

# HIGH COURT OF AUSTRALIA

GLEESON CJ,  
McHUGH, GUMMOW, CALLINAN AND HEYDON JJ

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THE CHIEF EXECUTIVE OFFICER OF CUSTOMS APPELLANT

AND

GRANITE ARMS PTY LTD & ANOR RESPONDENTS

*The Chief Executive Officer of Customs v Granite Arms Pty Ltd*  
[2005] HCA 51  
8 September 2005  
B77/2004

## ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 30 March 2004 and in their place order that:*
  - (a) *the appeal to that Court be allowed with costs;*
  - (b) *the orders of the Federal Court of Australia made on 23 May 2003 be set aside and on the cross-claim, it be declared that handguns imported into Australia under cover of entry for home consumption 2E.0129.0382E are "special forfeited goods" within the meaning of the Customs Act 1901 (Cth); and*
  - (c) *the respondents pay the appellant's costs of the cross-claim.*

On appeal from the Federal Court of Australia



**Representation:**

C M Maxwell QC with R M Niall for the appellant (instructed by Australian Government Solicitor)

B W Walker SC with M B Evans and F H Martin for the respondents (instructed by Roberts & Kuskie)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## **CATCHWORDS**

### **Chief Executive Officer of Customs v Granite Arms Pty Ltd**

Customs – Importation of handguns – Requirement in sub-item 4.1(a) of the Customs (Prohibited Imports) Regulations 1956, Sched 6, Pt 1 ("the Regulations") that the importer of a handgun has been given a statement by police authorities to the effect that the importer holds a licence or authorisation according to the law of the relevant State or Territory to possess the handgun or that such licence or authorisation is not required under the law of the relevant State or Territory – Second respondent had contracted to purchase handguns but its import permit was subsequently rescinded by the Queensland Police Service – Handguns were then consigned to first respondent in Victoria – Whether the guns were liable to condemnation as forfeited to the Crown – Whether a consignee of handguns is "the importer" of the articles for the purposes of the Regulations.

Words and phrases – "importer".

*Customs Act* 1901 (Cth), s 68.

Customs (Prohibited Imports) Regulations 1956, Sched 6, Pt 1.



1 GLEESON CJ, McHUGH, GUMMOW, CALLINAN AND HEYDON JJ. This appeal from the Full Court of the Federal Court<sup>1</sup> turns upon construction of the provisions of the Customs (Prohibited Imports) Regulations (Cth) ("the Regulations"), read with the *Customs Act* 1901 (Cth) ("the Act") and applied to somewhat unusual facts. Those facts are not the subject of any significant dispute.

2 Mr Garnet Featherstone is the principal of the first respondent ("Granite Arms") which carries on from premises in Victoria the business of trading in firearms and firearm parts. Mr Featherstone described Mr Ron Owen, the principal of the second respondent ("Omeo Way") as a trusted business friend. Omeo Way conducts a business of trading in firearms and firearm parts from premises in Queensland. Mr Owen described Mr Featherstone as a trusted business associate.

3 On 3 January 2000 Omeo Way agreed to purchase from the Wong Long Development Co Ltd ("Wong Long"), which carried on business from an address in Beijing, China, 3000 Norinco M213 pistols. The written sales contract provided for a first shipment of 1000 pieces and a second shipment of 2000 pieces. In each case the shipment was to be from an airport in China to Brisbane. On 19 January, 8 March and 19 April respectively, Omeo Way paid for the entire order of 3000 pistols by telegraphic transfers of \$US43,362, \$US33,762 and \$US67,452. The contract provided for the last payment to be made one week before the second shipment, that of the 2000 pieces. This case concerns that shipment. The last payment was made on 19 April and the second shipment arrived at Tullamarine Airport on 3 May. This is the critical date for the form of the legislation applicable to this case.

4 Section 50 of the Act provides for the making of regulations which prohibit the importation of goods into Australia unless specified conditions or restrictions are complied with (s 50(2)(c)). The pistols purchased by Omeo Way were firearms within the meaning of the definition in reg 4F(4) of the Regulations, and their importation into Australia was prohibited unless the cumulative criteria of reg 4F(1) were satisfied. First, the pistols were required to be articles to which an item listed in Pt 2 of Sched 6 to the Regulations applied; this criterion was satisfied. Secondly, the importation was to be in accordance with the requirements set out in column 3 of that item. These requirements, as relevant to this case, were that the importation comply with the "Police

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1 (2004) 136 FCR 515.

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authorisation test" and that the pistols comply with certain safety requirements. The safety requirements were set out in item 1 of Pt 3 of Sched 6. The effect of sub-item 1.5 was that each pistol had to "comply with the requirements of sub-items 1.6 to 1.9 (inclusive), tested in accordance with arrangements approved, in writing, by the Attorney-General".

5        It is well settled that the power conferred by s 50 of the Act may be used to assist the executive branch of government in the pursuit of policies it considers conducive to the welfare of the Commonwealth. The provision in the Regulations considered in *R v Anderson; Ex parte Ipec-Air Pty Ltd*<sup>2</sup> gives a well-known example.

6        Regulation 4F and Sched 6 were introduced in 1996 by the Customs (Prohibited Imports) Regulations (Amendment)<sup>3</sup> and had been amended before 3 May 2000, principally in 1998 by the Customs (Prohibited Imports) Regulations (Amendment)<sup>4</sup>. The 1996 Explanatory Statement stated that the changes were designed to introduce "a new, simplified structure for the control of the importation of firearms into Australia" and continued:

"Following the Port Arthur tragedy, the special meeting of the Australasian Police Ministers' Council (APMC) on 10 May 1996 adopted a number of resolutions aimed at effective national firearm controls."

The 1998 Explanatory Statement referred to the agreement during 1996 by all Australian governments on a national scheme to control the circulation of firearms in Australia and stated that the amendments to the Regulations were designed to ensure the access regime was uniform throughout the Commonwealth.

7        In the events that happened in the present case, difficulties arose in satisfaction of the testing requirements for the second shipment. But the litigated issues turn upon the operation of the "Police authorisation test". This was detailed in item 4 of Pt 1 of Sched 6 to the Regulations.

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2    (1965) 113 CLR 177. See also *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 136 CLR 1.

3    SR 91 of 1996.

4    SR 52 of 1998.



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8       Item 4 made special provision for what was identified as "a category C article". The terms in which this category was identified throw light upon the subject, scope and purposes of the Police authorisation test as a whole. For a category C article "the importer" was obliged to hold the requisite certificate "that the importer is a primary producer"<sup>5</sup>. Taken apart from this context the term "importer" might be thought to identify no more than a person who brings an article into Australia from an external source, so that the term has no concern with the relationship of any person with the article once that process has ended by the passing of the article for home consumption under the Act<sup>6</sup>. However, the provisions in item 4.1 respecting category C articles show that the Police authorisation test which item 4.1 details is concerned with more than the activity of introduction of the articles into Australia. Rather, the test also looks to the subsequent character and activities of the importer. Underpinning the scheme of the Regulations in question is the concern for public safety manifested in the Explanatory Statements which are mentioned above. The Regulations thus are to be construed with regard to more than the fiscal considerations which have guided the construction of the legislation in other cases<sup>7</sup>.

9       The Regulations imposed a requirement<sup>8</sup> that "the importation" must comply with at least one of four "tests" set out in Pt 1 of Sched 6. The "test" critical for this case was, as noted above, the "Police authorisation test" detailed as item 4 of Pt 1. The others were the "Official purposes test", the "Specified purposes test" and the "Specified person test". The content of these tests was found in items 1, 2 and 3 of Pt 1 of Sched 6. The first and third of these items are significant. The first dealt with importation for the purposes of the government of the Commonwealth, a State or a Territory and specified retention of government ownership after importation. The third dealt with cases where "the importer" had as the principal or only occupation "the business of controlling vertebrate pest animals on rural land"<sup>9</sup>. Here, as with item 4, the "Police

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5   Sub-item 4.1(b).

6   See *Siemens Ltd v Schenker International* (2004) 216 CLR 418 at 451-452 [95]-[97].

7   These include *Wilson v Chambers & Co Pty Ltd* (1926) 38 CLR 131; *R v Bull* (1974) 131 CLR 203.

8   Column 3, Pt 2, Sched 6.

9   Sub-item 3.2(a), Pt 1, Sched 6.

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authorisation test", the prohibition imposed by reg 4F is lifted by the satisfaction of criteria which fix upon activities with respect to the goods after importation has been completed.

10 This case turns not upon the particular provisions in sub-item 4.1(b) concerning category C articles nor upon any of the other items mentioned above, but upon the operation of par (a) of item 4.1. This is in more general terms and provides for compliance with the Police authorisation test that:

"*the importer* of the article has been given a statement, in an approved form, to the effect that the importer holds a licence or authorisation according to the law of *the relevant State or Territory to possess* the article, or that a licence or authorisation to possess the article is not required under the law of the relevant State or Territory, and the statement is given by:

- (i) for a State – by the Commissioner or Chief Commissioner of the police force of the State; and
- (ii) for the Northern Territory – the Commissioner of Police of the police force of the Northern Territory; and
- (iii) for a Territory other than the Northern Territory – the Chief Police Officer of the Australian Capital Territory". (emphasis added)

11 The respondents contend, as they did successfully at trial and to a majority of the Full Court (RD Nicholson and North JJ; Kiefel J dissenting), that in the events that happened Granite Arms was "the importer" of the shipment of 2000 pistols and the Police authorisation test was satisfied because Granite Arms held a licence or authorisation "to possess" the pistols under the law of Victoria, which was "the relevant State" for item 4.1(a).

12 The appellant ("the Chief Executive") denies that the Police authorisation test was satisfied; the use of the definite article in the phrase "the importer" identifies but the one entity (individual, partnership or corporation) among all the parties that may play a part in the introduction of imported goods into Australia, and Granite Arms was not that one designated entity. Those submissions should be accepted and the appeal allowed. We turn to explain why this is so.

13 On 10 February 2000, a month after the date of the contract between Omeo Way and Wong Long, an officer of the Queensland Police Service issued a written confirmation that, for the purposes of reg 4F and Sched 6 to the

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Regulations, Mr Owen held a licence or authorisation under Queensland law to possess the 2000 pistols. A permit in respect of the first shipment of 1000 pistols had been issued on 10 January 2000.

14           However, on 24 February 2000, the responsible officer of the Queensland Police Service wrote to Mr Owen's solicitors in part as follows:

"The assertion that your client will continue to modify category H weapons by a method that is considered to be in breach of *Section 7(1) of the Weapons Act 1990* [(Q)] and *Sections 73(2) to (5) of the Weapons Regulation 1996* [(Q)] is of great concern to the Queensland Police Service.

This is a serious matter of public interest and safety. Accordingly I have rescinded import permits number 061583 issued on 10 January 2000 and 060596 issued on 10 February 2000."

15           Mr Owen's affidavit evidence was that Omeo Way then had to decide to where the pistols should be shipped in substitution for the destination of Brisbane stipulated in the contract with Wong Long. It was the intention of Omeo Way that "the goods were to be wholesaled to [Licensed] Dealers throughout all States of Australia". The decision was made to consign them to Granite Arms in Victoria. In that regard, Mr Featherstone's affidavit evidence with respect to the goods was:

"I offered to apply for an Import Permit and Import them using my Customs Agents in Melbourne. We discussed the issues that [Omeo Way] would pay for all expenses and outgoing, with Freight On Board for Customs Clearance, Freight and such like and Mr Owen asked me if I wished to charge him a fee for being the Importer. I said that as it would not cost me anything I would do it as a favour."

16           The last sentence is significant. There was an understanding or arrangement between two men of commerce which they then sought to implement. It is unnecessary for the decision on this appeal to classify what was arranged as a contract or the appointment of Granite Arms as the agent in a legal sense of Omeo Way. This is not an action between Omeo Way and Granite Arms for breach of contract or abuse of the position of agent<sup>10</sup>.

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10   cf *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342; *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575.

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17           On 3 March and 12 April respectively, written confirmation was issued by  
the Victorian Chief Commissioner of Police that Granite Arms was licensed or  
authorised for the purposes of reg 4F and Sched 6 to the Regulations to possess  
under the law of Victoria the consignments of 1000 and 2000 pistols.

18           The applications to Victoria Police had been identified therein as made by  
Granite Arms for issue of Customs permits to import firearms. Mr Featherstone's  
evidence was that at no stage in the process of application was he asked by any  
officer of Victoria Police or of Customs whether he was the owner or would be  
the ultimate owner of the pistols.

19           The shipment of 1000 pistols arrived in Melbourne on 13 March. It was  
moved into bond, passed the "safety test" requirements under the Regulations on  
21 March, and was subsequently released and transported to Omeo Way in  
Queensland. As mentioned, this litigation concerns the second shipment of the  
remaining 2000 pistols.

20           Wong Long had been contacted by Mr Owen. It has not been suggested  
that there was a novation of the sale contract. However, Wong Long was asked  
to consign the goods to Mr Featherstone of Granite Arms. It complied and in  
respect of the second shipment Wong Long issued a document headed "Tax  
Invoice" showing shipment to Mr Featherstone as consignee in Melbourne. An  
Air Waybill was issued by Korean Air Lines Co Ltd. It showed Beijing as the  
airport of departure and Melbourne as that of destination, and identified Granite  
Arms as consignee.

21           After arrival of the second shipment at Tullamarine on 3 May 2000, FOB  
Customs (Vic) Pty Ltd ("FOB"), a customs broker, lodged electronically an entry  
for home consumption. This identified Granite Arms as "owner". Section 68 of  
the Act obliged "the owner" to enter the goods after the arrival at Tullamarine  
and "owner" was defined in s 4 as including the "consignee". Difficulties arose  
with safety testing of the shipment for compliance with items 1.6 and 1.9 of Pt 3  
of Sched 6 to the Regulations and the place where necessary repairs of some of  
the pistols were to take place. Mr Owen offered unsuccessfully to give the  
shipment safe storage at Omeo Way's premises at Gympie until repairs had been  
made to the satisfaction of the Australian Federal Police. The impasse was  
resolved by FOB arranging for transport to and custody of the goods in bond at  
the premises at Altona North in Victoria of Secon Carriers Pty Ltd ("Secon").

22           However, on 7 September 2001, "Seizure Notices" were issued by an  
officer of the Australian Customs Service. These stated respectively that on

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7 September at the premises of Secon 396 and 1604 pistols had been seized under s 203B(2) of the Act as goods suspected on reasonable grounds to be "special forfeited goods" because they failed to comply with reg 4F and Sched 6, Pt 1 to the Regulations. The notices were directed to Mr Owen at the Queensland address of Omeo Way. Claims for return of the two batches comprising the second shipment of 2000 pistols were made by Omeo Way as owner of the goods on 4 October. The claims were made on the ground that there was compliance with the above provisions of the Regulations.

23           The operation of the forfeiture provisions of the Act which had been set in train in this way was summarised by Kiefel J as follows<sup>11</sup>:

"Goods which are prohibited under s 50 are 'prohibited imports': s 51(1). Prohibited imports are amongst goods which are 'forfeited goods' under s 229(1)(b) and liable to be forfeited to the Crown. It is an offence for a person to import any prohibited imports: s 233(1)(b) and (1AA). Forfeited goods referred to in s 229(1)(b) are 'special forfeited goods': s 183UA.

Section 203B of [the Act] provides for the seizure of goods by an authorised officer where that person reasonably suspects that goods are special forfeited goods. The owner of goods may claim their return: s 205D(2). Where a claim is made, as it was here, s 205D(2) requires the goods to be returned by the person who seized them unless one of paras (a) to (e) of s 205D(2) apply. Paragraph (e) requires their return unless proceedings are brought before a court of summary jurisdiction for a declaration that the goods are special forfeited goods and, on completion of the proceedings, a court has made an order for condemnation of the goods as forfeited to the Crown. Customs made the requisite application to the Magistrates' Court of Victoria within the time allowed.

Section 205D(5) provides, by paras (b) and (c), that where proceedings of the kind referred to in s 205(2)(e) are commenced and, on completion of the proceedings, the court is satisfied that the goods are special forfeited goods, the court must declare the goods to be special forfeited goods and make an order for condemnation of the goods as forfeited to the Crown."

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11 (2004) 136 FCR 515 at 518.

24 The application for condemnation was made by the Chief Executive to the Magistrates' Court of Victoria on 11 January 2002. During the pendency of those proceedings, on 11 April, the respondents commenced proceedings in the Federal Court under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) for declaratory relief that the seizure of the second shipment had been unlawful. The Chief Executive cross-claimed for a declaration that the pistols are "special forfeited goods" and for their condemnation as forfeited to the Crown. The respondents pleaded that Granite Arms was importer "as agent" of Omeo Way and was at all material times entitled to possess the pistols whether on its own account or as an agent of Omeo Way.

25 At the request of the parties the Federal Court heard and determined the cross-claim first. Spender J ordered that the cross-claim be dismissed and the Full Court dismissed the appeal of the Chief Executive.

26 The evidence for the Chief Executive recorded an admission by the respondents that Omeo Way paid the costs, expenses and outgoings incurred in relation to the importation of the 2000 guns, and that Omeo Way had been invoiced by FOB for, and had paid, storage charges for the period before the seizure of the pistols on 7 September 2001.

27 In oral argument in this Court counsel, who appeared for both respondents, put the case more precisely than it had been pleaded. Counsel submitted that what made Granite Arms "the importer" for the purposes of the Regulations was that it "was the consignee to whom the goods were consigned and who tried to receive [them] as consignee".

28 Neither the Act nor the Regulations define the term "the importer". The absence of a definition of "imported" or "importation" was noted by Higgins J and Starke J in *Wilson v Chambers & Co Pty Ltd*<sup>12</sup>. In *R v Bull*<sup>13</sup>, Barwick CJ said that "in general" what was involved in importation of goods was "landing them, or bringing them within a port for the purpose of landing them in the country or place in relation to which importation is regulated". It was decided in *Bull* that, for the offence in s 233B(1)(b) of importation into Australia of any prohibited imports, the goods in question must have been brought within the limits of a port and that the bringing of the goods within the three mile limit of

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12 (1926) 38 CLR 131 at 146, 149.

13 (1974) 131 CLR 203 at 212.

the coast was not sufficient. In *Wilson*, one offence in issue was failure to enter imported goods as required by s 68. While the ship was in Port Kembla for bunkering the consignee of paint on board the ship sold it to the shipowner, and the paint passed into the ship's stores; later, while the ship was at Melbourne, some of the paint was used in painting the ship. It was held that the paint should have been entered by the consignee as imported goods.

29        In both ss 233B(1)(b) and 68, "imported" and "import" are used in contexts which differ from that of reg 4F and Sched 6 to the Regulations. The subject, scope and purpose of the Regulations is the performance by the Commonwealth of its part in the creation of a national scheme of firearms control. In this context the notion of importation, and the term "the importer", look to the possession of the firearms after release for home consumption.

30        Nor is it decisive that the width of the definition of "owner" appears to have had the result that Granite Arms as "consignee" had been obliged, by the agent FOB, to enter the second shipment for home consumption under s 68 of the Act. But it is to be noted that the seizure provisions do appear to fix upon one entity as "the owner", and in this case that was Omeo Way.

31        The requirement in respect of seizure notices is to serve "the owner of the goods" or, in default of identification of "the owner", then "the person in whose possession or under whose control the goods were when they were seized" (s 205(1)). That latter class already would be within the definition of "owner" in s 4, if it applied to s 205(1)<sup>14</sup>. It is "the owner of the goods" who may claim their return (s 205B).

32        Before the shipment of 2000 pistols was shipped from China to Tullamarine final payment had been made by Omeo Way and title may be taken to have passed to Omeo Way. That company directed or arranged with the seller for the particular mode of consignment to Australia. By arrangement between Omeo Way and Granite Arms all costs, charges and outgoings incurred by

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**14** Section 4(1) defines "Owner" in respect of goods as including a range of persons extending beyond those who are owners to those holding themselves out as such, importers, consignees, agents, and those possessed of the goods, beneficially interested in them, and having any control or power of disposition over them. The definition, which is not of "the owner", applies "except where otherwise clearly intended" (s 4(1)).

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Granite Arms were met by Omeo Way and storage charges for the period up to the seizure on 7 September 2001 were paid to FOB by Omeo Way.

33        The substance of what was arranged and carried out was that Granite Arms lent its name to Omeo Way for the identification of the consignee on the Air Waybill for carriage of Omeo Way's goods to Australia. This was arranged by Omeo Way to facilitate the consummation of its purchase and the placement of the goods in Australia and at the disposition of Omeo Way. If the second shipment had been released, as had the first, the pistols would have been at the disposition of Omeo Way, not of Granite Arms. It was Omeo Way which caused the goods to be consigned to Australia by the particular means adopted. In those circumstances to reason that because Granite Arms was "the consignee" designed in the Air Waybill, it was "the importer" within the meaning of the Regulations and to the exclusion of Omeo Way is to depart the world of practical affairs. The Regulations do not require that departure.

34        This conclusion is sufficient to require the allowance of the appeal. However, given the further arguments that were advanced by the Chief Executive as to the construction of the Regulations, something more should be said.

35        The Police authorisation test required in this case that "the importer" hold a licence or authorisation, according to the law of "the relevant" State or Territory, "to possess" the 2000 pistols. What circumstance renders a State or Territory "relevant"? The answer must be the State or Territory in which the importer is "to possess" the articles in question. Kiefel J noted in this regard that the reference to possession appears to be derived from the use of that term across the whole range of State and Territory legislation<sup>15</sup>.

36        Kiefel J held that "the possession" spoken of in the Police authorisation test is that of "the person who is to maintain their possession under the authority of the State or Territory in which they are to be held for some purpose referred to in the legislation of the State or Territory"<sup>16</sup>. Her Honour concluded that Granite Arms, whilst acting for Omeo Way under their arrangement with respect to importation, was not to continue to possess the pistols in Victoria after their importation. It is unnecessary to decide the appeal on that footing. The matter may be disposed of more directly.

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<sup>15</sup> (2004) 136 FCR 515 at 526.

<sup>16</sup> (2004) 136 FCR 515 at 527.



37           In the present case, if Omeo Way were "the importer", it had no licence, whether in Victoria or in Queensland, the two immediately apparent candidates for "the relevant" State. Granite Arms held a licence in Victoria but it was not "the importer".

38           The evidence of a joint federal, State and Territory purpose to achieve a seamless regulatory scheme may be accepted. As this case falls out, the barrier imposed at the national frontier was not successfully breached by the stratagem adopted by Omeo Way after withdrawal of its authority under the Queensland legislation. But, in the course of argument, possible arrangements were canvassed whereby the gaps in the seamless regulatory scheme could have been exploited by the respondents with success. It is unnecessary here to say anything further on that subject.

39           The appeal should be allowed with costs. The orders of the Full Court of the Federal Court should be set aside. In place thereof the appeal to that Court should be allowed with costs, the orders of the Federal Court set aside, and on the cross-claim it should be declared that the handguns imported into Australia under cover of entry for home consumption 2E.0129.0382E are special forfeited goods within the meaning of the Act. The Chief Executive's costs of the cross-claim should be paid by the respondents.