High Court of Australia

Parker v Comptroller-General of Customs [2009] HCA 7 (12 February 2009)

Last Updated: 12 February 2009

HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

STEPHEN EDWARD **PARKER** APPELLANT

AND

COMPTROLLER-GENERAL OF **CUSTOMS** RESPONDENT

Parker *v Comptroller-General of* ***Customs*** [2009] HCA 7
12 February 2009
S317/2008

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

J T Gleeson SC with M J Darke and D A Lloyd for the appellant (instructed by Yeldham Price O'Brien Lusk)

D J Fagan SC with G M Elliott for the respondent (instructed by Australian Government Solicitor)

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

CATCHWORDS

Parker v Comptroller-General of Customs

Practice and procedure – Appeals – Procedural fairness – Respondent issued a warrant under s 214 of ***Customs Act* 1901** (Cth) authorising seizure of documents relating to single bottle of brandy – Officers of respondent seized documents relating to "other goods" imported within previous five years – District Court decided in *In the matter of the appeal of Lawrence Charles O'Neill* (unreported, District Court of New South Wales, 18 August 1988) that warrants issued under s 214 did not permit seizure of five year documents – Court of Appeal decided *O'Neill* "mistaken" without affording appellant opportunity to make submissions – Whether appellant denied procedural fairness in Court of Appeal – Scope of principles respecting procedural fairness in curial proceedings – Whether appellate court required to afford parties opportunity to be heard on non-binding decision.

Practice and procedure – Appeals – Procedural fairness – Court of Appeal went on to decide appeal on footing *O'Neill* correct – Whether lack of opportunity to make submissions with respect to *O'Neill* caused prejudice to appellant and affected outcome in Court of Appeal.

Evidence – Illegally or improperly obtained evidence – *Evidence Act* 1995 (NSW) ("Evidence Act"), s 138 – Respondent admitted condition precedent to execution of warrant not satisfied – Whether wilful disregard of Act in execution of warrant – Whether additional fact of seizure of five year documents relevant to exercise of discretion under s 138.

Practice and procedure – Appeals – Procedural fairness – Function of appellate court upon review of exercise by trial judge of discretion under s 138 of Evidence Act.

Words and phrases – "procedural fairness", "relating to the goods", "the goods".

***Customs Act* 1901** (Cth), s 214, Sched V.
Evidence Act 1995 (NSW), s 138.

FRENCH CJ.

Introduction

1. On 30 July 1992 the Comptroller-General of **Customs** commenced proceedings in the Supreme Court of New South Wales against the appellant, Stephen Edward **Parker**, two companies, Lawpark Pty Ltd ("Lawpark") and Breven Pty Ltd ("Breven") and another individual, Gary Thomas Lawler. The proceedings arose, inter alia, out of alleged offences against the ***Customs*** *Act* 1901 (Cth) ("the **Customs Act**") involving unauthorised movement of goods from a bond warehouse and the evasion of duty payable under the **Customs Act**. The offences were said to have been committed between 1 August 1987 and 31 May 1990.
2. The background to the charges against Mr **Parker** was an inquiry undertaken between 1987 and 1989 by officers of the Australian **Customs** Service ("**Customs**") into suspected contraventions of the *Spirits Act* 1906 (Cth) ("the Spirits Act") and the **Customs Act**. The investigators formed the opinion that some importers of brandy had, before bottling and selling the imported product, been mixing it with a grain-based alcohol, produced in Australia, on which duty had not been paid. The primary targets of the inquiry were Lawpark, which imported and distributed spirits, Kingswood Distillery Pty Ltd ("Kingswood Distillery"), which manufactured and processed spirits in Australia, and Breven, which owned a bond store where imported spirits were warehoused without incurring any liability to pay duty. Mr **Parker** was a director and shareholder of Lawpark and Breven.
3. On 6 March 1990, **Customs** officers went to a number of premises and, relying upon notices to produce issued under s 214 of the **Customs Act** and reg 171 of the **Customs** Regulations, required the production of books and documents. They took the view that the requirements were not met. They then undertook compulsory searches and seizures relying upon warrants issued under s 214. Following examination of the documents obtained from their searches a number of charges were laid under the **Customs Act** including those against Mr **Parker**. Those against Mr **Parker** related to the unauthorised removal of imported Scotch whisky from the Breven warehouse and the evasion of duty payable in relation to the whisky.
4. The proceedings against Mr **Parker** came on for hearing in the Supreme Court of New South Wales in April 2005. By then he was the only remaining defendant. The extraordinary delay was in part the result of a stay of proceedings ordered on 10 June 1994. By the time of the trial the Spirits Act and the provisions of the **Customs Act** under which the documents had been seized had been repealed. Proceedings against each of the other defendants had been concluded.
5. The Comptroller-General[1] sought orders that Mr **Parker** be convicted of offences contrary to s 33(1) and s 234(1)(a) of the **Customs Act**. He also sought orders for the recovery of penalties and for the payment of unpaid duty[2]. He made an averment of all pleaded facts under s 255 of the **Customs Act**. Mr **Parker** did not give evidence himself and did not adduce evidence in his defence.
6. The Comptroller-General tendered a body of documentary evidence at the trial. The documents had been seized from Lawpark's premises at Wetherill Park in New South Wales. Their admissibility was challenged under s 138 of the *Evidence Act* 1995 (NSW) ("the Evidence Act") on the basis that they had been obtained improperly and/or in contravention of an Australian

law. It was said, inter alia, that the statutory power to search for and seize the relevant documents had not been enlivened because a condition precedent to the exercise of the power, namely the existence of a valid notice to produce issued under s 214 of the Customs Act, had not been satisfied.

7. A deficiency in the notice to produce was conceded by the Comptroller-General in his defence. The concession was that the notice was so imprecisely worded that the person required to produce documents pursuant to it would not be able to know the extent of the documents to which it applied. The trial judge, Simpson J, also found, in a separate ruling, that the range of documents seized went well beyond what would have been authorised by s 214 of the **Customs Act** even if the notice had been valid. That construction was based upon *O'Neill*, a judgment of the District Court of New South Wales given in 1988[3].
8. Although the seizure was therefore accepted as unlawful, Simpson J admitted the evidence. Section 138 allows the admission of evidence obtained improperly or in contravention of an Australian law if "the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained". Her Honour published her reasons for that ruling on 8 May 2006, on the same day in which she delivered her judgment in the case.
9. Her Honour made 14 orders of conviction, the first of which related to the offence of moving goods subject to the control of **Customs** without authorisation under the **Customs Act**. The other 13 related to evading duty payable on various quantities of alcohol. Her Honour stood the matter over for further consideration as to the consequences of those orders. Subsequently she ordered that Mr **Parker** pay a penalty of 3.25 times the amount of the duty evaded. This was a figure in excess of $10 million. She imposed a penalty of $12,000 in relation to the offence of unauthorised movement of goods. Mr **Parker** was required to pay the costs of the proceedings[4].
10. Mr **Parker** filed a notice of appeal in the Court of Appeal of the Supreme Court of New South Wales on 5 June 2006. An amended notice was filed on 19 March 2007. He sought to appeal from both the interlocutory ruling and the final judgment. The notice of appeal in the Court of Appeal raised a large number of grounds. Those ultimately pressed focussed on the admission of the documents seized from Lawpark's premises on 6 March 1990.
11. The appeal was heard on 16 and 17 October 2007 and dismissed on 6 December 2007. Basten JA, with whom Mason P and Tobias JA agreed, delivered the judgment of the Court of Appeal[5]. In the course of the judgment, the Court held that *O'Neill* had been wrongly decided and that s 214 did not bear the construction, favourable to Mr **Parker**, that had been adopted by the trial judge. On 13 June 2008, Mr **Parker** was granted special leave to appeal to this Court limited to the ground that the Court of Appeal had denied him procedural fairness by finding against him without notice of its intention to depart from *O'Neill*. The Comptroller-General by notice of contention sought to maintain the correctness of the Court of Appeal's construction of s 214.
12. The Court of Appeal was correct in its construction of s 214. It should, however, have given notice to Mr **Parker** of its intention to consider that question. In the event, Mr **Parker** was not deprived of the possibility of a successful outcome. There was no practical unfairness:

> "Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice."[6]

The appeal should be dismissed with costs.

The statutory framework – the **Customs Act**

13. As at 6 March 1990 s 214 of the **Customs Act** provided:

"(1) Whenever information in writing has been given on oath to the Collector that goods have been unlawfully imported exported undervalued or entered or illegally dealt with, or that it is intended to unlawfully import export undervalue enter or illegally deal with any goods, or whenever any goods have been seized or detained, the owner shall immediately upon being required so to do by the Collector produce and hand over to him all books and documents relating to the goods so imported exported entered seized or detained undervalued or illegally dealt with, or intended to be unlawfully imported exported undervalued entered or illegally dealt with, and of all other goods imported or exported by him at any time within the period of 5 years immediately preceding such request seizure or detention, and shall also produce for the inspection of the Collector or such other officer as he may authorize for that purpose and allow such Collector or officer to make copies of or extracts from all books or documents of any kind whatsoever wherein any entry or memorandum appears in any way relating to any such goods. Penalty: $1,000.

(2) For the purposes of this section, the Comptroller or the Collector of **Customs** for a State or Territory may issue to any officer of **Customs** or officer of police a **Customs** Warrant, in accordance with the form in Schedule V, marked with a **Customs** stamp.

...

(3) If any person fails to comply with a requirement by the Collector under this section, an officer of **Customs** or officer of police, having with him a **Customs** Warrant in the form of Schedule V hereto, may, at any time of the day or night, break open and enter into any house, premises or place in which any books or documents relating to the goods are or are supposed to be, and search –

(a) the house, premises or place;

(b) any person therein or thereon; and

(c) any chests, trunks or packages therein or thereon,

and take possession of, remove and impound any of those books and documents which are found."

14. Schedule V to the **Customs Act** was in the following terms:

"SCHEDULE V

THE COMMONWEALTH OF AUSTRALIA

Customs *Warrant*

To

WHEREAS information in writing has been given on oath to me that goods have been unlawfully imported, exported, undervalued or entered or illegally dealt with or that it is intended to unlawfully import, export, undervalue or enter or illegally deal with goods, (*or*

Whereas goods have been seized or detained)

You are hereby authorized, in the event of failing to comply immediately with any requirement made in pursuance of section two hundred and fourteen of the ***Customs*** *Act 1901-1923*, to enter into, at any time of the day or night, and search, any house premises or place in which any books or documents relating to the goods are or are supposed to be; and to break open any such house premises or place and search any person therein or thereon and any chests trunks or packages therein or thereon; and to take possession of, remove and impound any of those books and documents which are found:

And for so doing this shall be your sufficient warrant.

This warrant has force throughout

This warrant shall remain in force for a period of one month from the date thereof unless revoked before the expiration of that period.

Dated this day of 19 .

("CUSTOMS" STAMP) (Signature)"

15. The term "produce documents" was defined in s 4 of the **Customs Act** thus:

> "'Produce documents' means that the person on whom the obligation to produce documents is cast shall to the best of his power produce to the Collector all documents relating to the subject matter mentioned."

16. Section 214 conditioned the obligation to produce documents on the making of a requirement by the Collector. It did not prescribe that such requirements should be effected or accompanied by the tender of a notice to produce. Nevertheless, reg 171 of the **Customs** Regulations provided that a notice to produce documents under s 214 should be in accordance with Form 61, contained in Sched 1 to the Regulations. Nothing turns on the content of the form. Regulation 171 may be seen as mandating a written notice to produce as the means of making the requirement contemplated by s 214(1).
17. The **Customs Act** was largely drafted by the first Comptroller-General of **Customs**, Sir Harry Wollaston, and was modelled on the ***Customs Act* 1890** (Vic)[7] and the ***Customs*** *Consolidation Act* 1853 (UK)[8], later incorporated into the ***Customs*** *Consolidation Act* 1876 (UK)[9]. The ***Customs*** *Consolidation Act* 1876 made provision for search and seizure of goods pursuant to writs of assistance issued by the Court of Exchequer[10] or warrants issued by Justices of the Peace[11]. There appears to have been no general provision for requiring production or authorising seizure of documents relating to suspect goods.
18. A precursor of s 214 was enacted as s 22 of the ***Customs Act* 1896** (Vic) by way of amendment to the 1890 Act. It conferred power on the Collector of **Customs** and officers of **Customs** to require production of, and to seize, documents relating to unlawfully imported or entered articles and goods seized or detained under any Customs Act. The power was conditioned by an information on oath sworn before the Collector. There was no provision in that section for notice of a requirement to produce documents. The power to seize documents was not conditioned upon non-compliance with the request to produce nor upon the existence of a warrant. The power extended to documents relating to articles and goods imported or seized and detained within six years immediately preceding the requirement for production.
19. Section 214 of the **Customs Act**, as enacted in 1901, imposed an obligation to produce documents on the requirement of the Collector. It did not include a power of search and seizure. The Collector was, however, given power under s 215 to impound or retain documents presented in connection with any entry or required to be produced under the **Customs Act**. There was also separate provision for the issue of writs of assistance and **customs** warrants modelled on the UK legislation[12].
20. In 1923, s 214 was amended by adding s 214(2) and (3)[13]. The new sub-sections remained in substantially the same form up to the time relating to these proceedings. In the Second Reading Speech the Minister for Trade and **Customs** described the amending legislation as "purely a formal measure" involving no "principle"[14]. Section 255 was enacted at the same time and was the focus of the parliamentary debate.
21. In 1975 the Law Reform Commission recommended repeal of s 214 and its replacement with a less draconian alternative[15]. The recommendation was not implemented. In 1992 the Commission again considered s 214 describing it as "very unsatisfactory"[16]. Nobody, including **Customs**, supported its retention. The Commission recommended its repeal and substitution with a power of search and seizure upon a warrant issued by a judicial officer[17].
22. Section 214 and Sched V were repealed with effect from 1 July 1995 by the ***Customs, Excise and Bounty Legislation Amendment Act* 1995** (Cth) ss 2(5) and 6 and Sched 4, Items 44 and 67.
23. Section 255 of the **Customs Act**, as at 6 March 1990, provided in sub-s (1):

> "In any **Customs** prosecution the averment of the prosecutor or plaintiff contained in the information, complaint, declaration or claim shall be *prima facie* evidence of the matter or matters averred."[18]

24. The section was confined in its application to matters of fact[19] and did not operate to increase or diminish the probative value of any evidence given by witnesses[20]. It did not apply to an averment of the intent of the defendant[21].

The statutory framework – the Evidence Act, s 138

25. As at 12 April 2005, the date of the trial, and subsequently, s 138 was in the following terms:

> "(1) Evidence that was obtained:
> (a) improperly or in contravention of an Australian law; or
> (b) in consequence of an impropriety or of a contravention of an Australian law;
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
> ...
> (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:
> (a) the probative value of the evidence; and
> (b) the importance of the evidence in the proceeding; and
> (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
> (d) the gravity of the impropriety or contravention; and
> (e) whether the impropriety or contravention was deliberate or reckless; and
> (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
> (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
> (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law."

26. The term "Australian law" is defined in the Dictionary to the Evidence Act as a "law of the Commonwealth, a State or a Territory". The word "law" is defined in cl 9 of Pt 2 of the Dictionary:

> "(1) A reference in this Act to a law of the Commonwealth, a State, a Territory or a foreign country is a reference to a law (whether written or unwritten) of or in force in that place.
> (2) A reference in this Act to an Australian law is a reference to an Australian law (whether written or unwritten) of or in force in Australia."

There is no definition of "impropriety" or "contravention" in the Act.

27. Section 138 was one of the provisions of what became the *Evidence Act* 1995 (Cth) and the New South Wales Evidence Act recommended by the Law Reform Commission in its Report No 38, published in 1987. The proposed cl 119, as it was numbered in the draft Act, was explained by the Commission[22]:

> "This clause provides a discretionary exclusion for evidence obtained improperly, unlawfully or in consequence of an impropriety or breach of the law. It applies in both civil and criminal trials. It reflects, with some modifications, the present exclusionary discretion known as the rule in *Bunning v Cross*. The main difference is the placing of the onus of proof on the party seeking to have the illegally or improperly obtained evidence

admitted."

28. The party seeking to exclude the evidence has the burden of showing that the conditions for its exclusion are satisfied, namely that it was obtained improperly or in contravention of an Australian law. The burden then falls upon the party seeking the admission of the evidence to persuade the court that it should be admitted. There is thus a two stage process[23]. The party seeking admission of the evidence has the burden of proof of facts relevant to matters weighing in favour of admission. It also has the burden of persuading the court that the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way in which it was obtained.
29. The meanings to be accorded to the terms "improperly", "impropriety" and "contravention" in s 138 were not illuminated by the Law Reform Commission report. The relevant ordinary meanings of "improper" include "not in accordance with truth, fact, reason or rule; abnormal, irregular; incorrect, inaccurate, erroneous, wrong"[24]. "Contravention" refers to "[t]he action of contravening or going counter to; violation, infringement, transgression"[25].
30. Without essaying an exhaustive definition, the core meaning of "contravention" involves disobedience of a command expressed in a rule of law which may be statutory or non-statutory. It involves doing that which is forbidden by law or failing to do that which is required by law to be done. Mere failure to satisfy a condition necessary for the exercise of a statutory power is not a contravention. Nor would such a failure readily be characterised as "impropriety" although that word does cover a wider range of conduct than the word "contravention".

The pleadings

31. The proceedings brought by the Comptroller-General were conducted on pleadings. The final form of the statement of claim was one re-amended pursuant to leave granted on 16 May 2003. It alleged, inter alia, that 92,632.3 litres of alcohol liquid ("LALs") of Scotch whisky imported into Australia by Lawpark and stored at the Breven warehouse was removed without authority under the Customs Act and delivered for home consumption.
32. Mr **Parker** was said to have been an owner of the whisky within the meaning of s 4 of the **Customs** Act. He, or someone else on behalf of Breven and acting with his knowledge, was said to have removed the whisky, falsely recorded repack dockets and created false continuing permissions. **Customs** duty of $3,113,371.60 was said to have been payable by Mr **Parker** in respect of the whisky.
33. The Comptroller-General alleged that Mr **Parker** had committed some 13 breaches of s 234(1)(a) of the Customs Act by the evasion of duty in respect of various quantities of the Scotch whisky in issue. One breach of s 33(1) was alleged in respect of the removal of the whisky without authority. The breaches were alleged to have occurred over different periods between 1 August 1987 and 31 May 1990. The statement of claim then pleaded:

> "AND THE PLAINTIFF pursuant to and to the extent provided by s 255 of the Customs Act avers that all matters and facts specified herein are true and correct."

34. In his defence to the re-amended statement of claim Mr **Parker** denied the central allegations against him including the unauthorised removal of the Scotch whisky from the warehouse and the evasion of duty. He also pleaded an estoppel based upon an alleged payment accepted in full satisfaction of the duty claimed and associated representations by the Comptroller-General. The defence went on to plead the inadmissibility of documentary evidence to be relied upon by the Comptroller-General. It alleged that documents, including bond input records, bond output records and the Bond Register relating to Breven's premises were taken by the Comptroller-General on or about 6 March 1990. It alleged that the notice to produce under s 214 was not valid, that the Sched V warrant was not issued or executed according to law, that the documents taken were unlawfully obtained and that they should not be received in evidence.
35. The Comptroller-General filed a reply dated 8 December 2003 admitting that "the section 214

notice it served on ... Lawpark Pty Ltd was invalid" but asserting that "the notice was not intentionally invalid". He also admitted that because of the invalidity of the notice "the warrants that were executed on the basis of a failure to comply with that notice were not properly executed according to law".

36. The basis of the invalidity alleged by Mr **Parker** in his defence was not spelt out in that pleading. Nor was the basis of the admission in the Comptroller-General's reply.
37. The admissibility of the documents had been agitated in an extended voir dire hearing in cognate proceedings in the Supreme Court of New South Wales in March 1996 involving Kingswood Distillery[26]. Sully J had admitted the documents under s 138 albeit it had been admitted that the notice to produce was impermissibly vague. It seems that the pleading of matters going to admissibility in the defence and reply was designed to narrow the debate on that question by putting on record the Comptroller-General's concession as to the invalidity of the notice.
38. The Comptroller-General submitted in this Court that the concession which he made at first instance was that the s 214 notice "gave insufficient description of the goods in respect of which documents were to be produced". The correctness of *O'Neill* was not conceded and it was disputed that the execution of the warrant involved a "second 'contravention of an Australian law'" insofar as the documents seized went beyond those relating to goods specified in the notice to produce. As appears later in these reasons, the implied proposition that "a second contravention" could be identified on the basis that the seizure was beyond power even if the notice had been sufficient, is not to be accepted.
39. The Comptroller-General pleaded reliance upon s 138 of the Evidence Act in support of the admissibility of the documents notwithstanding the unlawfulness of their seizure. He referred to the decision given by Sully J in the proceedings against Kingswood Distillery on 15 March 1996[27]. In that case the court had admitted the documents and information into evidence.

The information – 16 January 1990

40. The information which grounded the notice to produce and the Sched V warrant was sworn on 16 January 1990 by an officer of **Customs**. He said that on 4 May 1989 a **Customs** officer in Brisbane had purchased two bottles labelled as French Brandy, the contents of one of which was found to have been adulterated. The labels also stated that the brandy had been imported by Lawpark. According to the information the false description of the content of the bottles was "contrary to subsection 9(1)(b) of the *Spirits Act* 1906". Therefore, it was alleged "Lawpark Pty Ltd have illegally dealt with goods, being the contents of the bottle". As is apparent, the false labelling of the brandy was not connected in any way with the offences ultimately alleged against Mr **Parker**.

The notice to produce – 1 March 1990

41. On the strength of the information a notice was signed on 1 March 1990 by the Collector of **Customs** for New South Wales. It was in the following terms:

> "TO: LAWPARK PTY LTD
> 4 BLACKSTONE STREET
> WETHERILL PARK NSW
> Whereas information in writing has been given on oath that goods, to wit one bottle of spirits labelled as 'Cheval Napoleon Old French Brandy', have by you been illegally dealt with on or before the thirty-first day of October 1988. Now, therefore, I, the Collector of **Customs** for the State of New South Wales, by virtue of the powers conferred upon me by the ***Customs Act 1901***, do hereby require you to produce and hand over to JAMES MICHAEL MUTTON an officer of **Customs** duly authorized by me on my behalf to receive the same, all books and documents relating to such

goods and relating to all other goods imported by you at any time within the period of five years immediately preceding this request, and I further require you to produce for the inspection of the said JAMES MICHAEL MUTTON an officer of **Customs** duly authorized by me for that purpose or such other Officer as I may authorize for the purpose, and allow such Officer to make copies of or extracts from all books or documents of any kind whatsoever wherein any entry or memorandum appears in any way relating to any such goods."

The Sched V warrant – 1 March 1990

42. Contemporaneously with the issue of the notice to produce, the Collector signed a Sched V warrant in the following terms:

"TO: James Michael MUTTON
Officer of **Customs**.
WHEREAS: information in writing has been given on oath to me that goods had been illegally dealt with.
You are hereby authorized in the event of LAWPARK PTY LTD failing to comply immediately with any requirement made in pursuance of section two hundred and fourteen of the ***Customs Act 1901***, to enter into, at any time of the day or night, and search, any house premises or place in which any books or documents relating to the goods are or are supposed to be; and to break open any such house premises or place and search any person therein or thereon and any chests trunks or packages therein or thereon; and to take possession of, remove and impound any of those books and documents which are found: And for so doing this shall be your sufficient warrant.
This warrant has force throughout the state of New South Wales.
This warrant shall remain in force for a period of one month from the date thereof unless revoked before the expiration of that period.
Dated this 1st day of March 1990."

The *O'Neill* judgment

43. Before turning to the judgment of the primary judge dealing with the admissibility of the documents seized under the Sched V warrant, it is necessary to refer briefly to the *O'Neill* judgment given by Dunford DCJ in the District Court of New South Wales on 18 August 1988. In that case the admissibility of documents seized under s 214 of the **Customs Act** was in issue.
44. Dunford DCJ held that upon its proper construction s 214(3), authorising search and seizure of documents upon failure to comply with a s 214(1) requirement, only extended to documents relating to the goods on which that requirement was based. That is to say only the goods which were the subject of the information could be seized or detained. The authority under s 214(3) did not extend to documents relating to the wider class of goods imported within five years prior to the date of requirement to produce. A similar view of the operation of s 214(3) was taken by two judges of the Federal Court in 1991 and 1993[28].
45. There was evidence before the primary judge of advice sought and received by the Collector of **Customs** which had touched upon the *O'Neill* decision. On 31 July 1989 an officer of the Australian Government Solicitor ("AGS") provided a written advice to the Collector that the interpretation of s 214 by Dunford DCJ was correct. On 11 August 1989 another officer of AGS advised the Collector, in writing, that the interpretation was incorrect and that s 214(3) authorised seizure of documents including five year documents.
46. On 7 September 1989 a Regional Manager (NSW) of **Customs** wrote to AGS seeking

advice about the use of s 214 powers in relation, inter alia, to Kingswood Distillery and Breven. AGS sought advice from Mr Rowling of counsel. On 27 October 1989 Mr Rowling produced a written advice raising doubts about whether s 214 would authorise the requirement for production of five year documents where the illegal dealing with goods relied upon was an illegal dealing under the Spirits Act. He did not in terms address the construction of s 214(3). Although he referred to *O'Neill*, he did so on another point.

Challenge to admissibility before the trial judge

47. Counsel for Mr **Parker** identified in writing before the primary judge seven heads of illegality in relation to the challenged evidence. In the fifth head he alleged that documents had been seized which did not relate to the bottle of brandy identified in each of the notices to produce.
48. Counsel for the Comptroller-General made clear at the hearing that the Comptroller-General conceded that the notice to produce "did not specify particular goods with sufficient particularity to enable the recipient reasonably to identify documents which would relate thereto." He also made clear that he did not concede the correctness of *O'Neill*.
49. In written submissions dated 18 April 2005 on the voir dire, counsel for Mr **Parker** relied upon the judgment of Heerey J in *Challenge Plastics Pty Ltd v Collector of* ***Customs*** [29]. He referred also to the judgment of Davies J in *Ace* ***Custom*** *Services Pty Ltd v Collector of* ***Customs*** *(NSW)*[30] and to *O'Neill*. This was in support of his contention that the only seizure authorised was of documents relating to the specified bottle of French brandy. He also submitted that **Customs** had failed to properly educate its officers about s 214. Although they had copies of *O'Neill* they did not understand its principle. No evidence had been offered to explain why the officers were not made aware of the principle in the case.

The decision of the primary judge on admissibility of the documents

50. On 8 May 2006 the primary judge published her judgment convicting Mr **Parker** of the offences the subject of this appeal[31]. On the same day she published her reasons for ruling on the admissibility of the documentary material which had been seized by the **Customs** officers. The challenge had been heard over five days of a voir dire hearing. Her Honour had ruled at the time that the evidence should be admitted[32].
51. Her Honour observed that the Comptroller-General had conceded "that there was an irregularity in the manner in which the evidence under consideration was obtained" and that to make sense of the concession, the "irregularity" had to be taken to amount to at least an impropriety for the purposes of s 138[33]. The concession was "not as extensive as the irregularities contended for on behalf of the defendant"[34]. The impropriety conceded was "the lack of proper identification of 'the goods' said to have been illegally dealt with"[35].
52. Her Honour adopted the construction placed on s 214(3) by Dunford DCJ in *O'Neill* and held that the documents seized "went well beyond those relating to any single bottle of brandy mentioned in the Notice to Produce"[36]. Their seizure was "at the very least an impropriety"[37]. She added that it could properly be called "a contravention of an Australian law"[38] although she did not say of what law. All of this, according to her Honour, was "within the concession made on behalf of the plaintiff"[39]. This was not correct. The concession clearly did not extend to the narrow construction of s 214(3) reflected in the *O'Neill* decision.
53. Her Honour acknowledged that at the relevant time there was a degree of controversy in **Customs** about what was authorised by s 214. However, that controversy centred on the words "illegally dealt with" in s 214(1) and whether they covered illegal dealing under statutes (such as the Spirits Act) other than the Customs Act. Her Honour formed the view that such illegality was covered by s 214 but did not regard it as necessary to resolve the constructional question. She referred to Mr Rowling's advice which focussed on the illegal dealing question. She said that it should have been disclosed to the then Collector before he issued the notice to produce and the warrant. Non-disclosure, however, was not brought about by any dishonourable

or dishonest motives on the part of the relevant officers.

54. Her Honour referred specifically to the allegation that documents unconnected with French brandy had been seized. This, she said, was covered by her earlier acceptance of *O'Neill's* case. The fact that documents "extraneous to those authorised to be taken by the warrant were in fact taken" came about because of a "lack of understanding of the complexities, and, indeed, anomalies, of s 214, and not by reason of any ill will, collateral purpose or *mala fides* on the part of any **Customs** officer"[40].
55. Turning to s 138 of the Evidence Act, her Honour said that she was satisfied that the impropriety in the collection of the evidence was not such as should result in the exclusion of the evidence. She said[41]:

> "The offences alleged against the defendant are serious, and the evidence is important. I am not in a position to judge at this stage its probative value, except to repeat that, as I understand it, the evidence so obtained amounts virtually to the whole of the prosecution case."

The decision of the primary judge as to liability

56. Two defences raised at trial were that the prosecution was statute barred and that the Comptroller-General was estopped from pursuing the claim. After rejecting those defences in her substantive judgment her Honour turned to other issues. She said that it was common ground that the applicable standard of proof was the criminal standard and that it was necessary for the Comptroller-General to prove each of the offences beyond reasonable doubt[42]. Without reference to the averment, she undertook a consideration of the evidence and, in particular, an expert report by a chartered accountant, Ms Tamara Lindsay, which was based upon an examination and analysis of the documents which had been seized.
57. At pars 120 to 123 of her reasons for judgment, her Honour identified "two short routes" to the conclusion that the Comptroller-General had established the facts pleaded in respect of each offence. The first was to be found in the averment.
58. Referring to s 255(3) her Honour said that the prosecution evidence would not gain any strength from an averment where rebuttal evidence was called. She then said[43]:

> "But in this case no evidence was given in rebuttal of any of the essential features of the Comptroller's case. In saying this I have not overlooked the extensive cross-examination of a number of witnesses, most particularly Ms Lindsay [the chartered accountant]. But scrutiny of that cross-examination reveals that no evidence was elicited that had the effect of rebutting any of her conclusions. I will deal shortly with the nature of the cross-examination of Ms Lindsay. I have concluded that the averment alone is sufficient to found a conclusion that all factual matters pleaded in the Re-amended Statement of Claim have been proved. (There remains, of course, a further step: it is necessary to consider whether those facts are sufficient to (and if so, do in fact) establish to the requisite standard, the commission of the offences charged.)"

59. Her Honour considered Ms Lindsay's evidence and accepted her conclusions. They supported convictions for all the alleged offences against s 234(1)(a). Her Honour was also satisfied, beyond reasonable doubt, that an incorrect record of movement purportedly done pursuant to a continuing permission was done deliberately and with dishonest intent and was done by Mr **Parker** himself.

The case presented to the Court of Appeal

60. There were numerous grounds of appeal against her Honour's decision to admit the challenged documents in evidence. Most are not relevant for present purposes save for the contention that

she should have found that the **Customs** officers were not properly trained in their powers under s 214 (grounds 22-23). That failure was advanced as a matter going to the balancing exercise under s 138. Her Honour, it was said, should have found that **Customs** knew of and had a copy of the *O'Neill* decision and was aware of its significance. She should have found that **Customs** knew and believed that if its officers "did not comply with the matters raised in the decision in *In the Matter of O'Neill*" then submissions in future litigation that a failure to follow correct procedure under s 214 was an honest mistake or done in ignorance of the legislative provisions, would not persuade a court to refrain from excluding evidence obtained illegally. Her Honour, it was said, should have found that **Customs** failed to properly educate its officers in respect of s 214 notwithstanding that **Customs** expressly believed that a failure to follow correct procedure would probably result in the exclusion of illegally obtained evidence.

61. The alleged failure of **Customs** to educate its officers in respect of s 214 was relevant in the appeal only on the assumption that the construction of s 214(3) adopted in *O'Neill* was correct.
62. The written submissions filed on behalf of Mr **Parker** in the Court of Appeal referred to the concession made by the Comptroller-General as to the inadequacy of the notices to produce. *O'Neill* was raised in the context of the failure to train and educate officers about that decision. Her Honour, it was said, had failed to give consideration to the seriousness of the illegal conduct for the purposes of s 138(3)(d), to the failure of **Customs** to ensure proper training and education of its officers relevant to s 138(3)(e) and to other matters which spoke against the exercise of the discretion to admit the documents.
63. The Comptroller-General conceded that her Honour had made no finding on the training and education question. He agreed, however, that her findings concerning lack of awareness of the *O'Neill* decision adequately exposed why it was not highlighted in training.
64. As appears from the preceding the correctness of the *O'Neill* decision was not in issue.
65. Counsel for Mr **Parker** in the Court of Appeal made it clear that he regarded the conceded inadequacy of the notice as a basis for vitiating the entire production requirement. That is to say, although he did not say it in terms, he did not need the *O'Neill* point to invalidate the seizure. He did endeavour to invoke the *O'Neill* construction as a basis for treating the impropriety associated with the seizure of the documents as somehow aggravated. But that was related to the training and education point. Counsel for the Comptroller-General made clear to the Court of Appeal that the Comptroller-General had not conceded the correctness of *O'Neill* before Simpson J and had maintained it was wrong. He said in oral argument in the Court of Appeal, however, that the Comptroller-General was content to support her Honour's judgment on the grounds on which it was based.

The judgment of the Court of Appeal

66. Basten JA first considered the proper construction of s 214 of the **Customs Act**. His Honour disagreed with the conclusion reached by Dunford DCJ in *O'Neill*. He said[44]:

> "The purpose of subs (3) is to ensure that, absent voluntary compliance, the warrant will permit a search by officers to obtain books or documents falling within the requirement which have not been supplied. To construe the category of books and documents in subs (3) as more limited than the books and documents referred to in subs (1) would be to defeat the purpose of subs (3) in circumstances where only a handful of the documents the subject of the requirement had been provided, but subs (3) was found to be restricted to that very handful."

He held that Simpson J had been mistaken in accepting the construction adopted in *O'Neill*.

67. Basten JA then considered the operation of s 138 and turned to the circumstances in which it was contended that the section was engaged. He rejected contentions advanced on behalf of Mr **Parker** that:
    1. The choice of s 214 as the preferred method of obtaining documents rather than proceeding under s 10 of the *Crimes Act* 1914 (Cth) and obtaining a search warrant for particular documents or things was improper.
    2. The s 214 notice was issued for an improper purpose, namely to trigger the entitlement to execute a Sched V warrant, rather than to obtain the production of the documents.

    A third basis for the alleged inadmissibility of the documents was that the notice was "hopelessly imprecise as to the goods in question"**[45]**. His Honour observed that this element of invalidity was accepted by the Comptroller-General for the purposes of the proceedings and was sufficient to attract the application of s 138 of the Evidence Act.

68. His Honour rejected the argument that even assuming the notice had been valid Mr **Parker** had not failed to comply with its requirement. Also rejected was the complaint that the primary judge had not addressed the alleged failure to train and educate **Customs** officers about the scope of a search and seizure under s 214. This was a contention made on the assumption that *O'Neill* was correctly decided. As to that, Basten JA said**[46]**:

> "As noted above, a proper consideration of s 214 does not support the view expressed in *O'Neill's* case that the search permitted in execution of the warrant did not entitle **customs** officers to locate and seize documents in relation to goods imported or exported during the previous 5 years. However, the comptroller did not dispute the correctness of *O'Neill's* case but rather relied upon the fact that Mr Swinton, who was the solicitor primarily responsible for legal advice in relation to the operation had failed to grasp the significance of the reference to *O'Neill's* case in counsel's advice. Accordingly, the complaint that the trial judge failed to address the issue must be addressed *on that basis*." (emphasis added)

69. His Honour found the complaint that this challenge was not addressed in the trial judge's reasons was factually correct. However, given the way in which it was presented in submissions, this was understandable. In the event, his Honour rejected the complaint on its merits on the basis that the **Customs** officers had "plausible legal advice" supportive of their position**[47]**.
70. His Honour then considered the factors identified in s 138(3). On the facts of the case he held that the evidence was correctly admitted.

    Grounds of appeal

71. The single ground of appeal in this case is that:

> "The Court of Appeal erred in denying procedural fairness to the Appellant by overturning a finding made by the trial Judge in the Appellant's favour, based on the correctness of the judgment *in the matter of the appeal of Lawrence Charles O'Neill* (unreported, NSWDC 18 August 1988), without the Respondent seeking such an outcome or the Court of Appeal giving notice it was considering it, and therefore without the Appellant having a proper opportunity to make submissions in support of the finding."

    Notice of contention

72. A notice of contention filed on behalf of the Comptroller-General asserted:

"In the event that this Court finds that the Court of Appeal erred in law by failing to afford the appellant procedural fairness when it found that the judge deciding *In the matter of O'Neill* (unrep, NSWDC, 18 August 1988) was 'mistaken' in his interpretation of s 214 of the **Customs Act 1901**, then the respondent gives notice that it will contend that the Court of Appeal's construction of s 214 as set out in [49]-[53] and [109] of its reasons for judgment is correct."

The construction of s 214

73. Although the proper construction of s 214 is no longer a matter of general importance, as the section has been repealed, it was raised in the notice of contention and is relevant to the disposition of this case.
74. Section 214(1) imposed obligations on the owner of goods referred to in an information given under the section. It imposed a like obligation in respect of goods which have been seized or detained. The relevant element of the obligation, ungrammatically framed, was to produce and hand over to the Collector "all books and documents relating to the goods ... and of all other goods imported or exported by him at any time within the period of 5 years immediately preceding such request".
75. Section 214(3) conferred a power of search and seizure in respect of books and documents upon an officer of **Customs** where two necessary conditions had been met. Those conditions were:
    1. A person had failed to comply with a requirement by the Collector under the section; ie under s 214(1).
    2. An officer of **Customs** or an officer of police had with him a **customs** warrant in the form of Sched V.

    Where both of these conditions were fulfilled the officer was empowered to break open and enter "any house, premises or place in which any books or documents relating to *the goods* are or are supposed to be" (emphasis added) and remove "any of those books and documents which are found". The question is whether "the goods" were those referred to in the information or whether they extended to goods imported within five years immediately preceding the requirement made under s 214(1). In considering that question, it is necessary to have regard to the form of the warrant set out in Sched V to the Act. Schedule V was part of the Act and not a species of delegated legislation. It was, however, ancillary to the substantive provisions of s 214.

76. Schedule V provided for a warrant issued under s 214(2) to state that it authorises its holder to take possession of, remove and impound books and documents relating to the goods the subject of the information. There was no ambiguity in its wording which would extend its coverage to books and documents relating to other goods imported within five years immediately preceding the making of a requirement under s 214(1). There was therefore a limitation on the range of documents covered by a Sched V warrant which did not apply to the range of documents the subject of the obligation imposed by s 214(1).
77. How then was s 214(3) to be read? It was that sub-section, not the warrant, which was the source of the power to break open and enter into premises and to take possession of and remove books and documents found therein. The officer exercising that power was required, as a condition of the power, to have the warrant with him or her. There was no express obligation to show the warrant to any person. Although there was reference in the proceedings to "executing" the warrant, it is not clear what that means in this context. In my opinion, s 214(3) could be read widely as extending to books and documents relating to the full range of goods referred to in s 214(1). It could also be read narrowly as confined to books and documents relating to the goods referred to in the information.
78. Each reading gives rise to an anomaly. On a wide reading there was an inconsistency between

the scope of s 214(1) and the terms of the Sched V warrant, the existence of which was a condition of the seizure power. On a narrow reading there would have been an apparently inexplicable inconsistency between s 214(1) and s 214(3).

79. The legislative history is of limited assistance. The **Customs** Act was partly modelled upon the ***Customs Act* 1890** (Vic) as amended by the ***Customs Act* 1896** (Vic). The latter Act incorporated a comprehensive power under s 22 to require production and to seize documents relating to suspect goods and goods imported up to six years before the production request. No equivalent seizure power was included in the 1901 Act, presumably on the basis that writs of assistance and **customs** warrants, otherwise provided for, could be used where seizure was necessary. The question is whether s 214(3) brought into the **Customs Act**, in 1923, a power of seizure narrower than the power of production conferred by s 214(1). In this respect the Second Reading Speech is of no assistance.
80. The constructional choice invites consideration of the following matters:
    1. The legislative antecedents of the **Customs Act**, reflected in the ***Customs Act* 1890** (Vic) as amended by the ***Customs Act* 1896** (Vic), made the seizure power and the production obligation congruent.
    2. There was no apparent policy reason for making the seizure power under s 214(3) significantly narrower than the production obligation under s 214(1).
    3. The terms of s 214(3) were consistent with a seizure power that was congruent with the production obligation.
    4. Schedule V, which would support a narrower reading, did not of itself confer any power or obligation. It was an ancillary provision giving content to the condition upon which the seizure power under s 214(3) could be exercised by specifying the form of the necessary warrant.
    5. Section 214(3) authorised the doing of that which would otherwise be unlawful or tortious. That consideration favours a narrower reading to the extent that such a reading is open.
81. Notwithstanding the significance of the last-mentioned consideration, which was referred to by Heerey J in *Challenge Plastics*[48], the better approach is that which maintains consistency between the substantive provisions, ss 214(1) and 214(3). Their construction cannot be governed by the terms of what is essentially a form of warrant in Sched V. Section 214(3) provided the coercive support immediately available in the event of non-compliance with a requirement made under s 214(1). To give effect to it requires the wider reading of s 214(3). On that basis the construction adopted by the District Court of New South Wales in *O'Neill* was incorrect and that adopted by the Court of Appeal in the present case was correct. Absent such a reading, there was no mechanism within the section to give effect to the objective, reflected in s 214(1), of obtaining access to documents including the five year documents.

Contentions and conclusions

82. The Comptroller-General conceded the invalidity of the notice to produce on the basis that it did no more than identify the relevant goods as a bottle of spirits labelled "Cheval Napoleon Old French Brandy", a description which, it was accepted, was so vague as to make it impossible to identify books and documents relating to those goods. Basten JA accepted the concession as a basis for invalidity. His Honour said[49]:

> "Such a notice was incapable of being complied with; Mr **Parker** could not reasonably have been expected to locate the relevant documents, because the notice was hopelessly imprecise as to the goods in question. The notice was therefore invalid. That element of invalidity was accepted by the comptroller for the purposes of the proceedings and was sufficient in itself to invoke the operation of s 138 of the Evidence Act, as recognised by her Honour at [22]."

83. The conceded deficiency meant that there was never any relevant obligation on Lawpark to produce documents of any kind under s 214(1). There could not therefore be a failure to comply

with the requirement by **Customs** officers under the section. A necessary condition for the exercise of the power under s 214(3) was therefore not met. It followed that there was no power conferred on the **Customs** officers by s 214(3) to take possession of and remove any books or documents from Lawpark's premises.

84. Simpson J at first instance accepted the concession that the notice did not properly identify the goods. By following *O'Neill* she also effectively found a second basis for concluding that the seizure of the five year documents was beyond power.

85. It was submitted for Mr **Parker** that the correctness of the trial judge's adoption of *O'Neill* was not put in issue before the Court of Appeal. There was no notice of contention. That submission may be accepted. Indeed in the course of argument in the Court of Appeal, counsel for the Comptroller-General, Mr Fagan SC, told the Court that his client was "content to support her Honour's judgment on the grounds upon which it was expressed". And further:

> "**Customs** has been content to proceed on the basis that if her Honour was right and accepting that her Honour was right about *O'Neill's* case then this was another point of illegality but for the reasons that her Honour gave the proper exercise of discretion under s 138 the evidence would nevertheless be received [sic]."

To the extent that the Court of Appeal rested its decision upon the view that *O'Neill* was wrongly decided, it did so without prior warning to Mr **Parker**. This was a matter going to the proper construction of s 214(3) which had not been in issue before the Court of Appeal. On the other hand, I agree with the point made by Gummow, Hayne and Kiefel JJ**[50]**. A court is not necessarily obliged to identify to the parties or their legal representatives, from among prior non-authoritative decisions, those which it may decide not to follow. What is essential is that the parties to proceedings be given an opportunity to be heard on all the issues in the case. Where a proposition of law is not in contest, the court should not decide the case on the basis of a departure from that proposition without notice to the parties. In this case, the Court of Appeal should have given the parties notice of its intention to consider *O'Neill* and an opportunity to make submissions about it.

86. It was submitted for Mr **Parker**, in effect, that the inadequacy of the notice to produce, conceded by the Comptroller-General, simply meant that the seizure of the books and documents was improper. It was further submitted that the asserted want of statutory power based on *O'Neill* to seize books and documents other than those relating to goods specified in the notice would have rendered the seizure a "contravention of an Australian law" for the purposes of s 138. That submission cannot be accepted. On the view taken by Simpson J the seizure of the books and documents was not authorised by s 214(3). The same result followed from the narrower basis upon which the Court of Appeal found a want of power to seize the documents.

87. Whether *O'Neill* was right or wrong about s 214, there was no relevant impropriety or contravention of Australian law antecedent to the obtaining of the documents. There was an absence of statutory power to make the seizure. The character of the seizure of the five year documents was the same regardless of the circumstance that led to the conclusion that there was no power to do it. The seizure was no doubt tortious. It may well have contravened some other statute. The documents were obtained "improperly" for the purposes of s 138(1) and their seizure was probably in contravention of an Australian law or laws. But even accepting the hypothesis that there were two bases for saying the officers lacked the power to do what they did, there was thereby no additional antecedent or concurrent impropriety or contravention.

Whether there was a denial of procedural fairness

88. Basten JA noted in his judgment that the Comptroller-General did not dispute the correctness of *O'Neill*. He also observed that the Comptroller-General proceeded upon the basis that the

solicitor responsible for legal advice in relation to the **Customs** operation had failed to grasp the significance of a reference to *O'Neill's* case in counsel's advice.

89. His Honour spent some time in his reasons for judgment on the correctness of *O'Neill* and the proper construction of s 214(3). There were however critical parts of his reasoning which appeared to rely solely upon the conceded deficiency in the notice and therefore did not turn upon the correctness of *O'Neill* and the construction of s 214(3). He said[51]:

> "In the result, the unlawfulness of the conduct of **customs** officers turned on the failure adequately to identify the bottle of brandy said to have been illegally dealt with pursuant to the Spirits Act. There was no evidence to indicate that it would not have been relatively easy to comply with that obligation of specificity. However, the fact that it was not done was not due to deliberate cutting of corners or disregard of the legal requirements. On one view, the error arose from a failure to reproduce in the notice requiring production of documents the detailed information supplied on oath for the purposes of s 214(1)."

On the other hand, his Honour did refer to the breadth of the power under s 214 in a way which was consistent with his construction of it. He said, inter alia[52]:

> "The seriousness of the intrusion on the rights of Lawpark and apparently Breven, through the seizure of their documents, flowed from the extraordinary breadth of the power conferred by s 214. The seriousness of the consequence for the affected businesses of an unlawful exercise of the power warranted careful scrutiny of the conduct of **customs**: however, it did not turn genuine attempts at compliance into deliberate disregard or reckless indifference."

90. Assuming, without deciding, that the Court of Appeal acted upon the construction of s 214(3) adopted by Basten JA, there is a question whether Mr **Parker** was lulled into a false sense of security because of the want of any challenge to the *O'Neill* construction. Could he have approached the case any differently if he had been put on notice of such a challenge? The answer to that question depends upon whether there was an argument that he could have put against admission of the evidence pursuant to s 138, on the basis of the deficiency in the notice to produce, which he did not put because of the assumption that the narrow construction of s 214(3) was not in dispute. Counsel for Mr **Parker** contended, in the course of argument in this Court, that, had the correctness of *O'Neill* been agitated in the Court of Appeal, Mr **Parker** could have argued that even if *O'Neill* were wrong the Sched V warrant was far too narrow to justify the search that took place. That proposition treated the warrant as a source of the seizure power. On the correct construction of s 214 the existence of the warrant was a necessary condition of that power. It did not define its extent. The hypothetical argument would not have succeeded.
91. No other alternative argument that could have been put is apparent. In the circumstances there was no relevant unfairness. The course taken by the Court of Appeal did not deny the appellant an opportunity to put argument that could have made a difference to the outcome[53]. He has, of course, been heard in this Court on the question of the correctness of the *O'Neill* decision and the proper construction of s 214.

Conclusion

92. For the preceding reasons, the appeal should be dismissed with costs.

93. GUMMOW, HAYNE AND KIEFEL JJ. The respondent, as Comptroller-General of **Customs**, formerly had the general administration of the ***Customs Act* 1901** (Cth)

("the Act")[54]. The term "Collector", which will appear in these reasons, is used to identify any of the principal officers previously described in s 8. This litigation comes before this Court on appeal from the Court of Appeal of the Supreme Court of New South Wales[55] (Mason P, Tobias and Basten JJA), which dismissed an appeal from the decision of a judge of the Supreme Court[56] (Simpson J). The critical events began some 20 years ago. In that interval there have been various changes to the Act and to other relevant legislation.

The nature of the proceedings

94. The Supreme Court exercised federal jurisdiction. The applicable statutory law of evidence, however, was not to be found in the *Evidence Act* 1995 (Cth). The effect of ss 4 and 8 of that statute was that in the Supreme Court s 79 of the *Judiciary Act* 1903 (Cth) fully operated and "picked up" New South Wales law, including the *Evidence Act* 1995 (NSW) ("the Evidence Act").
95. The proceedings in the Supreme Court were "**Customs** prosecutions" for the purposes of Pt XIV of the Act and were instituted in the Supreme Court by the respondent as provided by par (a) of s 245(1) of the Act. The nature of proceedings under Pt XIV was considered by this Court in *Chief Executive Officer of* ***Customs*** *v Labrador Liquor Wholesale Pty Ltd*[57]. In the present case, Basten JA (with whose reasons Mason P and Tobias JA agreed) held that the Act required that the proceedings be commenced and conducted by a process which, for the purposes of the organisation of the business of the Supreme Court, gave rise to an appeal to the Court of Appeal rather than the Court of Criminal Appeal[58]. In this Court no challenge was made to that conclusion.

The investigation by ACS

96. Officers of **Customs** ("the ACS") had investigated over several years, beginning in 1987, suspected contraventions of the Act and of the *Spirits Act* 1906 (Cth) ("the Spirits Act")[59]. Section 4 of the Spirits Act incorporated various provisions of the Act, including those of Pt XII with respect to the powers of the ACS and of Pt XIII providing for penalties.
97. The appellant was a director and shareholder of Lawpark Pty Ltd ("Lawpark") and Breven Pty Ltd ("Breven"). Lawpark imported and distributed alcoholic spirits for human consumption and Breven held a warehouse licence issued under Pt V of the Act and conducted a bond store where imported spirits might be warehoused without incurring a liability to pay duty under the Act. The warehouse licence contained a condition requiring Breven to retain for five years records relating to goods lawfully removed from the warehouse. A third company, Kingswood Distillery Pty Limited ("Kingswood"), made and processed spirits in Australia. By March 1990 officers of the ACS had formed the view that the three companies were participants in a scheme whereby, prior to bottling and sale in Australia, imported spirits had been adulterated or "extended" by the addition of locally produced grain-based alcohol.
98. The ACS then considered the use of legislative authority to obtain by compulsion documents in the possession of relevant parties. In that regard, provision was apparently made both by s 10 of the *Crimes Act* 1914 (Cth) and by s 214 of the Act. It was decided to rely upon s 214[60].
99. The focus of the appeal to the Court of Appeal was upon the admission into evidence at the trial of documents seized by officers of the ACS on 6 March 1990 in the purported execution of a warrant issued under s 214. The appellant unsuccessfully submitted that Simpson J had erred in exercising the power conferred by s 138 of the Evidence Act in favour of admission of the evidence.

The section 214 instruments

100. The provenance of s 214 is traced by the Chief Justice in his reasons. As enacted in 1901, what later became sub-s (1) of s 214 had been the whole of s 214. Section 214(1) created an offence.

The commission of the offence was conditioned upon failure to comply with a requirement of the Collector to "produce and hand over" certain books and documents, and to produce certain books and documents for inspection and permit the making of copies or extracts from them. The Collector was authorised to impose the requirement just described:

> "[w]henever information in writing has been given on oath to the Collector that goods have been ... illegally dealt with, or that it is intended to ... illegally deal with any goods, or whenever any goods have been seized or detained".

101. On 16 January 1990 an officer of the ACS swore what was identified as "Section 214 Information" ("the Information"). This was to the effect that, upon analysis, a bottle of "Cheval Napoleon Old French Brandy" purchased from an identified retailer in Queensland and labelled "Imported by Lawpark Pty Ltd ... Product of France. 37.0% A/V", had been shown to contain spirit which was the product of either or both grain and molasses rather than spirit wholly produced from grapes. Section 9(b) of the Spirits Act made it an offence to describe as brandy any spirit not wholly distilled from wine produced from grapes or grape products. The Information concluded that, within the meaning of s 214(1) of the Act, Lawpark had "illegally dealt with" goods being the contents of the bottle.
102. Acting upon that Information, on 1 March 1990 the Collector for New South Wales issued two instruments. The first, addressed to Lawpark, was headed "Notice to Produce Documents" ("the Notice to Produce") and required Lawpark to produce and hand over:

> "all books and documents relating to [one bottle of spirits labelled as 'Cheval Napoleon Old French Brandy'] *and relating to all other goods imported by you at any time within the period of five years immediately preceding this request*". (emphasis added)

103. It is important to note immediately that in the Court of Appeal, Basten JA referred to this limited identification of the one bottle, and went on**[61]**:

> "Such a notice was incapable of being complied with; Mr **Parker** could not reasonably have been expected to locate the relevant documents, because the notice was hopelessly imprecise as to the goods in question. The notice was therefore invalid. That element of invalidity was accepted by the [respondent] for the purposes of the proceedings and was sufficient in itself to invoke the operation of s 138 of the Evidence Act, as recognised by her Honour ...
> The fact that the request for production of documents was invalid, meant that there could be no valid trigger engaging the power to execute the warrant. To that extent, the search and seizure which followed were also invalid.
> However, the appellant separately asserted that there had been no failure to comply with the request, even assuming it were valid, so as to engage the power to execute the warrant, thereby constituting a separate complaint of improper or unlawful conduct."

This second complaint was concerned with the seizure of what in these reasons will be identified as the "five year documents".

104. The second instrument issued on 1 March 1990 to Lawpark was to be used if there was an inadequate response to the Notice to Produce. It was headed:

> "SCHEDULE V
> THE COMMONWEALTH OF AUSTRALIA
> ***Customs*** *Warrant*" (italics in original)

and addressed to a named officer of the ACS ("the Warrant").

105. The immediate source of the power of the Collector to issue the Warrant was s 214(2). This stated:

> "For the purposes of this section, the Comptroller or the Collector of **Customs** for a State or Territory may issue to any officer of **Customs** or officer of police a **Customs** Warrant, in accordance with the form in Schedule V, marked with a **Customs** stamp."

Provision to this effect had been introduced by the ***Customs*** *Act* 1923 (Cth) ("the 1923 Act")[62]. That statute also introduced s 214(3) and Sched V, and amended the averment provision of s 255, to which reference will be made[63].

106. Section 214(3) conferred authority for the commission of acts which at common law might be tortious, and actionable in trespass, detinue and conversion[64]. It provided:

> "If any person fails to comply with a requirement by the Collector under this section, an officer of **Customs** or officer of police, having with him a **Customs** Warrant in the form of Schedule V hereto, may, at any time of the day or night, break open and enter into any house, premises or place in which any books or documents relating to the goods are or are supposed to be, and search:
> (a) the house, premises or place;
> (b) any person therein or thereon; and
> (c) any chests, trunks or packages therein or thereon;
> and take possession of, remove and impound any of those books and documents which are found."

Schedule V stated, so far as material:

> "WHEREAS information in writing has been given on oath to me that goods have been unlawfully imported, exported, undervalued or entered or illegally dealt with or that it is intended to unlawfully import, export, undervalue or enter or illegally deal with goods, (or
> Whereas goods have been seized or detained)
> You are hereby authorized, in the event of ..... failing to comply immediately with any requirement made in pursuance of section two hundred and fourteen of [the Act], to enter into, at any time of the day or night, and search, any house premises or place in which any books or documents *relating to the goods* are or are supposed to be; and to break open any such house premises or place and search any person therein or thereon and any chests trunks or packages therein or thereon; and to take possession of, remove and impound any of those books and documents which are found:
> And for so doing this shall be your sufficient warrant." (emphasis added)

107. The Warrant issued in respect of Lawpark followed the form of Sched V. It did not follow the terms of the Notice to Produce, which included the words "and relating to all other goods imported by you at any time within the period of five years". However, in the events that happened, officers of the ACS acted as if the Warrant had expressly so provided.
108. The Notice to Produce was served on the appellant on 6 March 1990 at the premises of Lawpark (and, it would appear, of Breven) at Wetherill Park in New South Wales[65]. The principal officer of the ACS in attendance formed the view that there had been no proper compliance and the Warrant was then "executed". On its face the Warrant did not authorise the

seizure of "five year documents" and was thus in terms much narrower than those of the Notice to Produce. Nevertheless, a large number of documents was taken from the Wetherill Park premises and elsewhere, placed in boxes and sealed.

The course of proceedings in the Supreme Court

109. By statement of claim filed in the Common Law Division of the Supreme Court on 30 July 1992 and amended on four occasions, the respondent sought convictions of the appellant (who was one of four defendants) of one offence against s 33(1) of the Act, and 13 offences against s 234(1)(a) of the Act, an order for recovery of penalties and an order for payment of unpaid duty. Section 33(1) made it an offence for a person, except as authorised by the Act, to move, alter or interfere with goods subject to the control of the **Customs**. Section 234(1)(a) made it an offence to evade payment of any duty which was payable. The appellant was alleged to have committed the offences on various dates between 1 August 1987 and 31 May 1990.
110. The statement of claim as amended included an averment that, to the extent provided by s 255 of the Act, all matters and facts specified in the statement of claim were true and correct. Section 144 of the *Excise Act* 1901 (Cth) is in similar terms to s 255. In *Chief Executive Officer of* ***Customs*** *v El Hajje***[66]**, this Court held that the averment provisions of s 144 did not distinguish between the ultimate fact or facts in issue and other facts. However, the respondent accepted that an offence contrary to par (a) of s 234(1) carried a mental element of "blameworthy act or omission"**[67]**. The provisions of s 255 do not apply to an averment of the intent of the defendant (s 255(4)). Hence the importance of the seized documents in establishing the case against the appellant.
111. In circumstances which were not explored in the present appeal, a stay of the Supreme Court proceeding was ordered on 10 June 1994. Thereafter, the stay was lifted and the proceedings against the other three defendants were brought to a conclusion. The proceeding against the appellant came on for trial before Simpson J, sitting without a jury. In the reply the respondent had admitted that the Notice to Produce was invalid and that documents including bond input and output records and the Bond Register relating to the premises at Wetherill Park were not lawfully obtained pursuant to s 214 of the Act. However, the invalidity was said not to be "intentional" and the admission was confined at trial to the lack of proper identification of the one bottle in the Notice to Produce. The admission did not extend to the appellant's complaint respecting the "five year documents".

112 The appellant objected to virtually all of the evidence upon which (with the benefit of the averment provision in s 255 of the Act) the respondent proposed to prove the offences against the appellant. The appellant contended that the evidence had been obtained either or both "improperly" and "in contravention of an Australian law" and relied upon s 138 of the Evidence Act. The phrase "an Australian law" is so defined in the Evidence Act as to include both the common law and a law of the Commonwealth. In determining whether, in the terms of s 138(1), the desirability of admitting the evidence in question outweighs the undesirability of doing so, the court is to take into account the various matters in pars (a)-(h) of s 138(3)**[68]**.

113. After a lengthy voir dire hearing Simpson J ruled that the evidence in question would be admitted and then proceeded with the trial. On 8 May 2006, her Honour delivered two sets of reasons. The first contained her reasons for the ruling on evidence**[69]** and the other comprised the reasons for judgment that the 14 offences alleged against the appellant had been proved**[70]**.
114. There was then a further hearing on the question of penalty and on 30 November 2006 Simpson J delivered reasons for judgment on that subject**[71]**. Her Honour noted that the duty evaded had been in excess of $3 million and described the evasion offences under s 234 of the Act as of a systematic and calculated nature, leading to the conclusion that the penalty in respect of each offence was to be 3.25 times the amount of the duty evaded**[72]**.
115. In the concluding paragraphs of her reasons for the ruling on evidence, Simpson J stated:

"[Section] 138 of the Evidence Act requires, in effect, a balancing of a

> number of matters. One of these is the nature of the offences and subject matter of the proceedings in which the evidence is sought to be tendered; against that has to be weighed, *inter alia*, the gravity of the impropriety or contravention, whether it was deliberate or reckless, and the extent (if any) of the intrusion into the rights of individuals.
> As I have made clear, I am satisfied that the impropriety in the collection of the evidence was not such as should be met with exclusion of the evidence so obtained. The offences alleged against the [appellant] are serious, and the evidence is important. I am not in a position to judge at this stage its probative value, except to repeat that, as I understand it, the evidence so obtained amounts virtually to the whole of the prosecution case."

116. What her Honour said in the last sentence with respect to the probative value of the evidence must be read with her conclusions in her trial judgment. There, Simpson J (i) noted that no evidence had been given in rebuttal "of any of the essential features of the Comptroller's case", (ii) concluded that the s 255 averment alone was sufficient to found a conclusion that "all factual matters" pleaded by the Comptroller were proved, and (iii) turned to consider whether the requisite standard of proof beyond reasonable doubt had been met**[73]**.
117. Her Honour was assisted by the report and analysis of the seized documentation which had been prepared by a chartered accountant, Ms Tamara Lindsay. She had been extensively cross-examined by counsel for the appellant, but, in the result, Simpson J relied upon the conclusions stated in the report, saying that the methodology employed in the report had not been undermined in any way.

The Court of Appeal

118. The appellant appealed to the Court of Appeal seeking orders setting aside the convictions recorded on 8 May 2006 of the offences against ss 33 and 234 of the Act, and the penalties, fines and orders imposed and made on 30 November 2006. Each of the grounds of appeal pressed at the hearing related to the first decision of Simpson J**[74]**. The Court of Appeal dismissed the appeal with costs on 6 December 2007.
119. Much of the argument in this Court has turned upon the significance of the alleged defect in process with respect to the seizure of "five year documents" and upon the construction of s 214 and Sched V of the Act. In that regard, on 18 August 1988, Dunford DCJ had delivered his judgment in *In the matter of the appeal of Lawrence Charles O'Neill***[75]**, and in the course of his reasons had said:

> "Schedule [V] authorises the seizure of documents relating to 'the goods', and the only goods referred to in the warrant are the goods which are the subject of an information on oath or the goods that have been seized or detained. I note that sub-ss (2) and (3) [of s 214] and Schedule [V] were all inserted in the Act at the same time, namely by [the 1923 Act], and there is no direct reference in any of them to what might be called the five year documents, although the provision relating to the five year documents [has] been in sub-s (1) since the original enactment of the statute in 1901. It seems to me that sub-ss (2) and (3) should be construed so as to be compatible and consistent particularly as a search warrant constitutes a grave interference with a citizen's right to privacy.
> Moreover, in the usual course of events, once a warrant had issued, it is the terms of the warrant which (subject to the relevant statute) defines what might be seized. I am satisfied that on the proper construction of Schedule [V] only the goods the subject of the information on oath or the goods seized or detained are authorised to be taken, and accordingly I hold that if the execution of the warrant was valid, the only documents authorised to be seized were those relating to the goods detained, that is relating to shipment 1 and not those relating to any other importation within the previous five

years."

120. In the Court of Appeal, Basten JA considered in detail the questions of construction of the Act and concluded that, whilst Simpson J had accepted the decision in *O'Neill*, in his view the construction adopted in *O'Neill* "was mistaken"[76]. However, Basten JA went on to conclude that the challenges by the appellant to the judgment of Simpson J should be rejected and the appeal dismissed[77].

The appeal to this Court

121. It is important to note that the grant of special leave to appeal to this Court is limited to the following ground:

> "The Court of Appeal erred in denying procedural fairness to the [a]ppellant by overturning a finding made by the trial [j]udge in the [a]ppellant's favour, based on the correctness of the judgment [in *O'Neill*], without the [r]espondent seeking such an outcome or the Court of Appeal giving notice it was considering it, and therefore without the [a]ppellant having a proper opportunity to make submissions in support of the finding."

122. The appellant complains in this Court that without hearing the parties the Court of Appeal rejected the authority of *O'Neill* and thereby allegedly undermined his submissions respecting the unlawful or improper seizure of the "five year documents". Reserved reasons were delivered and orders pronounced without counsel having had the opportunity to question what was said respecting *O'Neill* in those reasons. The appellant further submits that this denial of procedural fairness deprived him of the possibility of a successful outcome in the Court of Appeal. The appellant refers in that regard to the well known statement of principle in *Stead v State Government Insurance Commission*[78], since applied in *Re Refugee Review Tribunal; Ex parte Aala*[79].
123. The appellant seeks remitter to the Court of Appeal to rehear those of its grounds of appeal to that Court which assert error by the primary judge in her ruling under s 138 of the Evidence Act.
124. The respondent submits that the Court of Appeal correctly differed from the interpretation given to s 214 of the Act in *O'Neill*. In the alternative, the respondent submits that the Court of Appeal nevertheless decided the appeal on the footing that *O'Neill* was correctly decided and that the result is that there was no prejudice to the appellant on that account. That alternative submission should be accepted and for this and other reasons the appeal should be dismissed.

Conclusions

125. When considering whether *O'Neill* had been correctly decided, the Court of Appeal did not refer to the further decision in *Challenge Plastics Pty Ltd v Collector of* ***Customs*** [80]. There, in 1993, Heerey J had held that s 214(3) of the Act authorised only the seizure of documents relating to the goods the subject of the information given to the Collector under s 214(1), and did not authorise the seizure of documents relating to goods imported or exported within the previous five years.
126. The relevant provisions have since been repealed. At this distance, the Court of Appeal should have been slow to depart from what was decided by the Federal Court, even if it had entertained doubts on the subject. However, without reaching any conclusion, we approach this appeal on the footing, favourable to the appellant, that the Court of Appeal should not have cast any doubt upon *O'Neill*.
127. Nevertheless, *O'Neill* does not supply the proper commencement point for the resolution of the appeal to this Court. The seizure of the five year documents was unlawful because it was not authorised. It was not authorised because, as the respondent had formally admitted in the pleadings, a necessary condition precedent to the execution of the Warrant (failure to comply

with the Notice to Produce) was not satisfied. And that condition precedent could never have been met because of the deficiency in the Notice to Produce at the initial stage of the procedures under s 214. What then is the significance of the seizure of the five year documents under colour of that Warrant?

128. This is not an appeal where the alleged error is said to appear in the decision of the primary judge, sitting without a jury, and the intermediate appellate court allegedly erred in the exercise of its appellate function in failing to recognise and correct that error. The appellant's complaint in this Court fixes upon the manner of disposition of the intermediate appeal and upon what is said to have been a denial of procedural fairness at that stage.

129. The task entrusted to the Court of Appeal by s 75A of the *Supreme Court Act* 1970 (NSW) included the making of the orders which ought to have been made by Simpson J, after the Court of Appeal had conducted a "real review" of the reasons of her Honour**[81]**. If, upon such a review, the Court of Appeal had been obliged to decide that there had been no appealable error in the conclusion of the primary judge respecting the application of s 138 of the Evidence Act, then there can be no occasion for this Court to make an order returning the matter to the Court of Appeal for a further hearing on that subject. Such an outcome would illustrate the proposition that not every departure from the rules of procedural fairness at a trial or an intermediate appeal will entitle the aggrieved party to an appellate remedy**[82]**.

130. Basten JA considered the operation of the factors in s 138(3) in that portion of his reasons headed "Application of discretion to admit evidence"**[83]**. His Honour (i) with respect to the phrase "the gravity of the impropriety or contravention" in par (d) of s 138(3), emphasised the major invasion of rights by the seizure of a large volume of documents without consent and without the authority of a valid warrant, (ii) said that the case for rejection of the evidence "would be strong, if not overwhelming" if there also had been "wilful disregard" of the requirements of the Act by the relevant officers of the ACS, but (iii) upheld the conclusion of Simpson J that there had been no such "wilful disregard" and that genuine attempts at compliance with the law were not deliberate disregard of it or reckless indifference to it**[84]**.

131. Basten JA also noted that the trial judge had correctly considered the evidence in the five year documents to be both critical to establishing the case against the appellant and compelling. (This may undervalue the importance of the s 255 averment.) His Honour also stressed both that the unlawfulness involved in the seizure did not diminish the probative value of the evidence and, with reference to the phrase "the nature of the relevant offence" in par (c) of s 138(3), that the serious nature of the offences involved "a deliberate flouting of the revenue laws for commercial benefit over a considerable period"**[85]**. Hence, in the view of Basten JA, the forensic background to the (unsuccessful) exertions of the appellant at trial to establish not only illegality but wilful disregard or at least indifference to the requirements of s 214.

132. His Honour concluded**[86]**:

> "The appellant also criticised her Honour's reasons in that they failed explicitly to weigh the mandatory factors set out in s 138(3). On a reading of her Honour's reasons, the criticism appeared to have force. However, once the real issues in the case were identified, it is clear that these issues were addressed. Some of the mandatory considerations (such as breach of the ICCPR and the possibility or absence of disciplinary action) simply did not arise on the case as presented at trial. Even if there were deficiencies in the reasons with respect to the balancing exercise required by s 138(3), once the relevant factual basis was accepted, the balancing exercise could as well be undertaken by this court on a rehearing as by the trial judge. That exercise has now been completed. A challenge to the inadequacy of her Honour's reasons in that respect was beside the point."

133. In this chain of reasoning no part was played by the earlier expression of opinion by Basten JA respecting the correctness of the interpretation of the Act in *O'Neill*. Under the heading "Failure to train and educate officers", his Honour said**[87]**:

> "As noted above, a proper consideration of s 214 does not support the view expressed in *O'Neill's* case that the search permitted in execution of the [W]arrant did not entitle [ACS] officers to locate and seize documents in

> relation to goods imported or exported during the previous 5 years. However, the [respondent] did not dispute the correctness of *O'Neill's* case but rather relied upon the fact that Mr Swinton, who was the solicitor primarily responsible for legal advice in relation to the operation had failed to grasp the significance of the reference to *O'Neill's* case in counsel's advice. Accordingly, the complaint that the trial judge failed to address the issue must be addressed on that basis."

After detailed consideration of the evidence, Basten JA concluded[88]:

> "[I]t is clear that [the ACS] did not ignore the decision in *O'Neill* but obtained their own advice in relation to it. As Dunford DCJ himself explained in his reasons, there were cogent arguments for both the broader and the narrower view of the power. [The ACS] obtained advice from the [Australian Government Solicitor] favouring the broader view, which advice was neither clearly mistaken, nor based on any misunderstanding of the statutory provision in question, nor of the principles of statutory construction. In any case where the scope of a statutory power is doubtful, [a body] which adopts a broader rather than a narrower view may later be found to have exceeded its authority. However, at least in the present circumstances, there was no deliberate or reckless disregard of an established constraint on power, nor can [the ACS] fairly be criticised for not adhering to the narrower view and directing its officers accordingly. It had plausible legal advice supportive of its position. It did not act improperly, for the purposes of s 138, in failing to instruct its officers to operate otherwise."

134. The significance of that statement for the appeal to this Court is as follows. The respondent is correct in the submission that the Court of Appeal decided the appeal before it on the footing, accepted by the respondent, that *O'Neill* was correct. The respondent had admitted, and there was therefore no issue at trial, that the documents that had been seized were not lawfully obtained pursuant to s 214 of the Act. The central issue had been whether there had been culpable failure by the ACS to adapt its procedures to give effect to *O'Neill*. On that issue the appellant failed in the Court of Appeal. Once this is appreciated, the respondent has a good answer to the limited ground on which special leave to appeal was granted by this Court.
135. However, before parting with the appeal several further points should be made or repeated.
136. The first concerns the emphasis sought by the appellant to be given in this Court to the further or additional "illegality" respecting the seizure of the five year documents, contrary to the reasoning in *O'Neill*. The gravity of the conduct of the officers of the ACS was in the commission of the tortious acts without the answer provided by a valid warrant. But this was not in deliberate or reckless disregard of the requirements of the Act. Further, the "illegality" was "complete" without any separate and distinct complaint respecting the five year documents and the significance of *O'Neill*.
137. The second matter concerns the scope of the principles respecting procedural fairness in curial proceedings. The content of the requirement of procedural fairness at appellate level, as elsewhere, cannot be surveyed in metes and bounds. But this litigation illustrates a point of general importance, habitually assumed without elaboration. It is that consideration by a court of the weight to be given to decisions that are not authoritative (because made by courts lower in the hierarchy) does not necessarily attract an obligation to invite submissions by the legal representatives of the parties directed specifically to those decisions. To extend that invitation on occasion may be prudent, but it is not always mandated by the requirements of procedural fairness and, as the decision of this Court in *Australian Securities Commission v Marlborough Gold Mines Ltd*[89] illustrates, it may be necessary to consider more than the dictates of procedural fairness. But what is required is that the parties are given a sufficient opportunity to be heard on the issues in the case and those issues will not often be defined in a way that requires specific identification of particular, but non-binding, previous decisions.
138. In this case there was no issue about whether the Warrant permitted search for, or seizure of, the

five year documents. It was admitted that it did not. The issue that was litigated about *O'Neill* was not whether it was correctly decided, it was what the ACS had done in response to *O'Neill*. The decision by the Court of Appeal to examine the correctness of *O'Neill* without inviting the parties to make submissions about the point was not a denial of procedural fairness.

Order

139. The appeal should be dismissed with costs.

140. HEYDON J. The background is set out above[90]. Simpson J's voir dire judgment referred to the notice to produce dated 1 March 1990 as "the Notice to Produce" and to the warrant dated 1 March 1990 as "the **Customs** Warrant". The same abbreviations will be employed below.

Simpson J's approach to admissibility

141. The information referred to in the Notice to Produce alleged that Lawpark Pty Ltd had illegally dealt with goods, namely the brandy in a particular bottle. The Notice to Produce required Lawpark Pty Ltd to produce all books and documents relating to (a) that bottle of brandy and (b) all other goods imported within the previous five years. The **Customs** Warrant purportedly authorised search for and seizure of all books and documents within categories (a) and (b). Many documents within category (b) were seized and tendered. Simpson J held that those documents were admissible under s 138 of the Evidence Act. But she did hold that they had been obtained "improperly" in two respects.
142. *The first impropriety*. Simpson J considered that the Notice to Produce failed to satisfy the requirement of s 214(1)[91] of the **Customs** Act that the notice to produce "all books and documents relating to" the bottle of brandy referred to in the information must identify it with sufficient clarity to enable the recipient to comply. She held that that was an impropriety within the meaning of s 138[92]. This holding has, correctly, not been challenged[93].
143. *The second impropriety*. Further, the seizure of documents in category (b) was, in Simpson J's opinion, at least an impropriety[94]. She took that view because that seizure was not permitted by the **Customs** Warrant: the **Customs** Warrant was a warrant in the same form as Sched V to the **Customs** Act, and she considered the range of documents capable of being obtained under the s 214(3) power and the Sched V warrant referred to in it to be narrower than the range of documents which a notice to produce under s 214(1) created an obligation to produce.
144. It may be that Simpson J viewed the decisive question in relation to the second impropriety in some places as being the construction of Sched V and in others as being the construction of s 214(3). If she did, it was understandable. Section 214(3) read by itself suggested that it was the source of power to enter, search and seize. But it did make possession of a Sched V warrant mandatory, and the language of the Sched V warrant suggested that it was the source of power to enter, search and seize ("You are hereby authorized ... And ... this shall be your sufficient warrant"). However, nothing turns on whether or not Simpson J took this view. Whatever the true construction of s 214(3) and Sched V, the selected construction of one in turn affected the other, and had to be congruent with it.
145. Simpson J's conclusion that the second impropriety had taken place would only hold good if the reasoning in *Re O'Neill*[95], with which Simpson J agreed, was correct. For in *Re O'Neill* Dunford DCJ held that while s 214(1) permitted the Collector to require the production of books and documents relating to two categories of goods (the goods which the information in writing alleged had been dealt with, and other goods imported or exported in the previous five years), s 214(3), and the **Customs** Warrant in the form of Sched V, permitted seizure only of the first category of documents, not the second.

The appellant's criticism of the Court of Appeal's reasoning

146. The appellant's submissions depend on the interrelationship between three parts of the Court of Appeal's judgment. In the first, the "*Re O'Neill* section", it held that decision to be wrong. In the second, the "failure to train section", it said that for the purpose of concluding whether there had been an impropriety arising from the respondent's failure properly to train and educate **customs** officers about *Re O'Neill* it would assume the correctness of that case. In the third, the "s 138(3) section", it applied the factors listed in s 138(3) to the first impropriety, but, according to the appellant, not the second.
147. Counsel for the appellant told the Court of Appeal that he relied on the excessive width of the search as "a further impropriety", ie a second impropriety. Counsel for the respondent correctly told the Court of Appeal that there was no notice of contention that *Re O'Neill* was wrong, and said: "accepting that her Honour was right about [*Re O'Neill*] then this was another point of illegality". The Court of Appeal noted that the respondent did not dispute the correctness of *Re O'Neill*, and said in the "failure to train section" that Simpson J's reasoning on that subject "must be addressed on that basis."[96] "That basis" involved assuming that *Re O'Neill* was correct, and that Simpson J was correct to find the second impropriety. But, said the appellant in this Court, when the Court of Appeal in the "s 138(3) section" dealt with a different topic – Simpson J's application of s 138(3) – it failed to do so "on that basis", ie on the basis that there were two improprieties, not one. It did so because in the "*Re O'Neill* section" it held that case to be wrong without having been invited by the respondent to do so and without notice to the parties[97]. If it were wrong, there was no second impropriety. Hence the appellant contended that he had been denied procedural fairness.

Did the Court of Appeal deny the appellant procedural fairness?

148. The wisdom of uttering dicta on a point not argued where those dicta do not affect the outcome as, by definition, they cannot if they are only dicta, may sometimes be questioned. That is partly because the absence of contested argument significantly weakens the future value of the dicta, and there can be other objections. But it is not necessarily a denial of procedural fairness for a court to utter dicta on a point not argued. That was so in relation to the "*Re O'Neill* section". Procedural fairness was only denied when in the "s 138(3) section" the Court of Appeal applied its opinion stated in the "*Re O'Neill* section" that the case was wrong – if it did. Did it?
149. *The respondent's first contention*. The respondent submitted that the remarks of the Court of Appeal about *Re O'Neill* were a "digression" and "not necessary because **Customs** had accepted through counsel that [the respondent was] prepared to conduct the case on the basis that [*Re*] *O'Neill* was right." The respondent's first contention was that the only significance of *Re O'Neill* lay in an argument by the appellant that there had been a failure by **Customs** to train its officers about the effect of *Re O'Neill*. While Simpson J found that the relevant officers had little understanding or awareness of what was disclosed by *Re O'Neill*, she did not find that this was the result of inadequate education and training, and found that the officers had not acted with ill-will, for a collateral purpose or in bad faith. The respondent submitted that the "failure to train" case run at trial was run again in the Court of Appeal, but only on the basis that it revealed a "disturbing" but non-reckless state of affairs. The respondent submitted that the key passage in the Court of Appeal's reasons was in the "failure to train section"[98], and that the balance of the Court of Appeal's reasoning in that section, which concluded that there was no impropriety in that regard, rested on an assumption that *Re O'Neill* was correct.
150. Crucial to the respondent's first contention is the proposition that the appellant *only* relied on *Re O'Neill* in the Court of Appeal to support the "failure to train" case. That proposition is not correct. The matter was put more broadly before Simpson J[99]. Further, Simpson J approached the matter more broadly. She saw the search as being illegal because the power to search under s 214(3) was narrow. And in the Court of Appeal counsel for the appellant supported Simpson J's approach[100]. In the absence of any specific challenge to her approach by the respondent in the Court of Appeal, and of any specific indication by the Court of Appeal that that approach was not accepted, the appellant was entitled to assume that Simpson J's view of the matter would stand, and would be taken into account by the Court of Appeal in the "s 138(3) section".

151. *The respondent's second contention.* The second contention of the respondent was that having stated in the "failure to train section" that the correctness of *Re O'Neill* was assumed, the Court of Appeal continued to make that assumption in the "s 138(3) section". That contention is crucial because, if it is correct, there was no want of procedural fairness. It is not correct. The question is a question of construction of the reasons for judgment. Properly construed, they falsify the respondent's contention. They are appropriately lengthy, detailed, thoughtful and complex. Although the Court of Appeal did note that the parties conducted the appeal on the assumption that *Re O'Neill* was right, it appears, with respect, in the course of preparing its reasons over time, inadvertently to have overlooked the fact that no hearing had been given on the question whether *Re O'Neill* was wrong, and to have taken into account its view, expressed in the "*Re O'Neill* section", that that case was wrong in deciding the appeal in defiance of the parties' assumption. That is so for reasons correctly stated by the appellant as follows.

152. First, the Court of Appeal said in the "s 138(3) section"[101]:

> "In the result, the unlawfulness of the conduct of **customs** officers *turned on* the failure adequately to identify the bottle of brandy said to have been illegally dealt with pursuant to the Spirits Act. There was no evidence to indicate that it would not have been relatively easy to comply with *that obligation of specificity*. However, the fact that *it* was not done was not due to deliberate cutting of corners or disregard of the legal requirements. On one view, *the* error arose from a failure to reproduce in the notice requiring production of documents the detailed information supplied on oath for the purposes of s 214(1)." (emphasis added)

The conduct of the **customs** officers was unlawful because it involved trespasses to land and goods. To say that "unlawfulness ... turned on" the failure of identification – the first impropriety – is to say that the failure of identification was a necessary condition of unlawfulness. The same conclusion flows from the reference to only one "obligation", one breach and one "error". Yet on Simpson J's approach, based on the correctness of *Re O'Neill*, "unlawfulness" also flowed independently from the second impropriety – the seizure of documents other than those relating to the bottle of brandy alleged to have been illegally dealt with. The correctness of Simpson J's conclusion that there were two improprieties was conceded by the respondent in the Court of Appeal. There were two reasons for the conclusion of "unlawfulness". Either reason was a sufficient condition for that conclusion. To say, as the Court of Appeal did, that "the unlawfulness" turned on only the first reason is to deny the existence of the second. Hence the Court of Appeal's language indicates that it was not relying on Simpson J's second impropriety and was assuming not that *Re O'Neill* was correct, but that it was wrong.

153. Secondly, this is confirmed by another passage in the "s 138(3) section"[102]:

> "The seriousness of the intrusion on the rights of Lawpark ... through the seizure of [its] documents, flowed from the extraordinary breadth of the power conferred by s 214."

This assertion that s 214(3) confers an extraordinarily broad power to search and seize is inconsistent with *Re O'Neill*. It recognised only a narrow power.

154. Thirdly, before the "s 138(3) section" the Court of Appeal had concluded in the "*Re O'Neill* section" that only the first impropriety had taken place[103]. It had not adopted Simpson J's conclusion that there had been a second impropriety. It had not referred to it at all. It had not noted that no second impropriety could be found unless *Re O'Neill* were correct. It had not said at the end of the "*Re O'Neill* section" that that opinion would be put aside in view of the contrary assumption on which the parties had conducted the case in the Court of Appeal. At one point in the "failure to train section" it did say: "the complaint that the trial judge failed to

address the issue must be addressed on that basis."[104] By "basis" it meant "the assumption that *Re O'Neill* is correct". By "issue" it meant the issue whether there had been a "failure to train and educate **customs** officers". In other words, the assumption being made by the Court of Appeal that *Re O'Neill* was correct was being made only for the purpose of deciding the issue of a "failure to train and educate officers". It was not being made in relation to the issues examined in the "s 138(3) section" after the failure to train issue had been dealt with. The respondent contended that the adoption of a "basis" that *Re O'Neill* was correct, contrary to the reasoned views of the Court of Appeal developed at some length in the "*Re O'Neill* section" [105], applied not only in the "failure to train section" but also in the "s 138(3) section". The better reading is that propounded by the appellant.

155. *The respondent's third contention*. The respondent relied on a passage in the "s 138(3) section" quoted above[106] which speaks of "the seizure of a large volume of documents without consent and without the authority of a valid warrant". But it does not identify why the **Customs** Warrant lacked validity. It is silent on whether the Court of Appeal had in mind the second of the improprieties identified by Simpson J as well as the first. The passage is thus neutral on the question of whether the Court of Appeal was there assuming that *Re O'Neill* was correct.

156. It follows that the appellant was denied procedural fairness. For this appeal to succeed, all the appellant needs to show is that that denial deprived him of the possibility of a successful outcome. Conversely, the respondent must show that to remit the matter to the Court of Appeal would be futile because this course would inevitably result in its making the same orders. To that end the respondent raised three points.

Was it inevitable that the Court of Appeal would have overruled *Re O'Neill* even if the appellant had been heard on the question?

157. The respondent submitted that the appellant's loss of an opportunity to argue that *Re O'Neill* was correct was immaterial, because *Re O'Neill* was plainly wrong.

158. The primary events took place nearly 20 years ago. The legislative language considered in *Re O'Neill* was repealed more than 13 years ago. The correctness of *Re O'Neill* is thus, for all purposes other than the justice of the way the appellant was treated, a subject of no more than purely antiquarian interest. In all these circumstances it is desirable in this dissenting judgment merely to record the opinion that it is strongly arguable that Dunford DCJ decided *Re O'Neill* correctly, that Simpson J was correct to agree with his decision, and that Davies J and Heerey J were also correct to reach the same conclusion. It would be surprising, and not creditable to the state of our judicature, if a view stated in 1988 by a future Supreme Court judge[107] after due consideration, arrived at independently in 1991, albeit without argument from counsel, by one Federal Court judge (Davies J)[108], followed in 1993 by another (Heerey J)[109] after taking into account the prior authorities, and shared by another Supreme Court judge in 2006 after those three authorities were cited to her, was not sufficiently arguable to escape the censure of being plainly wrong. Heerey J's primary point about s 214 has considerable force[110]:

> "It is one thing to impute to Parliament an intention that such a power can be exercised when the documents relate to particular goods which have been identified by information on oath as being the subject of dealings or possible dealings in breach of the Act. It is a very different thing to contemplate forceful removal of documents relating to any goods imported or exported over a period of five years. While the statute clearly gives the Collector the power to require the handing over of documents in the latter category, it does not ... authorise the further and serious step of seizure and removal."

Three further points may be made. First, to require occupiers of premises to respond to notices to produce by conducting their own searches, not only for documents relating to goods referred to in an information but also for documents relating to other goods imported or exported in the previous five years, is less onerous than permitting officers of the government to conduct searches for the latter category of documents. Searches

conducted by occupiers, informed by knowledge of their own record-keeping systems, are likely not to be unduly disruptive. But searches for the same wide classes of documents conducted by government officers may be very deleterious to the preservation of any order in the arrangements for keeping records in the premises searched and therefore damaging to the future conduct of the occupiers' businesses. Secondly, exercise of the right to search and seize conferred by s 214(3) may affect persons other than the person who has failed to comply with s 214(1). And, thirdly, contrary to what the Court of Appeal said[111], since the person on whom the notice to produce is served under s 214(1) will not necessarily be the same person as the person present when the search takes place under s 214(3), it does not follow that the latter person will be aware of the scope of the requirement in the notice to produce. Thus a construction which would permit searches under s 214(3) as extensive as the reach of the notice to produce under s 214(1) is a construction which would call, it is strongly arguable, for clearer words than those in s 214(3). The common law right to be free of searches and seizures not supported by a valid warrant or other lawful justification is a fundamental one.

159. Since it is strongly arguable that *Re O'Neill* was correctly decided, and it is at least clear that it is not plainly wrong, it cannot be said that remitter of the matter to the Court of Appeal for rehearing would be futile on the ground that the same outcome in that Court would be inevitable. To say that would be to deprive the appellant, and indeed the respondent as well, of the normal entitlement of litigants in intermediate appellate courts in this country to have their appeals considered by way of genuine rehearing. When an ultimate appellate court is asked to overturn a previously settled line of authority in lower courts, it usually regards itself as assisted in deciding whether to do so by the opinions, enunciated after contested argument, of the intermediate appellate court from which the appeal to the ultimate appellate court is brought. There are no such opinions available to this Court in this appeal.

Was any non-compliance with the warrant immaterial?

160. The respondent submitted that the Court of Appeal had unquestionably considered the appellant's claim to have the evidence excluded on the basis that the entire seizure was the result of trespasses committed because the first impropriety, in rendering the Notice to Produce invalid, negated a precondition to the legality of the search. The respondent submitted that the effect of the second impropriety in tainting the legality of the search could not improve that claim. The search "does not get any more unlawful by being unlawful for two reasons." The second impropriety might make the "character of the illegality" wider "and more colourful", but the second impropriety was directed only to the issue concerning the failure to train and educate officers, which was "fully agitated and fully considered".
161. So far as these submissions rest on the proposition that the appellant's submissions to the Court of Appeal about the undue width of the search went only to the "failure to train and educate" issue, they repeat an identical submission rejected above[112]. So far as these submissions discount the significance of any second impropriety, they must be rejected.
162. The appellant drew attention to an allusion to s 138(3)(h) by the Court of Appeal in relation to the s 214(1) requirement that the goods be properly specified in the Notice to Produce[113]: "There was no evidence to indicate that it would not have been relatively easy to comply with that obligation of specificity."[114] The next sentence referred to s 138(3)(e)[115]: "However, the fact that it was not done was not due to deliberate cutting of corners or disregard of the legal requirements." The appellant then submitted:

> "[H]ad [the Court of Appeal] accepted that the ⇦ **Customs** ⇨ Warrant only authorised the seizure of documents relating to the bottle of brandy said to have been unlawfully dealt with in the Information, then the discretion under section 138 would have had to be exercised in circumstances where: (i) ⇦ **Customs** ⇨ generally, including the Chief Inspector to whom a relevant ⇦

> **Customs** officer reported and from whom that officer took instructions, knew there was a decision of a Court exercising federal jurisdiction (namely [*Re O'Neill*]) that the **Customs** Warrant was so limited;[116] (ii) that decision, which was the only decision directly on the point, was correct; (iii) there was no decision to contrary effect and **Customs** had no reason to doubt the correctness of the decision other than the latter advice from the Australian Government Solicitor;[117] and (iv) accordingly, it was open to infer that **Customs** had decided to flout the Court's decision and to prefer the advice from the Australian Government Solicitor, well knowing that in doing so its conduct might (indeed, in all likelihood *would*) be found to have been unlawful ... [T]hose circumstances amount to compelling reasons for concluding that the seizure of the documents ... was a contravention of an Australian law which was at least reckless,[118] if not deliberate, within the meaning of section 138(3)(e)." (emphasis in original; one footnote omitted)

The respondent did not deal with these points about s 138(3)(e) directly. While strictly speaking s 138 does not create a discretion, the passage affords grounds for concluding that the failure of the Court of Appeal to inform the appellant of its attitude to *Re O'Neill* was not an immaterial error. The prospects of persuading the Court of Appeal to exclude the evidence are not contemptible. If *Re O'Neill* were correct, there were two improprieties, not one. The second was independent of the first. The quality of the second impropriety may have made it more vulnerable to an adverse s 138(3)(e) analysis than the first. In addition, the second impropriety may also have been more vulnerable to adverse analysis under s 138(3)(d) and (h).

163. It does not matter whether the present proceedings are analysed as only involving impropriety at the moment when the documents were obtained by the searches and seizures which took place, or whether there was impropriety earlier. What does matter is that even if the only impropriety was to be found in the searches and seizures themselves, there were, consistently with the approach of Simpson J and the parties in the Court of Appeal, two distinct reasons for concluding that the searches and seizures were improper or in contravention of law. Once that conclusion had been reached, and the Court of Appeal moved on to apply s 138(3), the factors there set out had to be evaluated in relation to each reason. It was possible that had evaluation been conducted in relation to the second reason, it might have turned out differently from the way the evaluation in relation to the first alone did.

164. The need to consider the operation of s 138(3) in relation to every reason why there is an impropriety or a contravention of Australian law may be illustrated by a search for documents purportedly pursuant to s 214(3) involving the following events before and during the search:

(a) an occupier of premises failed to comply with a notice to produce which did not sufficiently identify the documents to which the goods relate (because the relevant identification was omitted from the document as typed by reason of a mechanical failure not noticed by the Collector, who was under pressure to issue it urgently in order to ensure preservation of the documents);

(b) the **customs** warrant required by s 214(3) was issued, but was stolen by a third party without the knowledge of the officer of **Customs** who was in charge of the search just before that officer entered the premises; and

(c) a person assisting the officer to carry out the search, after becoming frustrated by an inability to find any documents, obtained knowledge of their location after inflicting physical violence for that purpose on the occupiers of the premises.

The seizure of the documents in this example is illegal. There are three reasons for the illegality. It is insufficient simply to say that once there is an illegality the reasons for it do not matter. It is necessary to examine the illegality in the light of each of the reasons for its being an illegality. It is likely that scrutiny of the first and second reasons would not result in inadmissibility: the conduct of the Collector was venial and the conduct of the officer in charge of the search was innocent. But scrutiny of the third reason may point much more strongly to exclusion in view of the factors listed in s 138(3)(d)-(f).

165. In the present proceedings, the Court of Appeal evaluated the first impropriety in the light of the factors listed in s 138(3). But the appellant has been deprived of the opportunity of having the Court of Appeal evaluate the second impropriety in the light of those factors. If the matter is remitted to the Court of Appeal with a view to reconsideration of whether the evidence is admissible and if that Court finds, after argument, that the second impropriety existed, it will not inevitably follow that the evidence will be held admissible. Hence it is not futile to permit an evaluation of it which has not yet taken place in that Court to take place.

Could the convictions be upheld on the averments alone?

166. The respondent submitted that it would be futile to allow the appeal, because the evidence objected to was not a necessary step in concluding that the appellant was guilty. The respondent referred to Simpson J's statement that s 255 of the **Customs** Act made the respondent's averment in the Re-amended Statement of Claim of all the allegations prima facie evidence of the matters averred. She said also that the appellant elicited no evidence in rebuttal, either directly or in cross-examination of the respondent's witnesses. She described this as one of "two short routes to the conclusion that the Comptroller has established the facts pleaded in respect of each offence."**[119]** The respondent did acknowledge that "the process by which the primary facts pleaded in the statement of claim and found proved by averment culminate in proof of the charges" was not "expressly exposed". But the respondent said that that step "hardly needed to be exposed", because if everything alleged in the Re-amended Statement of Claim was accepted, Simpson J's conclusion of guilt beyond reasonable doubt must follow. The proposition should not prevent the appeal from being allowed for the following reasons.

167. First, the trial was never conducted on the basis that the seized evidence was unnecessary for the establishment of guilt, or on the basis that the facts averred would suffice to prove guilt. The respondent relied on the averment merely as a supplementary mode of proof, not as the sole mode. Secondly, in moving from a conclusion that the factual matters pleaded had been "established" or "proved" – ie on the balance of probabilities – to a conclusion that guilt was established beyond reasonable doubt, Simpson J took into account evidence based to some extent on the materials illegally seized. Hence, as a matter of construction of her reasons, she did not reach a conclusion of guilt beyond reasonable doubt merely on the basis of the averments. Thirdly, the respondent's submission is inconsistent with the Court of Appeal's view that if the seized evidence were inadmissible the convictions would have to be set aside**[120]**.

Orders

168. The appeal should be allowed, the Court of Appeal's orders should be set aside, the matter should be remitted to the Court of Appeal for a rehearing of grounds 25 and 26 of the appellant's Amended Notice of Grounds of Appeal to that Court, and the respondent should pay the appellant's costs of the appeal to this Court. The costs of the first hearing in the Court of Appeal should abide the outcome of the second.

[1] By virtue of s 7 of the **Customs** Act as it stood at the relevant date, the Comptroller-General is the person who has general administration of the Act. The "Collector" is any principal officer of **Customs** or any officer "doing duty in the matter in relation to which the expression is used" (s 8(1)(a)). A Collector of **Customs** for a State or Territory is the principal officer of **Customs** for all or part of that State or Territory (s 8(1)(b)). After the ***Customs, Excise and Bounty Legislation Amendment Act 1995*** (Cth) the term "Comptroller-General" refers to the Chief Executive Officer of **Customs** (s 18). The "Collector" refers to the Chief Executive Officer, the Regional Director for a State or Territory, or any officer doing duty in the relevant matter. These reasons use the terms "Comptroller-General" and "Collector" as they applied before the 1995 amendments.

[2] For the history and nature of **customs** prosecutions and the standard of proof where penalties are claimed see *Chief Executive Officer of* ***Customs*** *v Labrador Liquor Wholesale Pty Ltd* [2003] HCA 49; (2003) 216 CLR 161 at 192-198 [101]- [113] per Hayne J; [2003] HCA 49.

[3] *In the matter of Lawrence Charles O'Neill* unreported, District Court of New South Wales, 18 August 1988.

[4] *Comptroller-General of* ***Customs*** *v* ***Parker*** *[No 3]* [2006] NSWSC 1269.

[5] ***Parker*** *v Comptroller-General of* ***Customs*** [2007] NSWCA 348; (2007) 243 ALR 574.

[6] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37] per Gleeson CJ; [2003] HCA 6.

[7] Cooper, ***Customs*** *and Excise Law,* (1984) at 8 [115].

[8] 16 & 17 Vict c 107.

[9] 39 & 40 Vict c 36.

[10] 39 & 40 Vict c 36, s 204.

[11] 39 & 40 Vict c 36, s 205.

[12] **Customs** Act, ss 198, 199 and Scheds III, IV.

[13] ***Customs*** *Act* 1923 (Cth).

[14] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 July 1923 at 1109-1110.

[15] Australia, Law Reform Commission, *Criminal Investigation*, Report No 2, (1975) at 211 (Appendix C).

[16] Australia, Law Reform Commission, ***Customs*** *and Excise*, Report No 60, (1992), vol II at 70-71 [7.4].

[17] Australia, Law Reform Commission, ***Customs*** *and Excise*, Report No 60, (1992), vol II at 22 [3.4], 70-71 [7.4].

[18] A similar provision, s 144 of the *Excise Act* 1901 (Cth), was discussed in *Chief Executive Officer of* ***Customs*** *v El Hajje* [2005] HCA 35; (2005) 224 CLR 159 at 172-174 [34]- [39]; [2005] HCA 35.

[19] Section 255(2)(b).

[20] Section 255(3).

[21] Section 255(4)(a).

[22] Australia, Law Reform Commission, *Evidence*, Report No 38, (1987) at 243.

[23] *Employment Advocate v Williamson* [2001] FCA 1164; (2001) 111 FCR 20 at 43-44 [78] per Branson J.

[24] *The Oxford English Dictionary*, 2nd ed (1989), vol VII at 747.

[25] *The Oxford English Dictionary*, 2nd ed (1989), vol III at 847.

[26] *Comptroller-General of* ***Customs*** *v Kingswood Distillery Pty Ltd* unreported, Supreme Court of New South Wales, 15 March 1996.

[27] *Comptroller-General of* ***Customs*** *v Kingswood Distillery Pty Ltd* unreported, Supreme Court of New South Wales, 15 March 1996.

[28] *Ace* ***Custom*** *Services Pty Ltd v Collector of* ***Customs*** *(NSW)* (1991) 31 FCR 576 at 584-585 per Davies J; *Challenge Plastics Pty Ltd v Collector of* ***Customs*** [1993] FCA 247; (1993) 42 FCR 397 at 400-401 per Heerey J.

[29] [1993] FCA 247; (1993) 42 FCR 397.

[30] (1991) 31 FCR 576.

[31] *Comptroller-General of* ***Customs*** *v* ***Parker*** [2006] NSWSC 390; (2006) 200 FLR 44.

[32] *Comptroller-General of* ***Customs*** *v* ***Parker*** [2006] NSWSC 387.

[33] *Comptroller-General of* ***Customs*** *v* ***Parker*** [2006] NSWSC 387 at [3], [22].

[34] *Comptroller-General of* ***Customs*** *v* ***Parker*** [2006] NSWSC 387 at [3].

[35] *Comptroller-General of* ***Customs*** *v* ***Parker*** [2006] NSWSC 387 at [22].

[36] *Comptroller-General of* ***Customs*** *v* ***Parker*** [2006] NSWSC 387 at [26].

[37] *Comptroller-General of* ***Customs*** *v* ***Parker*** [2006] NSWSC 387 at [26].

[38] *Comptroller-General of* ***Customs*** *v* ***Parker*** [2006] NSWSC 387 at [26].

[39] *Comptroller-General of* ***Customs*** *v* ***Parker*** [2006] NSWSC 387 at [27].

[40] *Comptroller-General of* ***Customs*** *v* ***Parker*** [2006] NSWSC 387 at [39].

[41] *Comptroller-General of* ***Customs*** *v* ***Parker*** [2006] NSWSC 387 at [42].

[42] In accordance with *Chief Executive Officer of* ***Customs*** *v Labrador Liquor Wholesale Pty Ltd* [2003] HCA 49; (2003) 216 CLR 161.

[43] *Comptroller-General of* ***Customs*** *v* ***Parker*** [2006] NSWSC 390; (2006) 200 FLR 44 at 65-66 [123].

[44] [2007] NSWCA 348; (2007) 243 ALR 574 at 587 [49].

[45] [2007] NSWCA 348; (2007) 243 ALR 574 at 597 [90].

[46] [2007] NSWCA 348; (2007) 243 ALR 574 at 601 [109].

[47] [2007] NSWCA 348; (2007) 243 ALR 574 at 603 [118].

[48] [1993] FCA 247; (1993) 42 FCR 397 at 401.

[49] [2007] NSWCA 348; (2007) 243 ALR 574 at 597 [90].

[50] At [137].

[51] [2007] NSWCA 348; (2007) 243 ALR 574 at 604 [124].

[52] [2007] NSWCA 348; (2007) 243 ALR 574 at 604 [122].

[53] *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141 at 145; [1986] HCA 54.

[54] Section 7. This was amended in 1995 to provide for responsibility to rest with the Chief Executive Officer of **Customs**.

[55] ***Parker*** *v Comptroller-General of* ***Customs*** [2007] NSWCA 348; (2007) 243 ALR 574.

[56] *Comptroller-General of* ***Customs*** *v* ***Parker*** [2006] NSWSC 387.

[57] (2003) 216 CLR 161; [2003] HCA 49.

[58] [2007] NSWCA 348; (2007) 243 ALR 574 at 583-584.

[59] Repealed by the *Excise Laws Amendment (Fuel Tax Reform and Other Measures) Act* 2006 (Cth), Sched 2.

[60] Section 214 since has been repealed by the ***Customs, Excise and Bounty Legislation Amendment Act* 1995** (Cth), Sched 4, Item 44. The appropriate form of the Act for the purposes of this appeal is in Reprint No 7 of 31 July 1990.

[61] [2007] NSWCA 348; (2007) 243 ALR 574 at 597.

[62] Section 31.

[63] By ss 31, 41 and 35 respectively.

[64] Also, s 215 empowered the Collector to impound or retain any document required to be produced under the Act.

[65] A second "Notice to Produce Documents" was served at premises occupied by Kingswood, but the appellant made no challenge with respect to what occurred at the Kingswood premises.

[66] (2005) 224 CLR 159; [2005] HCA 35.

[67] cf *Denver Chemical Manufacturing Co v Commissioner of Taxation (NSW)* [1949] HCA 25; (1949) 79 CLR 296 at 313; [1949] HCA 25.

[68] Paragraphs (a)-(h) read:

"(a) the probative value of the evidence, and

(b) the importance of the evidence in the proceeding, and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and

(d) the gravity of the impropriety or contravention, and

(e) whether the impropriety or contravention was deliberate or reckless, and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights* ['the ICCPR'], and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law."

[69] *Comptroller-General of* ***Customs*** *v* ***Parker*** [2006] NSWSC 387.

[70] *Comptroller-General of* ***Customs*** *v* ***Parker*** [2006] NSWSC 390; (2006) 200 FLR 44.

[71] *Comptroller-General of* ***Customs*** *v* ***Parker*** *[No 3]* [2006] NSWSC 1269.

[72] [2006] NSWSC 1269 at [37].

[73] [2006] NSWSC 390; (2006) 200 FLR 44 at 65-66.

[74] [2006] NSWSC 387.

[75] Unreported, District Court of New South Wales, 18 August 1988 at 12-13.

[76] [2007] NSWCA 348; (2007) 243 ALR 574 at 588.

[77] [2007] NSWCA 348; (2007) 243 ALR 574 at 605.

[78] [1986] HCA 54; (1986) 161 CLR 141 at 147; [1986] HCA 54.

[79] [2000] HCA 57; (2000) 204 CLR 82 at 88-89 [4], 116-117 [80], 128 [122], 130-131 [131], 153-155 [211]; [2000] HCA 57.

[80] [1993] FCA 247; (1993) 42 FCR 397 at 400-401. See also the comment by Davies J in *Ace* ***Custom*** *Services Pty Ltd v Collector of* ***Customs*** *(NSW)* (1991) 31 FCR 576 at 584-585.

[81] *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 at 126-127 [25]; [2003] HCA 22.

[82] cf *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141 at 145.

[83] [2007] NSWCA 348; (2007) 243 ALR 574 at 603-605.

[84] [2007] NSWCA 348; (2007) 243 ALR 574 at 603-604.

[85] [2007] NSWCA 348; (2007) 243 ALR 574 at 604.

[86] [2007] NSWCA 348; (2007) 243 ALR 574 at 605.

[87] [2007] NSWCA 348; (2007) 243 ALR 574 at 601.

[88] [2007] NSWCA 348; (2007) 243 ALR 574 at 603.

[89] (1993) 177 CLR 485; [1993] HCA 15.

[90] [1]-[72] and [94]-[120].

[91] Section 214 as it stood at the relevant time is set out at [13] above; see also [100].

[92] Section 138 is set out at [25] above; see also [112].

[93] It was also arguably a contravention of an Australian law rendering the Notice to Produce invalid, but it is desirable not to determine this point since the parties did not advance submissions on it and it is not necessary to decide it. However, the respondent admitted on the pleadings that the Notice to Produce was not "valid".

[94] She also said that it was "a contravention of an Australian law." That possibility may be noted without adopting any position one way or the other on its correctness.

[95] Unreported, District Court of New South Wales, 18 August 1988.

[96] ***Parker*** *v Comptroller-General of* ***Customs*** [2007] NSWCA 348; (2007) 243 ALR 574 at 601 [109], quoted above at [68] and [133], and below at [154].

[97] ***Parker*** *v Comptroller-General of* ***Customs*** [2007] NSWCA 348; (2007) 243 ALR 574 at 587-588 [50]- [53].

[98] See [68], [133] and [154]: ***Parker*** *v Comptroller-General of* ***Customs*** [2007] NSWCA 348; (2007) 243 ALR 574 at 601 [109].

[99] In oral argument it was submitted: "It is clear, on all of the authorities, including the decision of Dunford J ... that subsection 214(3) only permitted a seizure of documents relating to those documents identified in the summons. In this case, it is quite clear that they did not seize documents in relation to the respective bottles of brandy referred [to], but seized an enormous quantity of material in relation to all activities that had been going on for some time ... As a consequence, the action in seizing all of these documents ... is illegal." A similar point was made in written submissions.

[100] See [147] above.

[101] ***Parker*** *v Comptroller-General of* ***Customs*** [2007] NSWCA 348; (2007) 243 ALR 574 at 604 [124].

[102] ***Parker*** *v Comptroller-General of* ***Customs*** [2007] NSWCA 348; (2007) 243 ALR 574 at 604 [122].

[103] ***Parker*** *v Comptroller-General of* ***Customs*** [2007] NSWCA 348; (2007) 243 ALR 574 at 597 [90].

[104] At [68] and [133]: ***Parker*** *v Comptroller-General of* ***Customs*** [2007] NSWCA 348; (2007) 243 ALR 574 at 601 [109].

[105] ***Parker*** *v Comptroller-General of* ***Customs*** [2007] NSWCA 348; (2007) 243 ALR 574 at 584-588 [43]- [53].

[106] ***Parker*** *v Comptroller-General of* ***Customs*** [2007] NSWCA 348; (2007) 243 ALR 574 at 603 [120].

[107] Dunford DCJ served on the Supreme Court of New South Wales from 1993 until 2005.

[108] *Ace* ***Custom*** *Services Pty Ltd v Collector of* ***Customs*** *(New South Wales)* (1991) 31 FCR 576 at 584-585.

[109] *Challenge Plastics Pty Ltd v Collector of* ***Customs*** [1993] FCA 247; (1993) 42 FCR 397 at 400-401.

[110] *Challenge Plastics Pty Ltd v Collector of* ***Customs*** [1993] FCA 247; (1993) 42 FCR 397 at 401.

[111] ***Parker*** *v Comptroller-General of* ***Customs*** [2007] NSWCA 348; (2007) 243 ALR 574 at 588 [51].

[112] Above at [150].

[113] ***Parker*** *v Comptroller-General of* ***Customs*** [2007] NSWCA 348; (2007) 243 ALR 574 at 604 [124].

[114] The question whether this was not an impermissible reversal of the burden of demonstration established by s 138(1) was not raised by either party and may be put aside.

[115] ***Parker*** *v Comptroller-General of* ***Customs*** [2007] NSWCA 348; (2007) 243 ALR 574 at 604 [124].

[116] ***Parker*** *v Comptroller-General of* ***Customs*** [2007] NSWCA 348; (2007) 243 ALR 574 at 602-603 [114]- [117].

[117] ***Parker*** *v Comptroller-General of* ***Customs*** [2007] NSWCA 348; (2007) 243 ALR 574 at 603 [118].

[118] *Director of Public Prosecutions v Leonard* [2001] NSWSC 797; (2001) 53 NSWLR 227 at 248-249 [103].

[119] *Comptroller-General of* ***Customs*** *v* ***Parker*** [2006] NSWSC 390; (2006) 200 FLR 44 at 120 [65].

[120] ***Parker*** *v Comptroller-General of* ***Customs*** [2007] NSWCA 348; (2007) 243 ALR 574 at 584 [40].
