

HIGH COURT OF AUSTRALIA

BRENNAN CJ,
GAUDRON, McHUGH, GUMMOW AND KIRBY JJ

COMMONWEALTH OF AUSTRALIA

APPELLANT

AND

SCI OPERATIONS PTY LIMITED

RESPONDENT

COMMONWEALTH OF AUSTRALIA

APPELLANT

AND

ACI OPERATIONS PTY LIMITED

RESPONDENT

*Commonwealth v SCI Operations Pty Limited;
Commonwealth v ACI Operations Pty Limited
(S16-1997 and S17-1997) [1998] HCA 20
26 March 1998*

ORDER

- 1. Appeals allowed with costs.*
- 2. Special leave for the respondents to cross-appeal granted and cross-appeals dismissed with costs.*
- 3. Orders of the Full Court of the Federal Court of Australia set aside and in lieu thereof appeals to that Court dismissed with costs.*

On appeal from the Federal Court of Australia

Representation in both matters:

S J Gageler with R P L Lancaster for the appellant (instructed by Australian Government Solicitor)

A Robertson SC with J E Griffiths for the respondents (instructed by Blake Dawson Waldron)

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

CATCHWORDS

Commonwealth of Australia v SCI Operations Pty Limited
Commonwealth of Australia v ACI Operations Pty Limited

Customs and Excise - Customs Duties - Paid and lawfully retained - Entitlement to refund later arising under statute - Duty refunded on granting of Commercial Tariff Concession Order - Whether interest payable from the date of application for a Commercial Tariff Concession Order or from the date the Commercial Tariff Concession Order was made.

Judgments and Orders - Inclusion of interest in sum for which judgment given - Whether s 51A(1) of the *Federal Court of Australia Act 1976* (Cth) applicable.

Restitution - Interest on moneys received under statutory right to refund - Whether there is a right independent of statute to recover interest where defendant has been unjustly enriched by use of plaintiff's money - Whether interest payable from date of application for Commercial Tariff Concession Order.

Acts Interpretation Act 1901 (Cth), s 8.

Customs Act 1903 (Cth), s 163, Part XVA, ss 269C, 269N.

Customs Tariff Act 1987 (Cth), Pt III Sched 4.

Customs Regulations (Cth), regs 126(f), 127(1), 128, 128A.

Federal Court of Australia Act 1976 (Cth), s 51A.

1 BRENNAN CJ. Section 269C(1) of the *Customs Act* 1901 (Cth) ("the Act") authorises¹ the Comptroller-General of Customs to make an order in respect of particular goods where the Comptroller is satisfied that -

- "(a) goods serving similar functions to the particular goods are not produced in Australia; and
- (b) goods serving similar functions to the particular goods are not capable of being produced in Australia by any person in the normal course of business".

An order made under sub-s (1) is known as a Commercial Tariff Concession Order² (a "CTCO"). It must be in writing and declare that "particular goods are goods to which a prescribed item specified in the order applies"³. The term "prescribed item" is defined⁴ to mean -

"an item in Schedule 4 to the *Customs Tariff Act 1987* that is expressed to apply to goods that a Commercial Tariff Concession Order declares are goods to which the item applies."

2 The respondents, SCI Operations Pty Limited ("SCI") and ACI Operations Pty Limited ("ACI") applied for a CTCO in respect of a substance known as PET resin. On 3 June 1994 a CTCO was made declaring that "[PET resin] for use in the production of plastic bottles for the packaging of carbonated beverages" and declaring that item 50 in Pt III of Sched 4 to the *Customs Tariff Act 1987* (Cth)⁵ applied to those goods. Item 50 applied to "[g]oods that a Commercial Tariff

1 I refer to the provisions in Pt XVA of the *Customs Act* as they stood in 1987, the year in which the respondents applied for a Commercial Tariff Concession Order, in the present tense. Although a new Pt XVA had been enacted before 3 June 1994 when the Order was made, the case has been conducted on the footing that the rights and obligations of the parties consequent upon the making of the Order are to be determined by reference, inter alia, to Pt XVA as it stood in 1987.

2 s 269C(1C) of the Act.

3 s 269C(1).

4 s 269B(1).

5 Now repealed and replaced by the *Customs Tariff Act 1995* (Cth).

2.

Concession Order declares are goods to which this item applies". The rate of duty prescribed by item 50 was 2% ad valorem⁶ until 1 July 1988 and thereafter free⁷.

3 Section 269N(1) provides that a CTCO "in respect of particular goods shall be deemed to have come into effect on such date before the making of the order as is specified in the order". Section 269N(3) provides:

" Subject to sub-sections (4), (6) and (7), the date to be specified in a concession order for the purposes of sub-section (1) shall be -

- (a) where, within the period of 28 days immediately preceding the date on which the application for the order was made the person who made the application gave notice under section 269H of his intention to make the application - the date on which he gave that notice; or
- (b) in any other case - the date on which the application for the order was made."

Sub-sections (4), (6) and (7) had no application in the circumstances of the present case.

4 SCI and ACI had made application for a CTCO in respect of PET resin on 24 September 1987. The CTCO specified 1 September 1987 as the date from which the CTCO should be effective. Between that date and 3 June 1994 SCI and ACI had paid duty on the importation of PET resin entered for home consumption. Although the amounts paid were the amounts properly assessed in respect of PET resin at the times of the respective entries for home consumption, the effect of s 269N was to deem the PET resin in respect of which that duty had been paid to be liable only to the duty prescribed by item 50. Accordingly on 3 June 1994 the Comptroller paid to SCI the sum of \$5,457,379.08 and paid to ACI a sum of \$6,695,068.03, those amounts being the amounts of duty refundable consequent on the making of the CTCO.

5 Authority to make refunds of duty is found in s 163(1) of the Act. It provides:

" Refunds, rebates and remissions of duty may be made:

6 *Customs Tariff Act* 1987 (Cth), s 13.

7 Item 50 was amended with the effect stated by the *Customs Tariff Amendment Act* 1989 (Cth), s 6, Sched 3.

3.

- (a) in respect of goods generally or in respect of the goods included in a class of goods; and
- (b) in such circumstances, and subject to such conditions and restrictions (if any), as are prescribed, being circumstances, and conditions and restrictions, that relate to goods generally or to the goods included in the class of goods."

A regulation made under the Act⁸ provides that the making of a CTCO having the effect that duty is not payable on goods on which duty has been paid is a prescribed circumstance for the purposes of s 163 of the Act. Regulation 127(1) provides:

" A refund of duty shall not be made unless an application for the refund in accordance with regulation 128 is delivered in accordance with that regulation within the period within which that application may, by virtue of regulation 128A, be made."

The period prescribed by reg 128A is a period of 12 months after the date on which the CTCO was made⁹.

6 The refunds to SCI and ACI were made without awaiting an application for a refund under the Customs Regulations.

7 On 3 June 1994, at a time earlier than the time when the refunds were made, SCI and ACI commenced proceedings in this Court, each claiming a refund of the amount that was subsequently received by it on that day together with interest. The matters were remitted to the Federal Court. No judgment for any principal sum was entered in that Court. Wilcox J dismissed the claims for interest but on appeal to the Full Court a majority (Beaumont and Einfeld JJ, Sackville J dissenting) allowed the appeal and made orders including the following:

"(a) Declare that, unless good cause (in the form only of a 'windfall' defence) is shown to the contrary, the appellants are entitled to an order for interest under s 51A(1)(a), or if this be inappropriate, an order for interest in a lump sum amount to be determined in accordance with the discretion conferred by the provisions of s 51A (1)(b) of the *Federal Court of Australia Act 1976*;

8 Customs Regulations, reg 126(f), now reg 126(1)(f).

9 reg 128A(4).

4.

- (b) Order that the matters be remitted to a single Judge of the Court to be dealt with in accordance with these reasons and as the justice of the case requires."

8 The Commonwealth appeals to this Court, seeking the setting aside of that declaration and order and a restoration of the order of Wilcox J. By cross-appeal SCI and ACI seek an amendment of the Full Court's declaration by deleting the reference to the "windfall" defence.

9 The claims for interest are based on s 51A of the *Federal Court of Australia Act* 1976 (Cth) which provides:

" (1) In any proceedings for the recovery of any money (including any debt or damages or the value of any goods) in respect of a cause of action that arises after the commencement of this section, the Court or a Judge shall, upon application, unless good cause is shown to the contrary, either:

- (a) order that there be included in the sum for which judgment is given interest at such rate as the Court or the Judge, as the case may be, thinks fit on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date as of which judgment is entered; or
- (b) without proceeding to calculate interest in accordance with paragraph (a), order that there be included in the sum for which judgment is given a lump sum in lieu of any such interest.

..."

10 In my view it is unnecessary to decide whether the claims which SCI and ACI were respectively entitled to make for the refund of the duty paid are to be classified as causes of action for the recovery of money payable under the Act or as an entitlement to a public law remedy compelling the making of a refund¹⁰. Whatever be the nature of the relief to which SCI and ACI were respectively entitled, neither was entitled to a refund prior to the making of the CTCO. The effect of s 269N(3) was not to deem SCI and ACI to have been entitled to a *refund* at the moment when duty had been paid. The effect of s 269N was to deem *the duty paid to have been not payable* but an entitlement to a *refund* of that duty arose

10 See *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 242-243; *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 89-90.

5.

only at the time when s 269N was engaged and by reason of the engagement of s 269N and s 163, that is, when the CTCO was made on 3 June 1994¹¹.

11 It follows that, if a cause of action arose on the making of the CTCO, it arose on the same date as the date on which the money paid as duty was refunded. As there was no period during which SCI or ACI was kept out of money which it was entitled to have, there was "good cause shown" why no interest should be awarded on the principal sums sued for and paid on 3 June 1994. Moreover, even if the payment of those principal sums were to be regarded as the equivalent of judgment entered for the purposes of par (a) of s 51A(1) and even if the entitlement to the refund were properly to be seen as the arising of a cause of action, there was no "period between the date when the cause of action arose and the date as of which judgment is entered" so as to satisfy the condition on which the power to order interest under par (a) depends. If no amount could have been calculated in accordance with par (a), there was no room for the application of par (b). That paragraph enlivens the Court's power to order a lump sum only when the lump sum is "in lieu of any such interest", that is to say, "interest [calculated] in accordance with paragraph (a)". It follows that the order made by the Full Federal Court under par (b) must be set aside.

12 I would allow the appeals, grant special leave to both respondents to cross-appeal, dismiss the cross-appeals, set aside the orders of the Full Court and in lieu thereof dismiss the appeals to that Court with costs. The costs of the Commonwealth of the appeals and cross-appeals in this Court should be paid by the respondents.

11 See *Coleman v Shell Co of Australia* (1943) 45 SR(NSW) 27.

- 13 GAUDRON J. In 1987, the respondents, SCI Operations Pty Limited ("SCI") and ACI Operations Pty Limited ("ACI"), wished to import polyethylene terephthalate resin ("PET resin") into Australia for use in their manufacturing operations. In September of that year, they applied under Pt XVA of the *Customs Act* 1901 (Cth) ("the Act") for a Commercial Tariff Concession Order for goods of that description. Their application was refused and, following internal review of that decision, ACI brought proceedings in the Federal Court of Australia for judicial review¹².

- 14 Ultimately, a Commercial Tariff Concession Order was made on 3 June 1994 for goods in a somewhat narrower category than that originally applied for, namely, "[PET resin] for use in the production of plastic bottles for the packaging of carbonated beverages" ("the tariff concession order"). By that time, Pt XVA of the Act had been repealed and a new Pt XVA enacted with effect from 1 November 1992. It is common ground that the rights and obligations of the parties to these appeals are to be determined by reference to the provisions of Pt XVA as they stood before the 1992 amendments¹³ and it is, thus, convenient to proceed on the basis that those provisions continue in effect.

12 Following internal review pursuant to s 269K(2) of the Act, the original decision was affirmed on or about 5 July 1989 and it was from this review that ACI sought judicial review pursuant to s 5 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). On 18 October 1990, Foster J set aside the decision and remitted the matter for reconsideration: *ACI PET Operations Pty Ltd v Comptroller-General of Customs* (1990) 26 FCR 531. On 9 July 1991, the application was again refused. ACI once more sought judicial review and by consent, it was ordered that the decision be set aside. The application was further considered and again, on 24 July 1992 and 29 January 1993, refused. ACI again sought judicial review and on 15 October 1993, Foster J set aside the decisions and remitted them for reconsideration: *ACI PET Operations Pty Ltd v Comptroller-General of Customs* (1993) 118 ALR 114. The Comptroller-General appealed, and ACI cross-appealed, to the Full Court. The Full Court dismissed the appeal but allowed the cross-appeal, setting aside the order of the remitter. In lieu thereof, the Full Court ordered the making of a tariff concession order as from 1 September 1987 subject to there being no objections within a prescribed period: *Comptroller-General of Customs v ACI PET Operations Pty Ltd* (1994) 49 FCR 56.

13 This issue was considered in some detail in proceedings heard by Foster J. His Honour held that at the time of the repeal of Pt XVA, ACI had acquired a conditional right to the granting of a tariff concession order. As such, s 8 of the *Acts Interpretation Act* 1901 (Cth) operated to apply Pt XVA as it stood prior to its repeal and substitution in November 1992. Section 8 relevantly provides that:

- 15 Pursuant to s 269N(3) of the Act, the tariff concession order was expressed to have come into effect on 1 September 1987¹⁴. Its legal effect was as specified in ss 269N(1) and (2), namely, that it was "deemed to have come into effect [on 1 September 1987]"¹⁵ and it applied in relation to PET resin for use in the production of plastic bottles for the packaging of carbonated beverages "first entered for home consumption on or after [that day]"¹⁶. By operation of ss 21, 22 and 25 and Sched 4 of the *Customs Tariff Act* 1987 (Cth), its practical effect was that from 1 September 1987 to 1 July 1988, customs duty was payable at the rate of 2% on PET resin as described in the order and that, after 1 July 1988, it was duty free¹⁷.

" [w]here an Act repeals in the whole or in part a former Act ... the repeal shall not:

...

- (c) affect any right ... acquired accrued or incurred under any Act so repealed; or

...

- (e) affect any investigation legal proceeding or remedy in respect of any such right ...

and any such investigation legal proceeding or remedy may be instituted continued or enforced ... as if the repealing Act had not been passed."

Foster J further held that the transitional provisions in s 20 of the *Customs Legislation (Tariff Concessions and Anti-Dumping) Amendment Act* 1992 (Cth), the Act which effected the repeal and substitution of Pt XVA, did not operate to deem that the application for the tariff concession order had been refused: see *ACI PET Operations Pty Ltd v Comptroller-General of Customs* (1993) 118 ALR 114 at 118-127.

- 14 Section 269N(3) provides that subject to provisions not presently relevant, the day to be specified for the purposes of s 269N(1) is the day 28 days before the day on which the application for the order was made.
- 15 Section 269N(1).
- 16 Section 269N(2). Note that that sub-section is expressly made subject to ss 269P(7) and (8) but they have no present relevance.
- 17 The 1 July 1988 amendment was effected by the *Customs Tariff Amendment Act* 1989 (Cth).

- 16 Between 1 September 1987 and 29 February 1992, the respondents imported and paid customs duty at the rate of 10% on goods of the kind described in the tariff concession order, amounting to approximately \$5.5m in the case of SCI¹⁸, and \$6.7m in the case of ACI¹⁹. It is not in issue that, no tariff concession order having then been made, duty was payable on those goods when they were entered for home consumption and that the amounts from time to time paid were, in fact, the amounts then payable.
- 17 On 3 June 1994, the day on which the tariff concession order was made, SCI and ACI each commenced proceedings in this Court to recover the difference between the duty paid between 1 September 1987 and 29 February 1992 and the duty payable on the basis that the order came into effect on 1 September 1987 ("the refund amount") together with "interest at such a rate as the Court thinks fit on the whole or any part of [that] money for the whole or part of the period between the date when the cause of action arose and the date as of which judgment is entered"²⁰.
- 18 It is not now in issue that the proceedings were commenced after the tariff concession order was made. Shortly after the proceedings were commenced, the Commonwealth paid the refund amounts to which SCI and ACI were entitled. It also paid interest on those amounts for the period 15 October 1993 to 31 March 1994 in accordance with an undertaking previously given in connection with the proceedings for judicial review²¹. The proceedings commenced in this Court were later remitted to the Federal Court for hearing and determination of claims by SCI and ACI for interest for the periods 1 September 1987 to 14 October 1993 and 1 April 1994 to 3 June 1994.

The proceedings in the Federal Court

- 19 In the Federal Court, SCI and ACI based their claim for interest on s 51A(1) of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act") or, in
-
- 18 The precise amount was \$5,457,379.08, paid in respect of goods imported between September 1987 and March 1992.
- 19 The precise amount was \$6,695,068.03, paid in respect of goods imported between September 1987 and March 1992.
- 20 *ACI Operations Pty Ltd v Commonwealth* (1995) 63 FCR 21 at 24.
- 21 As a condition of a stay of orders the subject of an appeal to the Full Federal Court (*Comptroller-General of Customs v ACI PET Operations Pty Ltd* (1994) 49 FCR 56), the Commonwealth undertook to pay interest as from 15 October 1993 until judgment was given on the appeal which, as it happened was 31 March 1994. See *SCI Operations Pty Ltd v Commonwealth of Australia* (1996) 139 ALR 595 at 598, 600 per Beaumont andinfeld JJ.

the alternative, on restitutionary principles. At first instance, Wilcox J held that they were not entitled to interest on either basis²². SCI and ACI appealed successfully to the Full Court, it being held by the majority (Beaumont and Einfeld JJ, Sackville J dissenting) that the Court had power to award interest under s 51A. The view was also expressed that there was "a further discretion to order a lump sum by way of interest in an amount that is fair and just in the circumstances."²³

- 20 The question whether the power to award interest should be exercised in favour of SCI and ACI was, in the view of the majority in the Full Court, to be determined by application of restitutionary principles. In the result, the appeal to that Court was allowed and it was declared that "unless good cause (in the form only of a 'windfall' defence) is shown to the contrary, [ACI and SCI] are entitled to an order for interest under s 51A(1)(a), or if this be inappropriate, an order for interest in a lump sum amount to be determined in accordance with the discretion conferred by the provisions of s 51A(1)(b) of the [Federal Court Act]"²⁴. There were consequential orders, including an order that the matters be remitted to a single judge for hearing and determination "in accordance with [the] reasons [for judgment] and as the justice of the case requires"²⁵. The Commonwealth now appeals to this Court. SCI and ACI each seek special leave to cross-appeal on the grounds that the Full Court erred in failing to hold that the law of restitution gave them an entitlement to interest, and in holding that their claims for interest were subject to a "windfall gain" defence.

22 *ACI Operations Pty Ltd v Commonwealth* (1995) 63 FCR 21.

23 *SCI Operations Pty Ltd v Commonwealth of Australia* (1996) 69 FCR 346 at 372 per Beaumont and Einfeld JJ; 139 ALR 595 at 616.

24 *SCI Operations Pty Ltd v Commonwealth of Australia* (1996) 69 FCR 346 at 379; 139 ALR 595 at 643.

25 *SCI Operations Pty Ltd v Commonwealth of Australia* (1996) 69 FCR 346 at 379; 139 ALR 595 at 643.

Section 51A(1) of the Federal Court Act

- 21 It is convenient to begin with s 51A(1) of the Federal Court Act. Subject to s 51A(2), which does not bear on the issues in this appeal, s 51A(1) relevantly allows that:

" In any proceedings for the recovery of any money (including any debt or damages or the value of any goods) ... the Court or a Judge shall, upon application, unless good cause is shown to the contrary, either:

- (a) order that there be included in the sum for which judgment is given interest at such rate as the Court or the Judge, as the case may be, thinks fit on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date as of which judgment is entered; or
- (b) without proceeding to calculate interest in accordance with paragraph (a), order that there be included in the sum for which judgment is given a lump sum in lieu of any such interest."

- 22 It may at once be noted that the language of s 51A(1)(b), particularly its concluding words, namely, "a lump sum in lieu of any such interest", directs the conclusion that that paragraph merely allows that a lump sum may be awarded in lieu of interest under par (a). More significantly for the issues in this appeal, it cannot be construed as conferring a discretion to award interest independently of the existence of a cause of action or for a period prior to the date on which the cause of action arose.

The issues raised by the Commonwealth with respect to s 51A(1) of the Federal Court Act

- 23 The Commonwealth contends that s 51A(1) does not authorise an award of interest in the present cases because, in the circumstances:

- (a) there is and can be no judgment for the moneys claimed by SCI or ACI and, thus, there can be no judgment sum in which interest can be included;
- (b) the Act does not create a cause of action with respect to the money refunded to SCI and ACI; alternatively
- (c) if the Act does create a cause of action, no cause of action arose prior to 3 June 1994, the day on which the moneys were in fact paid.

Section 51A: interest where moneys paid before judgment

24 In essence, the Commonwealth's first argument is that s 51A(1) does not authorise the payment of interest where the moneys claimed in legal proceedings are paid in full prior to judgment. It was put that it was held by Hewson J in *The "Medina Princess"*²⁶ that a provision which is not relevantly distinguishable from s 51A(1)(a), namely, s 3(1) of the *Law Reform (Miscellaneous Provisions) Act 1934* (UK)²⁷, had no application in that situation and that, properly construed, s 51A(1) is also inapplicable.

25 In *The "Medina Princess"*, the moneys claimed were, in fact, paid prior to judgment. However, Hewson J did not base his decision on that aspect of the matter but, rather, on the view that the court had no power "to award interest upon a motion when it [had] not given judgment upon the principal sum claimed."²⁸ The decision in that case was subsequently criticised in *Tehno-Impex v Gebr Van Weelde Scheepvaartkantoor BV*²⁹. Later, in *President of India v La Pintada Compania Navigacion SA*³⁰, Lord Brandon of Oakbrook expressed the view that *The "Medina Princess"* was correctly decided, his Lordship apparently treating it as having decided that the provision in question in that case did not confer power to award interest on debts paid prior to judgment.

26 In my view, neither the language of s 51A(1) nor the decision in *The "Medina Princess"* dictates the conclusion that interest cannot be awarded on moneys paid prior to judgment. In this last regard, it may be noted that, in discussion as to costs in *The "Medina Princess"*, Hewson J made this observation³¹:

26 [1962] 2 Lloyd's Rep 17.

27 Subject to provisos which are not presently relevant, that section provided:

" In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment".

28 [1962] 2 Lloyd's Rep 17 at 21.

29 [1981] QB 648 at 665 per Lord Denning MR, 675-676 per Oliver LJ, 681 per Watkins LJ.

30 [1985] AC 104 at 121.

31 [1962] 2 Lloyd's Rep 17 at 23.

"I have not said that [the plaintiffs] were not entitled to interest. I said that this method of asking for it does not appeal to me."

More significantly, however, the power conferred by s 51A(1), being a power conferred on a court, is not to be construed as subject to limitations which its terms do not require³².

27 Sub-section (1) of s 51A does not specify that interest may be included in a judgment for a sum of money claimed in legal proceedings. Rather, it provides that it may be included "in the sum for which judgment is given". Clearly, s 51A(1) requires that there be a "sum for which judgment is given" before interest can be included. But that does not mean that interest cannot be awarded if payment of the moneys claimed in the proceedings is made prior to judgment. The mere payment of a debt or other money sum claimed in legal proceedings does not deprive a court of power to enter judgment for the costs of those proceedings. And judgment may be entered for costs in a fixed sum. In that event, there is, in terms of s 51A(1), a "sum for which judgment is given" and, in my view, there may be included in that sum interest pursuant to par (a), or, a lump sum in lieu of interest pursuant to par (b).

28 Were judgment to be entered for costs in a fixed sum in these matters, it would be open to the Federal Court to include interest or a lump sum in lieu of interest on the moneys claimed by SCI and ACI provided the other conditions of s 51A(1) were satisfied. It is, thus, necessary to consider whether the Act confers a cause of action with respect to the moneys claimed in these cases and, if so, when those causes of action arose.

32 See *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421. See also *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284 per Wilson J, 290 per Gaudron J; *Knight v F P Special Assets Ltd* (1992) 174 CLR 178 at 185 per Mason CJ and Deane J, 202-203 per Dawson J, 205 per Gaudron J; *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 275-276 per Gummow J; *Emanuele v Australian Securities Commission* (1997) 71 ALJR 717 at 729 per Gaudron J; 144 ALR 359 at 376; *Hyman v Rose* [1912] AC 623 at 631 per Earl Loreburn LC.

The provisions authorising refunds

29 As already mentioned, sub-ss (1) and (2) of s 269N operate to give what, for convenience, may be termed "retrospective effect" to a tariff concession order. However, the Act does not, in terms, provide for a refund of the difference between duty paid before an order is made and that which is payable on the basis of the order's retrospective effect. Rather, s 163 of the Act leaves that matter to the Customs Regulations (Cth)³³. So far as is presently relevant, that section provides that:

"(1) Refunds, rebates and remissions of duty may be made:

- (a) in respect of goods generally or in respect of the goods included in a class of goods; and
- (b) in such circumstances, and subject to such conditions and restrictions (if any), as are prescribed, being circumstances, and conditions and restrictions, that relate to goods generally or to the goods included in the class of goods."

30 The Customs Regulations relevantly allow, in reg 126(1), that:

"Each of the following circumstances is prescribed for the purposes of section 163 of the Act, namely where:

...

- (f) after duty has been paid on goods ... a Commercial Tariff Concession Order is made under Part XVA of the Act, the effect of which is that duty is not payable on those goods or duty is payable on those goods at a rate which is less than the rate which was applicable when the goods were entered for home consumption".

And reg 127(1) provides that:

" A refund of duty shall not be made unless an application for the refund in accordance with regulation 128 is delivered in accordance with that

33 Section 270(1) authorises the making of regulations "not inconsistent with [the] Act prescribing all matters which by [the] Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed for giving effect to [the] Act or for the conduct of any business relating to the Customs".

regulation within the period within which that application may, by virtue of regulation 128A, be made."

By reg 128, it is necessary, amongst other things, for an application to be in a form approved by the Collector of Customs, for it to contain such information as is required by the form and for it to be delivered to a Customs Collector. Regulation 128A relevantly requires that an application under reg 126(1)(f) be made within 12 months of the making of the Commercial Tariff Concession Order in question. It is common ground that neither SCI nor ACI made application for a refund pursuant to reg 128.

Conferral of a cause of action

31 It was accepted by the Commonwealth that ss 269N and 163(1) of the Customs Act and regs 126, 127, 128 and 128A of the Customs Regulations (together referred to as "the refund provisions") operate so that, if the conditions specified in regs 128 and 128A are satisfied, they create a legal entitlement to a refund. However, it was argued that that legal entitlement is not a cause of action, but, rather, an entitlement enforceable by administrative law remedy.

32 In large part, the Commonwealth's acceptance that the refund provisions give rise to a legal entitlement and its argument that they do not confer a cause of action are based on the decision of this Court in *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd*³⁴. That case concerned s 111(1) of the *Stamps Act* 1958 (Vic) ("the Stamps Act") which allowed that "[w]here the Comptroller [of Stamps] finds in any case that duty has been over-paid ... he may refund ... the amount of duty found to be overpaid". It was held that that provision gave rise to an obligation to refund the duty in issue and that that obligation was enforceable by an order in the nature of mandamus.

33 In *Royal Insurance*, Mason CJ took the view that the law of restitution entitled the claimant taxpayer to recover the moneys in issue and that s 111(1) of the Stamps Act could not be construed as conferring "authority to refuse a refund which a taxpayer is entitled to recover according to the principles of the general law."³⁵ The view taken by Brennan J, with whom Toohey and McHugh JJ agreed, was that there was "no residual discretion ... to refrain from making a refund in exercise of [the] powers [in question] once [it was found] that there has been an overpayment"³⁶. On the other hand, Dawson J held that s 111(1) conferred no

34 (1994) 182 CLR 51.

35 (1994) 182 CLR 51 at 66.

36 (1994) 182 CLR 51 at 88.

discretion at all³⁷, expressing the view that a statute should not be construed as "authoriz[ing] the retention of moneys received without any entitlement ... unless such an intention [is] made explicit."³⁸

34 It is necessary to examine the refund provisions in order to determine whether they confer a cause of action or some different legal entitlement. In that process it is to be borne in mind that the question whether a legislative provision conferring power in permissive terms confers a discretion and, if so, the further question whether that discretion is a general or more limited discretion are questions of statutory construction.

35 It is convenient at this stage to note that regs 126(1)(f), 127(1), 128 and 128A of the Customs Regulations confer no discretion at all: reg 126 simply specifies what are prescribed circumstances for the purposes of s 163 of the Act; and reg 127(1) provides that a refund "shall not be made" unless there has been an application in accordance with regs 128 and 128A. In terms, those regulations are consistent with the conferral of a legal right enforceable by legal action - in other words, a cause of action - provided the conditions specified by regs 128 and 128A are satisfied. Accordingly, the argument that the refund provisions do not confer a cause of action depends entirely on s 163(1) which, as already noted, relevantly allows that "[r]efunds ... may be made".

36 Ordinarily, the word "may" - the word used in s 163(1) of the Act and, also, in the provision considered in *Royal Insurance* - signifies a discretion to exercise or not to exercise the power in question. That general rule is now given force as an absolute rule of construction by s 33(2A) of the *Acts Interpretation Act* 1901 (Cth)³⁹, at least where a Commonwealth legislative provision allows that some person or body may do some act or thing as distinct from allowing that something may be done. However as McHugh and Gummow JJ point out in their judgment in this case, that statutory rule was enacted after s 163(1) of the Act came into effect and, thus, cannot dictate its meaning and effect.

37 In argument, counsel for the Commonwealth contrasted the permissive terms of s 163(1) of the Act with those of s 167. That latter section establishes a procedure for the payment of duty under protest and provides, in sub-s (4), that no

37 (1994) 182 CLR 51 at 99, 102.

38 (1994) 182 CLR 51 at 99.

39 Section 33(2A) provides:

" Where an Act assented to after the commencement of this subsection provides that a person, court or body may do a particular act or thing, and the word '**may**' is used, the act or thing may be done at the discretion of the person, court or body."

action lies "for the recovery of any sum paid ... unless the payment is made under protest in pursuance of [that] section and the action is commenced within the [times specified]". However, s 167(5) provides that nothing in that section is to "affect any rights or powers under section 163." Apart from suggesting that s 163 may confer a right of action, rather than a legal entitlement which is not a cause of action, sub-s (5) of s 167 makes it plain that that section has no bearing on the proper meaning of s 163(1). Rather, its meaning, so far as concerns the circumstances specified in reg 126(1)(f), must be ascertained by reference to s 269N of the Act which deals specifically with the effect of a tariff concession order.

38 As already indicated, s 269N allows that a tariff concession order may take effect from a date before it is made and provides, in sub-s (1) that the order is deemed to have come into effect on the date specified in it. And the section provides, in sub-s (2), that the order "applies in relation to the particular goods to which it relates ... entered for home consumption on or after the day on which it comes into effect". An order can only have effect in accordance with ss 269N(1) and (2) if those who have imported goods to which it relates have a right to obtain a refund of the difference between what they have paid and what is payable on the basis that the order took effect as specified in those sections.

39 The specific provisions of s 269N would be liable to be defeated if s 163(1) were construed as conferring any discretion to refuse a refund of the difference between the duty actually paid and the amount payable on the basis that a Commercial Tariff Concession Order took effect from the date specified in it. Section 163(1) is a general omnibus provision, designed to embrace the various different circumstances in which refunds may be made and to allow for the different conditions and restrictions which may from time to time be prescribed for the making of those refunds. Being a general provision, the apparent conflict between it and s 269N(2) is to be resolved by application of the rule embodied in the maxim *generalia specialibus non derogant* - general provisions do not detract from the specific - with the consequence that, while s 163(1) allows for the imposition of conditions and restrictions, it cannot be construed as conferring power to refuse a refund necessary to give effect to sub-ss (1) and (2) of s 269N of the Act so long as the prescribed conditions and restrictions, if any, are satisfied.

40 When s 163(1) is construed in the manner indicated, it follows that the refund provisions confer a right to payment of a refund subject to satisfaction of the conditions specified in regs 128 and 128A. The question whether those conditions have been satisfied can be objectively determined and the amount of the refund payable can be precisely ascertained by reference to the *Customs Tariff Act 1987* (Cth). That being so and in the absence of some provision to the contrary, the

refund provisions are to be taken as conferring a right enforceable by an action for debt⁴⁰.

- 41 The argument that the refund provisions do not confer a cause of action was not made by reference to any specific provision in the Act or in the Customs Regulations. Rather, it was made by reference to the decision in *Royal Insurance*. In that case, the duty to make a refund only arose upon the finding by the Comptroller of Stamps that duty had been overpaid. Where an obligation to pay a sum of money arises simultaneously with and by reason of an administrative determination as to the amount payable, as in *Royal Insurance*, it may be that the provision which creates that obligation should be construed as impliedly directing that the obligation is enforceable only by administrative law remedy. However, the right in issue in this case is not a right of that kind. It is a right conferred by statutory provisions which ascribe legal consequences to an administrative act which is not, itself, determinative of the amount to be paid. That being so, the argument that the refund provisions merely confer a legal entitlement enforceable by an administrative law remedy must be rejected.

When did the cause of action arise?

- 42 It is clear from the terms of reg 127 of the Customs Regulations that there is no entitlement to a refund unless and until a claim is made in accordance with regs 128 and 128A. As earlier indicated, no such claim was made by SCI or by ACI. Accordingly, no cause of action had arisen under the refund provisions when these proceedings were commenced. And unless SCI and ACI are entitled to interest on restitutionary grounds, these proceedings are without foundation. Certainly, there is no foundation for judgment in a sum in which interest can be included under s 51A(1) of the Federal Court Act.

The claim based on restitutionary principles

- 43 As earlier indicated, it is not in dispute that, the tariff concession order not having then been made, customs duty was payable at non-concessional rates on the goods which later became the subject of that order when those goods were entered for home consumption. The only right with respect to the moneys paid at that time is the right conferred by the refund provisions. And the refund provisions confer a right to a refund but not a right to interest on the amount refunded.
- 44 The right conferred by the refund provisions is a statutory right which has no counterpart in the general law. Being a right based wholly in statute, it can neither be cut down nor enlarged by resort to the general law or to restitutionary principles.

40 See *Mallinson v Scottish Australian Investment Co Ltd* (1920) 28 CLR 66 at 70. See also *Shepherd v Hills* (1855) 11 Ex 55 at 67 per Parke B [156 ER 743 at 747].

18.

More precisely, those principles cannot convert a statutory right to obtain a refund of money into a right to obtain a refund with interest. There is, thus, no substance in the claim that SCI and ACI were entitled to a judgment for interest by reason of restitutionary principles.

The "windfall" defence

- 45 There being no right to interest either under s 51A of the Federal Court Act or on restitutionary grounds, it is unnecessary to consider the argument made on behalf of SCI and ACI that the Full Court erred in allowing that their claim might be defeated by a "windfall" defence.

Conclusion

- 46 The appeals should be allowed with costs, special leave should be granted to SCI and ACI to cross-appeal and the cross-appeals dismissed with costs. The orders of the Full Court of the Federal Court should be set aside and, in lieu thereof, the appeals to that court should be dismissed with costs.

47 McHUGH AND GUMMOW JJ. These appeals were heard together. They are brought from decisions of the Full Court of the Federal Court⁴¹. By majority (Beaumont and Einfeld JJ, Sackville J dissenting), the Full Court allowed appeals by the present respondents, SCI Operations Pty Limited and ACI Operations Pty Limited ("SCI" and "ACI" respectively), against decisions of the primary judge (Wilcox J)⁴² in favour of the Commonwealth.

48 Wilcox J had heard together two proceedings remitted from this Court. His Honour identified the issue in both proceedings as whether the Commonwealth was "bound to pay interest on certain customs duty it collected on the importation of goods that was refunded because of the making of a commercial tariff concession order ... under s 269C of the *Customs Act* 1901 (Cth)" ("the Act")⁴³.

49 In this Court, the Commonwealth seeks orders which would have the effect of reinstating the orders by the primary judge which dismissed the proceedings instituted by SCI and ACI.

50 The questions which arise in the appeals turn principally upon a construction of the provisions of the Act with respect to refunds of duty and upon the construction of s 51A of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"). Section 51A provides for the making of orders for the inclusion of interest in sums for which judgment is given.

The facts

51 The relevant facts are not in dispute and may be stated shortly. SCI and ACI imported certain resin for use in the production of plastic bottles for the packaging of carbonated beverages ("the goods"). The customs duty upon the goods was demanded and paid. Payment was not made under protest but SCI and ACI contended that without such payment they could not have obtained the release of the goods. In respect of periods commencing in each case on 1 September 1987 and ending on 3 June 1994, the amount of duty paid by SCI was \$5,457,379.08 and by ACI was \$6,695,068.03.

41 *SCI Operations Pty Ltd v Commonwealth of Australia* (1996) 69 FCR 346; 139 ALR 595.

42 *ACI Operations Pty Ltd v Commonwealth* (1995) 63 FCR 21.

43 (1995) 63 FCR 21 at 22.

52 Part XVA of the Act (ss 269B-269S) is headed "COMMERCIAL TARIFF CONCESSION ORDERS"⁴⁴. Section 269G provides for applications to the Comptroller-General of Customs ("the Comptroller") for a commercial tariff concession order ("CTCO") in respect of the particular goods specified in the application. Section 269C states:

"(1) Subject to this Part, where the Comptroller, after considering an application under section 269G for the making of an order under this section in respect of particular goods, is satisfied that:

- (a) goods serving similar functions to the particular goods are not produced in Australia; and
- (b) goods serving similar functions to the particular goods are not capable of being produced in Australia by any person in the normal course of business;

the Comptroller shall make a written order, declaring that the particular goods are goods to which a prescribed item specified in the order applies."

It follows that the benefit of a CTCO applies in respect of the particular goods and its enjoyment is not limited to the particular applicant under s 269G. A CTCO in respect of particular goods is deemed to have come into effect on such day before the making of the CTCO as is specified in the order (s 269N(1)). In the present case, s 269N(3) required that the day to be so specified was the day occurring 28 days before the day on which the application for the CTCO was made. On 3 June 1994, a CTCO was made and it specified 1 September 1987 as the date upon which it came into effect. In the intervening period there had been lengthy litigation in the administrative review jurisdiction of the Federal Court. This history is recounted in the judgment of Beaumont and Einfeld JJ in the present litigation⁴⁵ and it is unnecessary to repeat it here.

53 On the same day as the CTCO was made, SCI caused to be issued out of this Court a writ claiming the sum of \$5,296,690 "being money payable by

44 Part XVA was repealed with effect from 1 November 1992 and a new Pt XVA inserted by s 10 of the *Customs Legislation (Tariff Concessions and Anti-Dumping) Amendment Act 1992* (Cth). However, as Gaudron J explains in her reasons for judgment, the parties have conducted the litigation on the footing that it involves accrued rights preserved by s 8 of the *Acts Interpretation Act 1901* (Cth). This judgment refers in the present tense to the form of the Act which is relevant to this appeal.

45 (1996) 69 FCR 346 at 351-353; 139 ALR 595 at 597-599.

[the Commonwealth] to [SCI] as money had and received by [the Commonwealth] to the use of [SCI] or otherwise". ACI also caused to be issued on 3 June 1994 a writ claiming, otherwise in the same terms, the sum of \$6,111,998. Later on 3 June, the Commonwealth paid SCI and ACI amounts equal to the sums paid for duty in respect of the periods commencing 1 September 1987. SCI received \$5,457,379.08 and ACI received \$6,695,068.03. These sums exceeded those claimed in the writs. Sums also were paid (\$263,700.07 to SCI and \$323,564.38 to ACI) in respect of interest for the period from 15 October 1993 to 31 March 1994. These interest payments were made pursuant to conditions imposed in earlier litigation. Nothing turns upon them for present purposes.

54 The Full Court granted a declaration in the following form⁴⁶:

"Declare that, unless good cause (in the form only of a 'windfall' defence) is shown to the contrary, the [respondents] are entitled to an order for interest under s 51A(1)(a), or if this be inappropriate, an order for interest in a lump sum amount to be determined in accordance with the discretion conferred by the provisions of s 51A(1)(b) of the *Federal Court of Australia Act 1976* (Cth)".

The Full Court also ordered that the matters be remitted to a single judge "to be dealt with in accordance with these reasons and as the justice of the case requires". In addition to the appeals by the Commonwealth, there are before this Court cross-appeals by SCI and ACI⁴⁷. They submit that their entitlement to interest is not subject to any "windfall defence" as stipulated in the above declaration.

55 In each appeal to this Court the ultimate issue is whether, in respect of the moneys received by the respondents on 3 June 1994, in respect of the earlier payments of duty by the respondents, they are entitled to interest thereon for the periods 1 September 1987 to 14 October 1993 and 1 April 1994 to 3 June 1994. Interest in respect of the supervening period from 15 October 1993 to 31 March 1994 is covered by the payments made under the arrangement to which we have referred.

⁴⁶ (1996) 69 FCR 346 at 379; 139 ALR 595 at 623.

⁴⁷ Special leave in respect of the cross-appeals was sought at the hearing of the appeals and was not opposed. Special leave should be granted.

The Act

56 It is necessary first to determine the nature of the legal right or other entitlement of the respondents to recoup the duty in question. Section 269N(1) provides that the concession order "shall be deemed to have come into effect" on a day which, on the facts, was required to be 1 September 1987. However, the starting point is that at the times when the payments of duty were made by the respondents duty was properly exigible in those amounts under the law as it then stood.

57 The respondents stressed that s 269N(1) operates "retrospectively". However, in *Coleman v Shell Co of Australia*⁴⁸, Jordan CJ pointed out that "there has been some ambiguity in the use of the word 'retrospective'". His Honour went on to distinguish between a statute which provided that as at a past date the law shall be taken to have been that which it was not, and the creation by statute of further particular rights or liabilities with respect to past matters or transactions⁴⁹.

58 Section 269N did not render the concession order retrospective in the sense that it provided that, as at a past date, being 1 September 1987, and thereafter, the law was to be taken to have been that which it was not. Rather, the result was that, on 3 June 1994, there were brought into existence fresh rights or liabilities in respect of matters or transactions which had occurred on or after 1 September 1987.

59 It is that result which indicates a rejection of the submission by SCI and ACI that they enjoyed an entitlement to interest in respect of the period before 3 June 1994. As will later appear, the submission that, upon its true construction and in respect of the payments of duty after 1 September 1987, the legislation imposed a duty or obligation in the nature of a debt to pay money enforceable by an action of debt, should be accepted. However, the due date for payment of that debt did not arrive before the making of the CTCO on 3 June 1994 and would not have occurred thereafter until the making of the requisite application for refund of the duty. In the circumstances of the present litigation, it follows that on no basis could SCI and ACI maintain that they received the payments on 3 June 1994 at a

48 (1943) 45 SR (NSW) 27 at 30. See also *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194; *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 537 at 564, 578; *Robertson v City of Nunawading* [1973] VR 819 at 823-824; *La Macchia v Minister for Primary Industry* (1986) 72 ALR 23 at 26-27; *Rodway v The Queen* (1990) 169 CLR 515 at 518-519; Pearce and Geddes, *Statutory Interpretation in Australia*, 4th ed (1996) at [10.4]; and cf *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 89.

49 (1945) 45 SR (NSW) 27 at 31.

time when there had accrued in their favour statutory debts upon which there had accrued any interest for late payment. There was prompt, not late, payment.

60 These conclusions follow from a further consideration of the legislation, to which we now turn. Section 167(4) provides 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 the payment is made under protest in pursuance of that section and the action is commenced within the times specified therein. However, s 167(5) states that nothing in that section "shall affect any rights or powers under section 163". It will be noted that s 167(5) speaks not only of powers but also of rights under s 163. So far as presently material, s 163 provides:

- "(1) Refunds, rebates and remissions of duty may be made:
- (a) in respect of goods generally or in respect of the goods included in a class of goods; and
 - (b) in such circumstances, and subject to such conditions and restrictions (if any), as are prescribed, being circumstances, and conditions and restrictions, that relate to goods generally or to the goods included in the class of goods.

(1A) The regulations may prescribe the amount, or the means of determining the amount, of any refund, rebate or remission of duty that may be made for the purposes of subsection (1)."

The Governor-General may make regulations not inconsistent with the Act and prescribing all matters which by the Act are required or permitted to be prescribed (s 270(1)). Regulation 126(f) of the Customs Regulations ("the Regulations") stipulates as a prescribed circumstance for the purposes of s 163 the making, after duty has been paid on goods, of a CTCO under Pt XVA of the Act, the effect of which is that duty is not payable on those goods or duty is payable on them at a rate less than the rate applicable when the goods were entered for home consumption. Regulation 127(1) is as follows:

"A refund of duty shall not be made unless an application for the refund in accordance with regulation 128 is delivered in accordance with that regulation within the period within which that application may, by virtue of regulation 128A, be made."

Regulation 128A(4) states:

"An application for a refund of duty in a circumstance specified in paragraph (f) of regulation 126 may be made within 12 months after the date on which the by-law, determination or Commercial Tariff Concession Order was made."

Regulation 128 stipulates that an application for a refund of duty "shall" be in a form approved by the Collector, state as far as practicable the nature and particulars of the claim, and be delivered to a Collector. Paragraph (a) of s 8(1) of the Act provides that a reference to "the Collector" or "a Collector" shall be construed as a reference to any principal officer of Customs or any officer doing duty in the matter in relation to which the expression is used. Finally, reg 128B states:

"(1) A refund, rebate or remission of duty may, subject to the Act and to these Regulations, be made by a Collector.

...

(5) A Collector may make arrangements with a person to whom a refund of duty may be made whereby the amount of the refund may be set off against the whole or part of that person's liability for duty, and an amount that has been so set off in pursuance of such an arrangement shall, for the purposes of the Act and these Regulations, be deemed to have been refunded to that person."

There was no evidence that, before the commencement of the actions in this Court on 3 June 1994, applications in the form stipulated by reg 128 had been made.

- 61 One submission by the respondents is that, upon its proper construction, the legislation created a duty or obligation in the nature of a debt to pay them the refunds in question. On the other hand, the Commonwealth referred in particular to the phrases in s 163(1), "[r]efunds ... of duty may be made" and in reg 128B(1), "may ... be made by a Collector" as indicative of the conferral of something less than a duty or obligation to pay money⁵⁰. However, the answer does not depend upon the abstract meaning of the term "may", but on whether "the particular context of words and circumstance make it not only an empowering word but

50 Whether the legislation imposed a requirement or conferred a power to pay, the argument proceeded on the footing that in either case there would be at least an implied appropriation: see *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 87. See also *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 577-578, 583, 593, 603.

indicate circumstances in which the power is to be exercised - so that in those events the 'may' becomes a 'must'"⁵¹.

- 62 Section 33(2A) of the *Acts Interpretation Act* 1901 (Cth), which was inserted by Sched 1 to the *Statute Law (Miscellaneous Provisions) Act* 1987 (Cth), states:

"Where an Act assented to after the commencement of this subsection provides that a person, court or body may do a particular act or thing, and the word '**may**' is used, the act or thing may be done at the discretion of the person, court or body."

However, sub-ss (1) and (1A) of s 163 of the Act took the form in which they are applicable to this litigation before the addition of sub-s (2A) to s 33 of the interpretation statute⁵².

- 63 Legislation should not readily be construed as conferring upon the executive branch of government a discretion to retain, rather than an obligation to refund, moneys received under a statutory entitlement which from a subsequent date has been displaced by the operation of that legislation⁵³. Regulation 126 operates to identify circumstances which, by their own force, identify the prescribed circumstances in which refunds, rebates and remissions may be made under s 163(1). In the present case, the relevant circumstance specified in par (f) of reg 126 is the making of a CTCO, after duty has been paid on goods, the effect of which is that duty is not payable on those goods or is payable at a rate which is less than that which was applicable when they were entered for home consumption. There is no element of discretionary judgment as to the existence of the requisite circumstances and no requirement that any officer of the Executive form a particular opinion in the matter. In that respect, this legislation may be compared to that considered in *Commissioner of State Revenue (Vict) v Royal Insurance*

51 *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134; see also *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 63-64, 84-86, 97-98; *Mitchell v The Queen* (1996) 184 CLR 333 at 345-346.

52 Section 163(1) was enacted by the *Customs Act* 1971 (Cth) and s 163(1A) by Sched 1 to the *Statute Law (Miscellaneous Provisions) Act (No 2)* 1984 (Cth).

53 cf *Woolwich Building Society v Inland Revenue Commissioners* [1993] AC 70 at 172; *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 99; *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 465-466.

*Australia Ltd*⁵⁴. The central provision with which that case was concerned, s 111(1) of the *Stamps Act* 1958 (Vic), provided:

"Where the Comptroller finds in any case that duty has been over-paid ... he may refund to the company, person or firm of persons which or who paid the duty the amount of duty found to be overpaid."

64 However, the duty or obligation to make a refund in cases such as the present is preconditioned upon the taking of the procedural steps required by reg 127(1). This stipulates that a refund shall not be made unless an application has been delivered in accordance with reg 128 and within the period stipulated by reg 128A. These steps are elements of the new right which the legislation creates⁵⁵.

65 There is applicable to the present litigation the statement of principle in the judgment of this Court in *Mallinson v Scottish Australian Investment Co Ltd*⁵⁶ which appears in the following passage:

"The rule applicable here is stated in *Shepherd v Hills*⁵⁷ as follows, viz, 'Wherever an Act of Parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the Act contains some provision to the contrary'; and where the amount is liquidated the action of debt is appropriate (*Hopkins v Swansea*⁵⁸). The obligation is none the less a debt because the statute gives no particular method of enforcing it (*Booth v Trail*⁵⁹)."

54 (1994) 182 CLR 51.

55 *The Crown v McNeil* (1922) 31 CLR 76 at 96, 100; *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471 at 488; *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 277. In the present litigation the writs were issued on 3 June 1994 and served on 28 June 1994. It is unnecessary for these appeals to determine whether, by the payments on 3 June, the Commonwealth, after action, waived the notice requirement: see *Breavington v Godleman* (1988) 169 CLR 41 at 105.

56 (1920) 28 CLR 66 at 70; cf *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 424, 461. See also *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624 at 630, 649-650; *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1997] 4 All ER 747.

57 (1855) 11 Ex 55 at 67 [156 ER 743 at 747].

58 (1839) 4 M & W 621 [150 ER 1569]; (1841) 8 M & W 901 [151 ER 1306].

59 (1883) 12 QBD 8 at 10.

In the present case, the legislation does not contain "some provision to the contrary" in the sense used by Parke B in *Shepherd v Hills*. In particular, the duty or obligation is not preconditioned by the exercise of an administrative discretion or the formation of an opinion which would attract judicial review⁶⁰. However, as indicated, in the circumstances with which these appeals are concerned, on 3 June 1994 when SCI and ACI received the payments on account of duty, no completed cause of action lay for recovery of those amounts. This was because, on the evidence, SCI and ACI had not taken the necessary steps to comply with regs 127, 128 and 128A.

66 The duty or obligation created by the statute to pay money was quantified in s 163 and in the Regulations by reference solely to a refund of the duty paid. There was no component in that obligation which added a sum to represent the value of the use of the payments made by SCI and ACI on account of duty in the periods between their respective payments and the making of the CTCO on 3 June 1994. The statutory scheme embodied in Pt XVA of the Act represented a balance struck by the legislature between the competing interests of importers, local producers and the revenue. The Comptroller was required by s 269L not to make a CTCO unless the Comptroller had published a notice in the *Gazette*, inviting the submission of reasons why the order should not be made, and had considered any responses. Further, s 269E(1) conferred upon the Comptroller a discretion to refuse to make a CTCO if, in the Comptroller's opinion, the making thereof "would be likely to have a substantially adverse effect on the market for any goods produced in Australia".

67 In those circumstances, opposition by local producers and the pursuit of administrative law remedies might lengthen the period between application under s 269G and the making of a CTCO under s 269C. The solution adopted was to provide for a refund of duty paid so as to conform to the position settled with the making of the CTCO, but not to include an additional obligation to make a payment in the nature of interest in respect of any period before the making of the CTCO and the lodgment of an application in proper form for refund of duty.

Section 51A of the Federal Court Act

68 In the present cases, the duty was refunded on the day on which the CTCO was made. There was no period in which debts in respect of the refunds were due and owing but unpaid. Therefore, there is no foundation for any application in the

60 cf *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 274-275; *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624 at 630, 636-637.

actions commenced on 3 June 1994, upon their remitter to the Federal Court, of s 51A of the Federal Court Act. So far as presently relevant, this states:

"(1) In any proceedings for the recovery of any money (including any debt or damages or the value of any goods) in respect of a cause of action that arises after the commencement of this section, the Court or a Judge shall, upon application, unless good cause is shown to the contrary, either:

- (a) order that there be included *in the sum for which judgment is given* interest at such rate as the Court or the Judge, as the case may be, thinks fit on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date as of which judgment is entered; or
 - (b) without proceeding to calculate interest in accordance with paragraph (a), order that there be included *in the sum for which judgment is given* a lump sum in lieu of any such interest.
- (2) Subsection (1) does not:
- (a) authorize the giving of interest upon interest or of a sum in lieu of such interest;
 - (b) apply in relation to any debt upon which interest is payable as of right whether by virtue of an agreement or otherwise;
 - (c) affect the damages recoverable for the dishonour of a bill of exchange;
 - (d) limit the operation of any enactment or rule of law which, apart from this section, provides for the award of interest; or
 - (e) authorize the giving of interest, or a sum in lieu of interest, otherwise than by consent, upon any sum for which judgment is given by consent." (emphasis added)

69 In the present cases, the causes of action arose on 3 June 1994 and, the payments having been made on that day, there was no sum for which judgment was given or could be given within the meaning of s 51A(1). The statements of claim filed in the Federal Court on 7 November 1994 were relevantly in the same form and alleged that after the commencement of the proceedings the Commonwealth had paid to SCI and ACI the respective sums of \$5,457,379.08 and \$6,695,068.03. What was claimed was interest on those amounts for the periods 1 September 1987 to 14 October 1993 and from 1 April 1994 to 3 June 1994. We have set out earlier in these reasons the declaration made by the

Full Court in favour of SCI and ACI. This reflected the situation established by the statements of claim that the subject-matter of the litigation was confined to the claims for interest for periods preceding 3 June 1994.

- 70 In argument, reference was made to a statement by Lord Brandon of Oakbrook in *President of India v La Pintada Compania*⁶¹. The House of Lords there was dealing with the construction of legislation in some respects resembling s 51A of the Federal Court Act. His Lordship said⁶²:

"There are three cases in which the absence of any common law remedy for damage or loss caused by the late payment of a debt may arise, cases which I shall in what follows describe for convenience as case 1, case 2 and case 3. Case 1 is where a debt is paid late, before any proceedings for its recovery have been begun. Case 2 is where a debt is paid late, after proceedings for its recovery have been begun, but before they have been concluded. Case 3 is where a debt remains unpaid until, as a result of proceedings for its recovery being brought and prosecuted to a conclusion, a money judgment is given in which the original debt becomes merged."

- 71 However, as we have indicated, the present appeals are concerned with neither case 1 nor case 2 nor case 3. Case 1 and case 2 are concerned with the situation where a debt is paid late. There was no late payment of the debts due on and from 3 June 1994 to SCI and ACI. *A fortiori*, case 3 has no application, there being no money judgment given in which there merges the original and unpaid debt.

61 [1985] AC 104.

62 [1985] AC 104 at 122.

Interest independently of statute

- 72 Independently of their reliance upon s 51A as the source of curial authority to award the interest they seek in these proceedings, SCI and ACI assert a "free-standing" right to the recovery of interest where the defendant has had the use of the plaintiff's money in circumstances which indicate an unjust enrichment at the expense of the plaintiff. The existing state of authority does not favour acceptance of such a broad proposition.
- 73 The present is not a case where the assertion is that the appellant's breach of contract or negligence has caused the respondents to pay away or the appellant to withhold money and as a result the respondents have been deprived of the use of the money so paid away or withheld⁶³. Nor do the respondents seek an award of damages representing compensation for a wrongfully caused loss of their money, which is assessed wholly or partly by reference to the interest which would have been earned by safe investment of the money⁶⁴.
- 74 It is true that in the administration of its remedies, equity followed a different path to the common law with respect to the award of interest. In cases of money obtained and retained by fraud and money withheld or misapplied by a trustee or fiduciary, the decree might require payment of compound interest⁶⁵. However, in *Westdeutsche Bank v Islington London Borough Council*⁶⁶, the House of Lords answered in the negative the question whether, where statutes, of which s 51A(2)(a) is a local example, provide for orders for payment of simple but not compound interest upon common law claims, equity, in its auxiliary jurisdiction, will supplement the statute by providing for an award of compound interest.
- 75 In other instances, equitable relief might involve the payment of simple interest. As an element in the relief administered upon rescission of a contract under which the plaintiff had paid over moneys to the defendant, the order might require the defendant to make the repayment with interest calculated from the date of the initial payment⁶⁷. Relief against forfeiture by a vendor of payments under an instalment or terms contract might require repayment with interest from the

63 See *Hungerfords v Walker* (1989) 171 CLR 125 at 149 per Mason CJ and Wilson J.

64 See *Hungerfords v Walker* (1989) 171 CLR 125 at 152 per Brennan and Deane JJ.

65 See *Hungerfords v Walker* (1989) 171 CLR 125 at 148.

66 [1996] AC 669.

67 An example is the orders made in *Alati v Kruger* (1955) 94 CLR 216 at 229-230.

dates the respective instalments were paid⁶⁸. An account of profits would carry interest⁶⁹. Conversely, a party seeking equitable relief may be obliged to do equity by the payment or repayment of moneys with interest⁷⁰. A purchaser who, after the date fixed for completion, seeks specific performance will be treated in equity as having been in possession from the completion date and, in general, will be required to offer the vendor interest on the purchase price from that date⁷¹. However, the present litigation does not involve the administration of any equitable relief and so call for consideration of the issue whether it was unconscionable of the appellant to make the refunds on 3 June 1994 without the addition of payments on account of interest.

- 76 Moreover, even if it be accepted, despite the present state of authority, that there be a principle of the width advanced by SCI and ACI, it could not apply in the present case. The collection of the duty in question in the period before the making of the CTCO was required by statute. Such entitlements as SCI and ACI enjoyed in respect of repayment were the product also of statute. The restitutionary considerations which are present in various areas of the law cannot "purport to override statute by claiming a superior sense of injustice to Parliament's"⁷². In his dissenting judgment in the Full Court, Sackville J said⁷³ that the legislation did not evince an intention:

"to expose the Commonwealth to a liability to pay interest to each and every importer of goods under the concessional scheme. What was intended was that the making of the CTCO would create an entitlement of the importer of goods to recover any duty paid on those goods after the date of the

68 *Pitt v Curotta* (1931) 31 SR (NSW) 477 at 483.

69 See *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 570.

70 See, for example, the orders in *Nelson v Nelson* (1995) 184 CLR 538 at 618-619; *Maguire v Makaronis* (1997) 188 CLR 449 at 500.

71 *Esdaile v Stephenson* (1822) 1 Sim & St 122 at 123 [57 ER 49 at 50]; *Harvela Ltd v Royal Trust Co* [1986] AC 207 at 236-237. See also Davis, "Interest as Compensation" in Finn (ed), *Essays on Damages*, (1992) 129 at 138-139.

72 *National Australia Bank Limited v Budget Stationery Supplies Pty Limited*, unreported, New South Wales Court of Appeal, 23 April 1997 at 12 per Mason P. See also the remarks of Lamer CJ in delivering the leading judgment in the Supreme Court of Canada in *Reference re Goods and Services Tax* [1992] 2 SCR 445 at 476-478.

73 (1996) 69 FCR 346 at 398; 139 ALR 595 at 641-642.

application. The entitlement was not to arise unless and until a CTCO was made.

... I do not think it can be said that the Commonwealth was unjustly enriched at the [respondents'] expense by the fact that the duties were not repaid until the date the CTCO was made."

We agree.

Orders

- 77 The appeals should be allowed. Leave to cross-appeal should be granted but the cross-appeals dismissed. In place of the declaration and orders of the Full Court, it should be ordered that the appeals to that Court be dismissed with costs. The costs of the appellant of the appeals and cross-appeals in this Court should be paid by the respondents.

78 KIRBY J. "One would expect to find, in any developed system of law, a comprehensive and reasonably simple set of principles by virtue of which the courts have power to award interest ... Sadly, however, that is not the position in English law". Thus said Lord Goff of Chieveley in *Westdeutsche Bank v Islington LBC*⁷⁴. In that case the House of Lords divided on the question of whether, in the context of a given statute, the principles of equity might supplement a right to simple interest on a common law claim.

79 The principles applicable to the recovery of interest under Australian law, being derived from the same historical source, are no more certain. But where the interest is claimed to supplement entitlements under a detailed statutory scheme which makes no provision for interest, the first duty of a court to which a claim for interest is addressed is to decide whether such supplementation is consistent with the provisions of the statutory scheme.

Nature of the proceedings

80 After a measure of apparent reluctance, cured only by extensive litigation, the Comptroller-General of Customs ("the Comptroller-General"), by his delegate, made a commercial tariff concession order ("CTCO") under the *Customs Act* 1901 (Cth). The order operated retrospectively and, relevantly, entitled two large corporations to receive refunds of very large sums earlier paid by them as customs duty upon imported goods. The CTCO was made. The refunds were immediately paid. But the corporations say, in effect, that the Commonwealth has had the use of their moneys over an extensive period. They therefore claim interest. A comparatively small amount of interest was paid to them; but only pursuant to an express undertaking given to the Full Federal Court in the course of the earlier litigation. The corporations seek the balance of the interest which, they say, is required by law and commercial justice. Stated so broadly, the suggested merits of the corporations' claims may be appreciated. However, to establish a legal right (none being expressed in the *Customs Act*), a proper foundation in law must be shown.

81 The primary judge⁷⁵ considered that no such foundation existed. He rejected the claim⁷⁶. The Full Court of the Federal Court of Australia set aside this

74 [1996] AC 669 at 684.

75 Wilcox J.

76 *ACI Operations v The Commonwealth* (1995) 63 FCR 21.

conclusion⁷⁷. By majority⁷⁸, that Court ordered that, subject to an exception⁷⁹, now contested in a cross-appeal, interest should be paid. A declaration was made⁸⁰ that the interest be paid under either s 51A(1)(a) or s 51A(1)(b) of the *Federal Court of Australia Act 1976* (Cth) and that the calculation of it be remitted to a single judge of that Court. By special leave, appeals have now been brought to this Court. The Commonwealth seeks the restoration of the order of the primary judge rejecting the claim for interest.

82 As appears from the terms of the declaration of the Federal Court, now under scrutiny, the principal foundation for the claim for interest was a general provision enacted by the Parliament whereby, in language which is fairly standard for superior courts in Australia (and indeed elsewhere), the Federal Court is empowered to make orders for the inclusion of interest on sums for which judgment is given by it. However, an alternative route to the same conclusion was proffered. This invoked the law of restitution. It was contended that a non-statutory principle for the award of interest, such as the law of restitution, could co-exist with the express provisions of s 51A of the *Federal Court of Australia Act*⁸¹. The purpose of the award of interest was to compensate a party, successful in litigation, for the detriment suffered by being kept out of its money and deprived of the use of it by the unsuccessful party⁸². Looked at another way, it was argued that the Commonwealth should not be able to pocket the benefit of having had the capacity to use the money over time⁸³.

83 The majority in the Full Court upheld the claim to interest under s 51A(1) of the *Federal Court of Australia Act*. Their Honours also indicated that, in principle, they were of the view that the claim could be upheld under restitutionary

77 *SCI Operations v The Commonwealth* (1996) 69 FCR 346; 139 ALR 595.

78 Beaumont and Einfeld JJ; Sackville J dissenting.

79 That the interest should not be paid if the Commonwealth could show good cause to the contrary (in the form only of a "windfall" defence): (1996) 69 FCR 346 at 376; 139 ALR 595 at 620.

80 (1996) 69 FCR 346 at 379; 139 ALR 595 at 623.

81 cf *Hungerfords v Walker* (1989) 171 CLR 125 at 147-148.

82 *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657 at 663, 666; *Andjelic v Marsland* (1996) 186 CLR 20 at 28; *Harbutt's v Wayne Tank Co* [1970] 1 QB 447 at 468.

83 The respondents referred to Mason and Carter, *Restitution Law in Australia* (1995) at par 2807; *Star v O'Brien* (1996) 40 NSWLR 695 at 703, 706-707; *National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd* unreported, New South Wales Court of Appeal, 23 April 1997 at 11 per Mason P.

principles⁸⁴. However, for convenience, the orders made contemplated calculation of interest only in accordance with the statute⁸⁵. In this Court, the Commonwealth disputed the availability of either basis for an award of interest. With reference to the purported reliance on s 51A(1)(b) of the *Federal Court of Australia Act*, the Commonwealth also contended that this basis had not been suggested at trial and that, to permit reliance to be had upon it, for the first time on appeal, involved a procedural unfairness⁸⁶.

84 All of these interesting skirmishes come to nothing if, as the Commonwealth primarily submitted, the basic scheme of the legislation under which the sums of duty were repayable ousted (by express provision or necessary implication) the additional entitlement in the form of interest claimed by the corporations. If, by express enactment, the sole amount which, by law, might be recovered was the customs duty earlier paid, general statutory provisions or common law or equitable principles whereby interest might be recovered in other circumstances would have no operation. Argument based on the facility to award interest under the *Federal Court of Australia Act* or the scope of the law of restitution would have no application. Technical arguments would not arise. By law, the entitlement to refund would be restricted to that expressly afforded by the Parliament. No entitlement to interest being stated there, none would be recoverable.

85 I would uphold this primary argument. In my view, the provisions of the customs legislation, properly understood, state the entirety of the sums which may be recovered by an importer following the making of a CTCO. In effect, they oust both the general power of the Federal Court to include interest on judgments and any power to do so under the general principles of the law of restitution or otherwise.

84 (1996) 69 FCR 346 at 378; 139 ALR 595 at 622.

85 (1996) 69 FCR 346 at 379; 139 ALR 595 at 623.

86 The Commonwealth's submissions were not that the majority of the Full Court were barred from relying on s 51A(1)(b) under any circumstances. Instead, the Commonwealth's chief concern appeared to relate to the assumed factual basis that their Honours used to justify the application of s 51A(1)(b). The majority in the Full Court reached their conclusion that s 51A(1)(b) was applicable on the basis that the Comptroller-General had failed to act reasonably so as to make the CTCO at an earlier date. However, that allegation had been abandoned by the respondents at the trial. The Commonwealth therefore contended that such a finding was not open either to the Full Court or this Court.

A scheme for refunds of customs duty

86 The background facts are stated in the reasons of other members of the Court. There is no dispute about them. There is no point in my repeating them. The relevant statutory provisions are also there set out.

87 To understand the subjective motivation of SCI Operations Pty Limited and ACI Operations Pty Limited (the respondents) in pursuing so vigorously their claims to interest (quite apart from the large amounts of money involved) it is perhaps as well to remember the tortuous course which the respondents' efforts to secure the CTCO took. To say that the Comptroller-General, and his officers, were disinclined to make the CTCO would be an under-statement. The applications went backwards and forwards between the Federal Court and the administrators. Those with a penchant for tales of administrative obstacle courses can read some of the earlier decisions⁸⁷.

88 The respondents persisted with fortitude. They ultimately secured the making of the CTCO. The happy day was 3 June 1994, nearly seven years after they had first lodged applications for that purpose under the *Customs Act*⁸⁸. When the delegate of the Comptroller-General made the CTCO in question he specified 1 September 1987 as the day on which it came into effect. It is this element of retrospectivity, pursuant to statute, which was to give rise to the claim for interest.

89 Against the background of the long history of disputation between the respondents and the Comptroller-General, it was not altogether surprising that the statements of claim which each of the respondents filed in the Federal Court in common form and their subsequent statements of facts, issues and contentions, relied upon grounds which included the assertion that the amounts paid by them as customs duty had been wrongly demanded and that the CTCO should have been made at an earlier time⁸⁹. However, this foundation for the claims for interest,

87 For example *ACI PET Operations v Comptroller-General of Customs* (1990) 26 FCR 531; *ACI PET Operations v Comptroller-General of Customs* (1993) 118 ALR 114; *Comptroller-General of Customs v ACI PET Operations* (1994) 49 FCR 56; 121 ALR 347.

88 s 269G.

89 *SCI Operations Pty Ltd v The Commonwealth*, Federal Court of Australia, Statement of Claim, 7 November 1994, pars 14, 15; *ACI Operations Pty Ltd v The Commonwealth*, Federal Court of Australia, Statement of Claim, 7 November 1994, pars 14, 15; *SCI Operations Pty Ltd v The Commonwealth*, Federal Court of Australia, Applicant's Statement of Facts, Issues and Contentions filed pursuant to the order of Justice Wilcox made on 2 December 1994, 6 January 1995, pars 20A, 22A, B7, B8; *ACI Operations Pty Ltd v The Commonwealth*, Federal Court of (Footnote continues on next page)

which might have given rise to different issues, was expressly abandoned at first instance⁹⁰. The respondents there made it clear that their case was⁹¹:

"simply that, the CTCO having been made, the duty was refundable on 3 June 1994 and [they] were entitled to interest on the amount of the refunded duty from the dates of the original payments, either on the basis of the law of restitution or s 51A of the *Federal Court of Australia Act*".

90 The primary judge noted three concessions made for the respondents. They were important to his approach and also for that of the dissenting judge in the Full Court⁹². The concessions were that the respondents were liable to pay customs duty on the goods in question when they were originally imported⁹³; that the Comptroller-General was both entitled and obliged to retain such duty on behalf of the Commonwealth until the making of the CTCO on 3 June 1994; and that it was only when this event occurred that the Comptroller-General (or the Commonwealth) became bound to refund the duty to the respondents, although the amount of such refund was calculated by reference to the duty paid from September 1987 to February 1992.

91 In the context of these concessions, the Commonwealth submitted that the language of the *Federal Court of Australia Act*, permitting that Court to provide interest, did not attach for various textual reasons. The primary such reason was because "the date when the cause of action arose"⁹⁴ was not September 1987, as claimed. If any such date were applicable it was 3 June 1994. Hence there was no entitlement to interest under the Act. No entitlement to restitution arose because, far from wrongfully keeping the respondents out of moneys to which they were entitled, the Comptroller-General was not only authorised, but obliged, to retain the moneys until the CTCO was made. These arguments are examined in the reasons of other members of this Court. I do not wish to say anything about them.

Australia, Applicant's Statement of Facts, Issues and Contentions filed pursuant to the order of Justice Wilcox made on 2 December 1994, 6 January 1995, pars 20A, 22A, B7, B8.

90 (1995) 63 FCR 21 at 25.

91 (1995) 63 FCR 21 at 25.

92 (1996) 69 FCR 346 at 386; 139 ALR 595 at 630 per Sackville J.

93 The obligation arose under the *Customs Act*, s 132(1) and the *Customs Tariff Act* 1987 (Cth), s 21.

94 s 51A(1)(a).

As I have already indicated, my view is that the claim for interest must be rejected on a more fundamental ground.

Determining the nature and source of the entitlement to refund

92 Once the respondents abandoned any claim that the sums previously paid by them as customs duty had been wrongly demanded, or that the CTCO should have been made at an earlier time, they necessarily accepted that the amounts paid by them were lawfully paid and collected at the rate of duty then applicable. Their only entitlement to recover these sums arose from the *Customs Act*, s 269N. That section provided for the retrospective exemption from customs duty which gave rise to the entitlement to the refunds.

93 The statutory context of s 269N is analogous to that examined by this Court in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd*⁹⁵. In 1987, the Victorian Parliament enacted a statute in which one section⁹⁶ gave retrospective operation to another section⁹⁷. The latter provision was "deemed to have come into operation on 30 June 1985"⁹⁸. Mason CJ was inclined to view the 1987 amendment as enacting a statutory fiction by which amounts paid after 1985 were to be characterised, retrospectively, as having been made under a mistake of law, and so recoverable⁹⁹. However, the majority of this Court decided that the proper analysis of the right to refund was to be found, and found only, in the language enacted by Parliament.

95 (1994) 182 CLR 51.

96 *Taxation Acts Amendment Act 1987* (Vic), s 2(4).

97 *Taxation Acts Amendment Act 1987* (Vic), s 8, amending the *Stamps Act 1958* (Vic), s 99(3).

98 *Taxation Acts Amendment Act 1987* (Vic), s 2(4). See (1994) 182 CLR 51 at 62, 83.

99 (1994) 182 CLR 51 at 67.

94 Brennan J, writing with the concurrence of Toohey and McHugh JJ, said¹⁰⁰:

"[T]here was no mistake affecting the payment of the amount ... When paid, the Comptroller was entitled - indeed, she was bound - to retain it. But, by force of the operation attributed to the 1987 amendment, the Commissioner is retrospectively disentitled to retain what was paid ... under the Act as it had stood before the 1987 amendment commenced. What effect in law does the 1987 amendment have? ... I see no reason to treat the Commissioner's liability to refund the amount ... as other than statutory. There is no occasion to invoke notions of common law restitution in order to discover a cause of action entitling a payer to a refund.

It follows that, *prima facie*, all of the amounts claimed ... are recoverable. The Commissioner's liability to refund would have been enforceable by action if it were not for s 111(1) but, as that provision is clearly intended to prescribe the means by which the Commissioner's liabilities should be discharged, *mandamus* is the appropriate remedy to compel the Commissioner to refund overpayments which she is legally liable to refund."

The opinion of Dawson J was to similar effect¹⁰¹.

95 Conventionally, a deeming provision, being inherently artificial, is confined to the achievement of the purpose for which Parliament has enacted it¹⁰². It is not ordinarily designed to "alter the facts of history"¹⁰³. Without clear language, it does not change the character, for legal purposes, of the payments when originally made so as to pretend that they were made by mistake or unnecessarily. In the present case, the retrospective operation of s 269N of the *Customs Act* was not designed to attract the application of other special federal legislation, such as the interest provisions of the *Federal Court of Australia Act*¹⁰⁴. Its purpose was, and was only, to provide the exemption from duty backdated to the specified date. That exemption arose, under the CTCO, not only for the benefit of the particular applicant who had procured its making but for all importers affected by its terms.

100 (1994) 182 CLR 51 at 89-90 (footnote omitted).

101 (1994) 182 CLR 51 at 99-100.

102 *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at 696; *Ex parte Walton*; *In re Levy* (1881) 17 Ch D 746 at 756; *Westpac Banking Corp v Tomassian* (1993) 32 NSWLR 207 at 212.

103 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 478. See also *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 100 per Dawson J.

104 s 51A(1).

Once the CTCO was made, all of them were entitled to recover customs duties previously paid pursuant to a then lawful obligation and collected by the Comptroller-General pursuant to his statutory duties. The making of the CTCO had a universal effect according to its terms. This was so whether the importer was aware of the application for the CTCO at the time of payment or not. It was so whether the importer had passed the burden of the duty paid on to its customers or not.

The statutory scheme excluded an entitlement to interest

- 96 These characteristics of the applicable legislative scheme distinguish this case from those in which an unlawful demand has been made and sums paid and collected otherwise than at the applicable lawful rate¹⁰⁵. Or from those in which moneys have been paid pursuant to a mistake of law or fact¹⁰⁶. Or from cases where questions have arisen as to the validity of the taxing provisions pursuant to which moneys have been paid¹⁰⁷. Or where there has been a dispute as to the amount or rate of duty payable and it is later authoritatively determined that duty, previously demanded and paid, was wrongly assessed¹⁰⁸. In such cases a different principle may be invoked by the taxpayer claiming a refund with interest. Here, the entitlement to the refund upon the making of a CTCO with retrospective operation is expressly envisaged by the *Customs Act*. It is provided for with particularity. In my view, that provision and particularity exclude a supplementary entitlement to interest.

105 *Sargood Bros v The Commonwealth* (1910) 11 CLR 258; *Mason v New South Wales* (1959) 102 CLR 108; *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137.

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

107 *Air Canada v British Columbia* [1989] 1 SCR 1161; (1989) 59 DLR (4th) 161; cf *Woolwich Building Society v IRC* [1993] AC 70.

108 *Collector of Customs v Gaylor Pty Ltd* (1995) 35 NSWLR 649; *State Bank of NSW v Commissioner of Taxation* (1996) 62 FCR 371; 132 ALR 653.

97 My reasons for this conclusion arise from a scrutiny of the statutory scheme. They are as follows:

1. *The language of the provision* The terms of the *Customs Act* envisage that the refund will be calculated with retrospective effect. Such effect might extend (as in the present proceedings) over many years. If it had been the purpose of the Parliament to provide an entitlement to interest, it would have been expected that it would have provided for such interest in express terms. It did not. By implication, therefore, the Parliament's purpose was that the importer should, by statute, recover the duty paid by it but nothing more. That was the scheme of the legislation according to its terms. To superimpose additional benefits by way of recovery of interest, clear language in the Act would be required. So far as the language of Pt XVA of the *Customs Act* (as it stood at the relevant time) is concerned, there is no hint of an entitlement to interest. There are indications to the contrary.
2. *History of the legislation* The entitlement to recover an amount previously paid as duty is found only in s 269N of the *Customs Act*. That entitlement was a new one which was introduced following a review of the *Customs Act*. It is permissible to have regard to the background to the provision in order to elucidate the purpose and intended operation of s 269N¹⁰⁹. Doing so will help to ascertain whether the Act defines exclusively the importer's rights or is compatible with, or envisages, an additional entitlement to interest, under another statute or under the general law. Section 269N was not included in the *Customs Act* by oversight. It was part of a comprehensive scheme of legislative reform introduced by the *Customs Amendment Act* 1983 (Cth). That reform was substantially based on a report of the Industries Assistance Commission¹¹⁰, as extracted and explained in the reasons of Sackville J in the Full Court¹¹¹. The report pointed out that concessional duties for certain imports had been a feature of Australian customs law since federation¹¹². Before 1983, the concessional system operated by means of by-laws and determinations, many of which were limited to individual importers and were not widely publicised¹¹³. It was into this context, where there was a lack of

109 *Acts Interpretation Act* 1901 (Cth), s 15AB; cf *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

110 Industries Assistance Commission, *The Commercial By-Law System* (1982); House of Representatives, *Parliamentary Debates* (Hansard), 11 May 1983 at 401.

111 (1996) 69 FCR 346 at 380-381; 139 ALR 595 at 624-625.

112 Industries Assistance Commission, *The Commercial By-Law System* (1982) at 10, 63; cf Cooper, *Customs and Excise Law* (1984) at pars 1034-1038.

113 Industries Assistance Commission, *The Commercial By-Law System* (1982) at 87.

certainty, an absence of public scrutiny, high administrative costs and the application of inappropriate criteria, that the reforms introduced by the 1983 amendments were enacted. The object of the new system was, by the making of a CTCO, to exempt from duty all goods of the specified kind. Inherent in the system - which included publication of applications in the *Commonwealth Gazette*, provision for opposition to be expressed¹¹⁴ and consideration of such opposition by the Comptroller-General¹¹⁵ - were inbuilt and inevitable delays. No provision for full or partial compensation or for reimbursement or interest with respect to such delays was provided. It cannot be suggested that the drafters of the legislation, or the Parliament itself, would have been unaware of the delays inherent in the scheme. Or of the obligation of the importer, in the meantime, to pay the duty whilst any application for a CTCO was being processed.

3. *Arguable justifications* Express provision for the regulations to prescribe the amount, or the means of determining the amount of any refund, rebate or remission of duty was included as an addendum to the 1983 amendments by a further amendment to the *Customs Act* enacted in 1984¹¹⁶. No regulations were made providing for interest. The reason why neither the *Customs Act* nor the regulations made provision for interest invites speculation. However, some clues exist in the operation of the scheme in Pt XVA of the *Customs Act* as it stood prior to the amendments in 1992¹¹⁷ that introduced the provisions presently applicable. Sackville J, in his reasons, extracted passages of the Industry Commission's 1991 report on the topic¹¹⁸. That report makes it clear that the scheme was dealing with very large sums of the revenue and a large proportion (about 11.5%) of the total value of goods imported into Australia¹¹⁹. Although the delay between lodgment of an application for a CTCO and approval was reported, on average, to be about six months, in some cases (of which the present are examples) delays could

¹¹⁴ s 269L(a).

¹¹⁵ s 269L(b).

¹¹⁶ By the *Statute Law (Miscellaneous Provisions) Act (No 2) 1984* (Cth), s 3 and Sched 1.

¹¹⁷ *Customs Legislation (Tariff Concessions and Anti-Dumping) Amendment Act 1992* (Cth), s 10.

¹¹⁸ (1996) 69 FCR 346 at 383; 139 ALR 595 at 627.

¹¹⁹ The total amounts of savings of duty under the CTCO scheme was reported to be \$962 million in the 1989-90 financial year. See Industry Commission, *The Commercial Tariff Concession and By-Law Systems* (1991) at 51.

be protracted and the process could take years¹²⁰. Refunds of duty to importers could sometimes result in windfalls depending upon whether the duty paid had already been passed on to customers. The Industry Commission report did not address the question of interest. So far as appears from the report, no importer made submissions that interest should be payable¹²¹. None of these considerations is necessarily determinative of the proper operation of Pt XVA of the *Customs Act* or of s 269N in particular. However, the specificity of the scheme and the competing interests of equity and revenue raising suggest that, had the Parliament been minded to allow interest to be recoverable for the delays inherent in the scheme, it would have expressly provided for it. Against the background of the history and operation of the scheme, the absence of such a provision reinforces the conclusion that the payment of interest was not to be part of the balance of legal entitlements struck by the scheme as enacted¹²².

4. *Exclusivity of statutory remedies* This conclusion is further reinforced by the general principle that where a statute creates a new right and specifies a remedy, that remedy is ordinarily to be treated as exclusive¹²³. Where the remedy creates, for the first time, a form of entitlement which will result in a payment from the consolidated revenue, the presumption that the benefits enacted represent the entirety of what was intended by the Parliament has even greater force¹²⁴. Dealing as we are here with very great sums, upon which interest payments (even for periods considerably shorter than the seven years in this case) would be enormous, it is reasonable to suggest that the Parliament would have provided for the payment of such sums rather than leaving it to judges invoking rules or principles of law designed for quite different circumstances. Involved is not simply the potential payment of interest to the claimants for the CTCO but also to all other beneficiaries who, perhaps much earlier, may have imported goods of the specified description

¹²⁰ Industry Commission, *The Commercial Tariff Concession and By-Law Systems* (1991) at 137-138.

¹²¹ Industry Commission, *The Commercial Tariff Concession and By-Law Systems* (1991) at 353-391.

¹²² cf *Comptroller-General of Customs v Kawasaki Motors (No 1)* (1991) 32 FCR 219 at 240-241; 103 ALR 661 at 682-683, where Hill and Heerey JJ held that the rules of natural justice were not applicable to decision-making under s 269P of the *Customs Act*.

¹²³ *Josephson v Walker* (1914) 18 CLR 691 at 701.

¹²⁴ *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 241-245; cf *Walker v Department of Social Security* (1995) 56 FCR 354 at 369-370; 129 ALR at 212-213.

and are entitled to claim a refund of duty under the CTCO, once made. Instead of leaving such provisions to courts and individual assessment, it might have been expected that, had it been intended that interest should be paid, specific and detailed statutory provisions would have been enacted or regulations lawfully made. These considerations reinforce the impression which is derived from a reflection on the statutory scheme as a whole, in the form in which it was enacted. Refunds of duty were recoverable. Interest was not.

98 Upon the foregoing analysis, the statutory scheme defined what might be recovered. Upon its true construction it excluded the payment of interest. For the recovery of interest an amendment and elaboration of the statutory scheme would be required. General provisions of other statutes or of the common law or equity could not, at least in the present circumstances, provide a foundation to enlarge the ordinary entitlements of the respondents enacted by the Parliament. Upon this basis, the provisions of s 51A of the *Federal Court of Australia Act* and the principles of the law of restitution have no application.

99 Although it is not necessary to my approach, it is worth observing that the foregoing conclusion also has consequences for the application of s 51A of the *Federal Court of Australia Act* and for the invocation of the principles of restitution. The proper remedy of the respondents, if repayment of duty were delayed or denied, would have been proceedings for mandamus¹²⁵. Alternatively, they could have sought a mandatory order under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) to compel the making of a refund under the *Customs Act*, s 163. Such public law proceedings would not have constituted "proceedings for the recovery of any money" within the meaning of s 51A(1). Nor, on this analysis, could it conceivably be said that the Commonwealth, prior to the making of the CTCO, had wrongly taken the benefit of the duty paid at the respondents' expense occasioning an injustice to them for which there was no recognised defence¹²⁶. The reliance on s 51A(1) involved, in effect, an appeal to the entitlement of the respondents to compensation for loss sustained by reason of their being kept out of their money. The reliance on the law of restitution depended upon the entitlement of the respondents to have the Commonwealth divested of what the Commonwealth was not entitled to retain. But on the analysis stated, the respondents were not kept out of their money because until the CTCO was made the money was properly received and retained by the Comptroller-General. Nor

125 For similar conclusions in analogous circumstances in the United States of America see *Kaucky v Southwest Airlines Co* 109 F 3d 349 at 351 (7th Cir 1997); *Sigmon v Southwest Airlines Co* 110 F 3d 1200 at 1203 (fn 8), 1204 (5th Cir 1997).

126 *Woolwich Building Society v IRC* [1993] AC 70 at 197.

was there any injustice in the Comptroller-General's having, and using, that money. By statute he was so entitled.

100 So far as s 51A(1)(b) is concerned, if it were necessary I would have been inclined to uphold the Commonwealth's complaint that reliance upon this provision occasioned procedural unfairness to it. In light of the respondents' failure to press the issue at trial (mentioned above), the assumption by the majority in the Full Court that the Comptroller-General had failed to act reasonably so as to make the CTCO at an earlier date was not open. Whatever substance might at one stage have been in it, this point had been abandoned. It could not be invoked to sustain the respondents' interpretation of par (b)¹²⁷.

Conclusions

101 My conclusions make it unnecessary for me to consider the many other questions which were argued in this case¹²⁸. In the approach which I favour, the claims to interest fail at the threshold. They do so because there is no provision for interest in a comprehensive statutory scheme which effectively codified the importer's entitlements once a CTCO was made. General statutory provisions or common law principles could not expand the importer's rights. An attempt to do so would not be to elaborate or supplement the statutory scheme. It would be impermissibly to change it.

102 I would not dissent from the observation of Sackville J, at the close of his reasons, that the "unfortunate history" of this litigation "suggests very strongly that there should at least be some provision for interest where the decision-making process miscarries (assuming that there is no other remedy available)"¹²⁹. However, given the respondents' failure to press the issue at the trial, they were not entitled to base their claim for interest or compensation upon grounds of excessive delay or erroneous decision-making. The theory advanced for the respondents would entitle all importers benefited by a CTCO with retrospective operation to an

127 (1996) 69 FCR 346 at 399-400; 139 ALR 595 at 642-643.

128 Such as (a) the correctness of the decision of the Federal Court in *State Bank of NSW v Cmr of Taxation* (1995) 62 FCR 371; 132 ALR 653 having regard to *The "Medina Princess"* [1962] 2 Lloyd's Rep 17; *President of India v La Pintada Compania* [1985] AC 104; (b) which of the views expressed in *Westdeutsche Bank v Islington LBC* [1996] AC 669 represents the law of Australia; or (c) the suggested effect of s 167(4) of the *Customs Act* to foreclose any action at common law for the recovery of duty paid; cf *Comptroller-General of Customs v Kawasaki Motors (No 2)* (1991) 32 FCR 243 at 263-264; 103 ALR 637 at 656-657.

129 (1996) 69 FCR 346 at 398; 139 ALR 595 at 642.

award of interest. That theory of the legislation simply cannot stand with the scheme of the Act as enacted by the Parliament.

Orders

103 I agree in the orders proposed by Brennan CJ.

