Pty Ltd* [1999] 2 VR 38 at 44-45; see also reasons of McHugh J at n 5.

129 Reasons of McHugh J at n 5.

130 *Stretton v Malika Holdings Pty Ltd* [1999] 2 VR 38 at 46.

131 The text of s 153 of the Act.

109 In the relevant paragraph of the respondent's statement of claim in the Supreme Court of Victoria, she asserted that the amount of duty demanded constituted "a debt due and payable to the Crown", an obvious reference to s 153 of the Act. So the issue for decision ultimately became the narrow one of whether, by its terms and purposes, as viewed in the context of the Act, s 167 obliged the appellant, if it disputed "the amount or rate of duty payable in respect of [such] goods" or "the liability of any goods to duty, under any Customs Tariff" to "pay under protest the sum demanded by the Collector" or, in default of doing so, lose the right to dispute the amount or rate or liability in question.

110 So presented, the issue is relatively straight-forward and confined. This Court is not concerned with the contested factual questions that might arise about the alleged special "agreement" between the appellant and the respondent pursuant to which the goods were released into home consumption. Nor is this Court concerned, as such, with the legal or factual arguments by which the appellant disputes its liability (contesting, in essence, that, although claimed as "duty" and asserted to be such, the amount involved is not a "duty" as the Act imposes it and thus not payable by it to the respondent). These are questions which would arise in any proceedings between the parties. However, first it is necessary to determine whether the appellant is entitled to raise such questions at the trial or, for being in default of compliance with s 167 of the Act, is prevented from doing so.

111 This Court is also unconcerned (except as it touches upon the operation of s 167 in the scheme of the Act) with the respondent's assertion that, even at this late stage, it was open to the appellant to pay the duty in question under protest and subsequently pursue whatever remedies it might have in that regard[132]. Such remedies might arise either by "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"[133] or by application to the Administrative Appeals Tribunal for review of the respondent's decision to demand the sum paid under protest[134]. The appellant has not taken that course. It asserts that it is not obliged to do so. It accepts that payment under protest, and pursuit of consequent remedies against the respondent, were options available to it. But the essence of the disagreement between the parties lies in the appellant's contention that s 167 of the Act does not foreclose other avenues to contest the amount or rate or liability to duty and the respondent's contention that it does.

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132 Respondent's written submissions.

133 The Act, s 167(2).

134 The Act, s 273GA(2); see reasons of Gummow and Callinan JJ at [81]-[82].

The arguments for the respondent's meaning

112 The arguments for the meaning urged by the respondent are contained in the reasons of Batt JA in the Court of Appeal, which became those of the Court[135]. They are carefully reasoned and, for a time, they held my support. The most important arguments for the respondent's meaning of the Act are as follows.

113 First, s 167 of the Act must be given meaning in a context, reflected in the long history of Customs legislation and in the light of the provisions of other sections of the Act. The respondent is required by law to impose duties of customs upon the importation of goods into Australia. She is required to collect those duties. Such duties are imposed and rendered payable by the owner at the time the goods enter into Australia[136]. The legislative scheme, reflected in the Act, has therefore long favoured the exaction of the payment of duty as a precondition for the entry of the goods in question into this country[137]. This is not a Draconian invention of the Federal Parliament. It was the approach long followed in England in the nineteenth century[138]. A similar approach has been adopted in the United States of America both in the past[139] and at present[140]. It

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135 *Stretton v Malika Holdings Pty Ltd* [1999] 2 VR 38.

136 *R v Lyon* (1906) 3 CLR 770 at 777-779 per Griffith CJ; *Wilson v Chambers & Co Pty Ltd* (1926) 38 CLR 131 at 140-141, 150-151; *Wing On & Co Ltd v Collector of Customs (NSW)* (1938) 60 CLR 97 at 99-100 per Starke J; affd (1938) 60 CLR 101 at 105-107 per Latham CJ, 109-110 per Dixon J; *Carmody v F C Lovelock Pty Ltd* (1970) 123 CLR 1 at 7-8 per Barwick CJ, 12 per Menzies J, 26 per Gibbs J; *Conga Foods Pty Ltd v Chief Executive Officer of Customs* [1999] NSWCA 237 at [4].

137 The Act, s 132; cf *R v Lyon* (1906) 3 CLR 770 at 777-779. Section 132 of the Act, as first enacted, provided that: "All import duties shall be paid at the rate in force when the goods are entered for home consumption." Subsequently that section was deleted. Notwithstanding this, in *Carmody v F C Lovelock Pty Ltd* (1970) 123 CLR 1 at 22-23, Gibbs J remarked that, despite the absence of such a provision, any amount short levied should be paid by the person who was liable to pay the duty.

138 *The Attorney-General v Ansted* (1844) 12 M & W 520 [152 ER 1304]; *Canada Sugar Refining Company v The Queen* [1898] AC 735 at 740-741; cf Wollaston, *Customs Law* (1904) at 78-79.

139 *United States v Cobb* 11 F 76 (1882).

140 *United States v Cherry Hill Textiles Inc* 112 F 3d 1550 (1997).

was also the approach followed in the Australian colonies prior to federation[141]. Its history is described in much authority, including recent authority, in Australian courts[142]. It is a history that arose out of the obvious difficulty confronted by any customs service of tracing goods once they have entered into home consumption and thereafter recovering duty levied in respect of them. Moreover, the owner, at least if it is the importer, will usually be in the best position to discharge the onus of establishing the identity, nature and quality of the goods in question. For these reasons it is not wholly unreasonable effectively to place the onus upon it to do so. The arguments about the suggested unfairness of the construction of s 167 of the Act, of which the appellant complains, have to be weighed in the context of this legal history and policy. When viewed in that context, the construction urged by the respondent would not be a particularly novel one.

114 Secondly, when considered against this background, the provisions of s 167 can be seen as constituting a special scheme (whether strictly a "code" or not) by which the Parliament has provided for a particular procedure to be followed where there is "any dispute … as to the amount or rate of duty payable in respect of any goods, or as to the liability of any goods to duty"[143]. Having so expressly provided, it would ordinarily be taken that other general provisions in the Act, relating to circumstances of disagreement between the Collector and the owner of imported goods or disputes other than those expressly mentioned in s 167(1) of the Act, should be read as subject to that sub-section. The general must give way to the particular. Where a dispute of the particular variety arises (of which the present is one) it would not be very surprising if it were to be determined in favour of the single and special way afforded by the Parliament and no other way.

115 Thirdly, various textual indications in s 167 of the Act (and by way of contrast in s 165) give a measure of support to these arguments. Thus s 167(1) opens with words of considerable width ("any dispute"). Such broad language would not ordinarily be read down so as to confine it to a dispute in pending litigation. Moreover, the kind of "dispute" which the sub-section proceeds to identify represents a comprehensive list of matters in contest. And the operation of s 167(1) is triggered by a "sum" being "demanded by the Collector as the duty payable in respect of the goods". The section is to apply "unless the contrary is

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141 *Sargood v The Queen* (1878) 4 VLR L 389.

142 *Comptroller-General of Customs v Kawasaki Motors (No 2)* (1991) 32 FCR 243 at 263-264.

143 The Act, s 167(1).

determined in an action brought in pursuance of this section"[144]. That provision takes the reader to s 167(4). By that sub-section "[n]o action [is to] lie for the recovery of any sum paid to the Customs as the duty payable in respect of any goods, unless [such] payment is made under protest in pursuance of [s 167]".

116 Fourthly (and I view this as the most telling argument) unless such a construction is given to s 167, so that it represents the exclusive mechanism for resolving disputes as to the amount or rate or liability to duty under the Act, the effect is substantially to erode the practical operation of the section. Its obvious purpose was to give very significant advantages to the Collector. It was to assure the recovery of the "sum demanded", although the same had normally to be paid "under protest". If, notwithstanding s 167, it were to remain open to the owner to raise in a court, in objection to an action by the Collector for the recovery of duty, every argument of law and fact amounting to a "dispute" as to the amount or rate or liability to duty, the essential point of payment "under protest" would be at risk of being lost. Notwithstanding the absence of "protest", the owner could proceed to plead its objections. If this were what the Act permitted, it would effectively make it easy for the owner, at least in certain cases, to avoid the scheme for payment under protest and yet maintain the objections contemplated by s 167. If this were legally possible, it could be expected that, normally, office-holders in the position of the respondent might return to the customs practices of the nineteenth century. They might refuse to release goods, the subject of dispute, until duty was paid in full. They might spend much more time scrutinising such goods for fear of losing the advantages which the scheme of s 167 of the Act is designed to reserve to the Collector.

117 Fifthly, so far as the use in s 167(1) of the word "may" is concerned ("the owner of the goods *may* pay under protest the sum demanded") the respondent disputed that this was used in a permissive sense, expressing no more than an option which the owner might, or might not, take. Instead, according to the respondent, in its context, the word was to be understood as contemplating a distinction between the owner's privilege not to challenge the sum demanded (in which event the duty would have to be paid) or, if the demand were to be challenged, to pay under protest the duty levied. Thus, there was indeed an option. But it was only an option to pay with or without challenge.

The appellant's meaning is preferable

118 Notwithstanding these arguments, which were put persuasively on behalf of the respondent, I have concluded that the better view of s 167 of the Act is that it does not constitute an exclusive scheme that ousts, in an action to recover the

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144 The Act, s 167(1).

duty, the entitlement of the appellant to contest the lawfulness of the duty purportedly imposed on it. My reasons are as follows.

119 First, it is important to start from a point of principle. The appellant has been sued in an action at law in a court of law of the Australian Judicature. The duty of such a court is to determine the lawfulness of the claim and of any defence that may be mounted in resistance to it. Ordinarily, if a repository of statutory powers can be shown to have exercised those powers otherwise than in accordance with law, such a demonstration will constitute a defence to a claim resting on such purported exercise[145]. This is so, because only if the repository of the powers has acted in accordance with law will it be entitled to extract money from, or otherwise burden, the individual concerned.

120 In the Australian Commonwealth, this feature of constitutional government and the rule of law is given constitutional effect by the provision rendering all officers of the Commonwealth (such as the respondent) directly accountable to the jurisdiction and powers of this Court to establish (where it is contested) the constitutionality and lawfulness of their actions[146]. These simple truths do not resolve the question of whether the terms of s 167 of the Act are such that, unless invoked by an owner in the position of the appellant, no other means is available to permit a disputed liability to duty to be raised. But the constitutional context and the ordinary assumption of our legal system are such that one would usually anticipate that any legislation depriving an owner of the right to raise, in defence of proceedings against it, arguments contesting legal liability to the claim, would be expressed with clarity and without ambiguity[147].

121 I agree with McHugh J[148] that contemporary applications of the principle that legislation is presumed not to erode fundamental rights unless this object is clearly expressed need to be considered in the context of the quantity and variety of legislation today. However, that still leaves much work for the presumption to perform. The key word is "fundamental"[149]. The presumption can be displaced

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145 Manning, (2001) 101 *Columbia Law Review* 1 at 119-120.

146 Ch III, especially s 75(v): see *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 80-81 [140]; 176 ALR 219 at 257-258; *Re Carmody; Ex parte Glennan* (2000) 74 ALJR 1148 at 1150 [4]; 173 ALR 145 at 147.

147 *Potter v Minahan* (1908) 7 CLR 277 at 304-306; *Bropho v Western Australia* (1990) 171 CLR 1 at 17-19.

148 Reasons of McHugh J at [26]-[31].

149 *Potter v Minahan* (1908) 7 CLR 277 at 304 set out in the reasons of McHugh J at [27].

or satisfied. But it is a very useful discipline for the Parliament and for those who draft legislation submitted to it for enactment. In the absence of full argument on the question, I would not be inclined to narrow the operation of the presumption. And in any case, the Universal Declaration of Human Rights, Art 17, like the Magna Carta (1215), cl 52, treats as "fundamental" the rule against arbitrary deprivation of property[150]. And the International Covenant on Civil and Political Rights, Art 14.1 treats as an entitlement, in the determination of rights and obligations in a suit at law, access to a competent, independent and impartial tribunal.

122 The respondent disputed the application of this principle of construction. She contended that there was no derogation from constitutional or common law rights, simply a search, by way of the procedure outlined by the Act, for what those rights were. I agree with her submission that there is no common law right to import goods into Australia without paying duty, imposed upon such goods by law, levied on behalf of the Collector in accordance with law. But this was not the point the appellant made. The common law privilege to which it appealed was different. It was the common law entitlement, ordinarily, to raise in defence of a claim at law, the fundamental objection that the claim was brought by a repository of statutory powers who, in the particular circumstances, had acted outside those powers. Such a defence may normally be raised by virtue of the assumptions inherent in the legislation conferring the powers, or by the application of the common law itself[151]. This was the rule of the common law to which the appellant appealed.

123 In Australia, this is reinforced, in the case of federal legislation and of officers of the Commonwealth, by the terms of the Constitution itself[152]. The appellant's point was that, if it were to be deprived of these basic entitlements, it was necessary for the Parliament to spell out the deprivation in clear and unmistakable language. The appellant was being sued by an officer of the Commonwealth. It was entitled to defend itself with law[153].

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150 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 658-659; cf Manning, (2001) 101 *Columbia Law Review* 1 at 119-120.

151 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 60-61 [38]-[39], 79-81 [132]-[143]; 176 ALR 219 at 230, 255-258.

152 See especially the Constitution, s 75(v).

153 cf *Sorrell v Smith* [1925] AC 700 at 715 where Viscount Cave LC spoke of the normal right of self-defence in actions of law: "The plaintiff struck the first blow, and when it was countered by a similar blow struck by the defendants ran to the Court for protection. His attitude recalls the saying of a French author: 'Cet animal

(Footnote continues on next page)

124 Secondly, according to the appellant the Act, when examined, did not unambiguously deprive it of the entitlement which it invoked. Indeed, the better view of the Act was that it contemplated alternative procedures, one only of which was that contained in s 167. Textual reinforcement for this last statement may be found in the language of s 167 itself. (1) The key verb ("may") is expressed in apparently permissive terms. This fact takes on added significance when the word is viewed, not in isolation, but in the context of the entire section and the surrounding sections. Thus, the verb used in s 165(1) is obligatory ("shall pay"). In s 167(4), the verb used is "shall". Similarly, where mandatory effect is intended in s 167, appropriate language is used. This differentiation, according to orthodox canons of statutory construction, suggests the deliberate and alternative use of obligatory and permissive language where each was intended. (2) Although the language to which s 167(1) attaches is cast in wide terms, it is not universal. Thus some "disputes" fall outside those that are specified. Presumably in such cases, even on the respondent's argument, s 167(1) would not be an exclusive scheme. Whilst the opening words "any dispute" are undoubtedly wide, they merely enliven whatever privilege or obligation s 167(1) enacts. The extent of that privilege or obligation is determined by the verb "may". It is difficult to turn that word into "shall", especially when the latter word appears in the same sub-section 25 words later. (3) The person who enlivens the entitlements under s 167(1) is "the owner of the goods". But as Gummow and Callinan JJ point out, that expression is given a wide and somewhat artificial meaning in the Act[154]. I agree that it would be an odd result for s 167(1) if the owner, in such an extended sense, were denied a right to which it would otherwise be entitled by law, to contest the lawfulness of a duty claimed against it, simply because an importer had not paid the duty payable under protest in accordance with s 167.

125 Thirdly, far from being a construction of the Act that defies the long history of customs law, various passages exist, in the early days of the Commonwealth, and in respect of the predecessor to the present s 167 of the Act, in which the procedure of payment under objection, contemplated by the section, is described as optional[155]. Dr Wollaston, first Permanent Head of the Department of Trade and Customs and Comptroller General of Customs for the Commonwealth, writing in 1904, suggested that "when a duty or obligation exists

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est très méchant; quand on l'attaque, il se défend." (This animal is very wicked; when it is attacked, it defends itself.)

154 See the definition of "owner" in s 4(1) of the Act set out in the reasons of Gummow and Callinan JJ at [71].

155 cf *Sargood Bros v The Commonwealth* (1910) 11 CLR 258 at 277-278.

at common law independently of a Statute, a new remedy given by the latter is simply cumulative and does not preclude the ordinary common law remedy by way of action unless there are express words to that effect"[156]. On that footing, Dr Wollaston so regarded the original s 167. He noted that in the United States any other remedy had been expressly taken away, but added "not so here"[157].

126 The suggestion by the Court of Appeal that this construction was overtaken by the later insertion in s 167 of sub-s (4) is unconvincing[158]. By its terms, that sub-section attaches only where a sum has been "paid to the Customs as the duty payable". In other cases, of which the present is one, where no such payment has been made, the permissive words of s 167(1) remain. They sustain the impression which Dr Wollaston expressed so long ago. One might be forgiven for according additional weight to that impression because it was expressed contrary to the interest of the Comptroller General. It is preferable to the approach now asserted by a successor nearly a century later, treating s 167(1) as an exclusive "code" which, unless invoked, denies the owner rights to defend itself at law against claims to duty which it contests.

127 Fourthly, there is the point last mentioned in the quotation from Dr Wollaston's early work. Where a legislature wishes to provide an exclusive scheme, subject to the Constitution, it is always open for it to do so. The Parliament can expel entitlements, which would ordinarily be enjoyed by an individual in our society, to contest the lawfulness of a governmental imposition, subject to any constitutional constraint. It may be done by clear language, as it was, long ago, under the applicable United States legislation[159]. Yet notwithstanding Dr Wollaston's 1904 warning, the Parliament of the Commonwealth has not done so. It did not, for example, despite many amendments of the Act, and even of the section, introduce (as it might have done) provisions akin to those adopted in income tax law[160] constituting an assessment as conclusive evidence of the matter stated in it. It may be said by the respondent, in fairness, that the absence of prior challenges of the present kind suggests a widely held or common assumption that s 167 had the effect argued for by the respondent in this appeal. So much may be true. But when, as in this case, the spotlight of attention is placed upon the section, it requires

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156 Wollaston, *Customs Law* (1904) at 115.

157 Wollaston, *Customs Law* (1904) at 115.

158 *Stretton v Malika Holdings Pty Ltd* [1999] 2 VR 38 at 50.

159 *United States v Cobb* 11 F 76 (1882); see now *United States v Cherry Hill Textiles Inc* 112 F 3d 1550 at 1552 (1997).

160 *Income Tax Assessment Act* 1936 (Cth), s 177.

substantial surgery to get it to perform the work which the Parliament might have obviated, in order to reverse the interpretation which Dr Wollaston accepted so long ago.

128 Fifthly, so far as the most telling argument for the respondent is concerned, that the construction urged for the appellant allows an owner to walk out of the requirements of s 167 and to reserve all of its rights, too much weight should not be given to this submission. The Collector remains in a dominant position. The Collector may decline to give permission to remove goods subject to the Custom's control, as contemplated by s 40AA of the Act. The Customs retain the right to require, and to take security for, compliance with the Act[161]. Pending the giving of the required security in relation to any goods subject to the control of the Customs, it may refuse to deliver the goods or to give any authority under the Act to deal with the goods.

129 Moreover, the Customs, being a revenue raising agency of the Commonwealth, is in a much better position to promote and obtain amendment to the Act, than is the ordinary owner or importer of goods. If, when analysed, the Act turns out to be different in its effect from previous assumptions, the Collector can propose an amendment. If it is truly intended that s 167 of the Act should be an exclusive scheme, to be observed in every case where there is a dispute as to the amount or rate or liability to duty (such that no equivalent dispute may be raised in any other way), such a provision could be enacted in plain terms. This, rather than the inconvenient withholding of goods (costly to the Customs as to the owner), is the more likely outcome of such a construction of s 167 if the favoured construction proves inconvenient or uncongenial. The ambiguities of the Act will then be removed. Obligations will be clearly imposed on the owner of goods which, at the moment, are at best implicit and uncertain. Responsibility for depriving owners of basic civil rights otherwise belonging to them will be accepted by the Parliament to the extent that the Constitution permits.

Conclusion and orders

130 The result is that I regard the construction of the Act urged for the appellant to be the preferable one. It is more faithful to the permissive language in which the Act is expressed. It is consonant with legal history and early opinions about the Act's operation. And it is consistent with the contrast between the terms of the Act and other legislation effecting the result desired by the respondent. Most importantly, it resolves in favour of the appellant an ambiguity that exists in the Act that may be changed, if that be the Parliament's purpose and it acts as the Constitution allows. It is an ambiguity that should be resolved as

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161 The Act, s 42(1).

the appellant submits because, otherwise, the appellant is denied a chance to defend itself in an action at law before a court on the basis that the respondent's claim against it is not a "duty" in accordance with law.

131 In our society, and under the Constitution, very clear language is required to deprive a person of the right to contest before a court the lawfulness of official action. Especially is this so where the action concerned is that of an officer of the Commonwealth that must ordinarily, when challenged, be justified by reference to federal law and ultimately to constitutional authority.

132 It is not necessary for this Court itself to answer the questions reserved by the primary judge. Ordering that the appeal from his orders be dismissed will have that effect by confirming those answers. I therefore agree in the orders proposed by Gummow and Callinan JJ.