

B. The statutory scheme

- Act, ss 68, 132AA, 165, 99(2), 30, 33, 71E, 273GA(1)(a), 79(1), 80(d), 78(3), 81(1)(d)

C. The proper construction of s 35A of the Act

Text and context

4. The words “the possession, custody or control” of goods in s 35A(1) are not qualified by adjectives such as “exclusive”, “separate”, “complete” or “personal”: ASR [6], [13]; cf RS [44], [50], [67].
5. The subject of s 35A(1) is “a person”, not “the person” (cf ss 35(1A), (1B), 36(1)(b), (2)(b), (4), (6); cf FC [86], [97] (**AB 52, 55**)).
6. The word “person” includes natural persons and corporate entities. It should not be construed so as to include, in its application to goods held in a licensed warehouse, only “the licensee of a warehouse” (cf RS [51], [59]; cf former s 92(4) (**JBA v1 Tab 4**)).

Purpose

7. The purpose of s 35A is to protect the revenue and, accordingly, it should be construed broadly. Section 35A imposes an absolute duty to keep goods safely. It is not concerned with notions of fault, or with the capacity of a person to keep goods safely: cf FC [99] (plurality), [35]–[37] (Davies J).
 - *Collector of Customs (NSW) v Southern Shipping Co Ltd* (1962) 107 CLR 279 (**JBA v 1 Tab 12**) at 287 (Dixon CJ, with whom Windeyer J agreed), 289–290 (McTiernan J), 295 (Taylor J), 299 (Menzies J), 304–305 (Owen J)

D. The Full Court’s reasoning

8. The plurality concluded that employees do not have the kind of custody or control required to fall within s 35A(1) via a three-step reasoning process.
9. *Step 1*: The plurality erroneously carved up the compound expression “the possession, custody or control” and analysed its component parts separately: FC [68] (plurality) (**AB 48**); cf [31] (Davies J) (**AB 35**).
 - *XYZ v Commonwealth* (2006) 227 CLR 523 (**JBA v1 Tab 24**) at [176], [19]
 - *Federal Commissioner of Taxation v ANZ Banking Group Ltd* (1979) 143 CLR 499 (**JBA v1 Tab 16**) at 519–520 (Gibbs ACJ), 532–533 (Mason J)

10. *Step 2*: The plurality erroneously construed “possession” in s 35A to mean “exclusive possession”: FC [97] (**AB 55**).
- *Goben Pty Ltd v Chief Executive Officer of Customs* (1996) 68 FCR 301 (**JBA v1 Tab 17**) at 306-307
11. *Step 3*: The plurality erroneously considered that, because employees “generally” do not have “possession” of their employers’ goods, it was “but a short step” to conclude that “control” is subject to the same limitation: FC [98], [111] (**AB 57–59**).
- FC [106]–[110]
 - Pollock and Wright, *An Essay on Possession in the Common Law* (**JBA v2 Tab 27**) at 58-60, 18, 26–27
 - Stephen, *A Digest of the Criminal Law* (**JBA v 2 Tab 30**) at 222–223
 - *Anderson Group Pty Ltd v Tynan Motors Pty Ltd* (2006) 65 NSWLR 400 (**JBA v1 Tab 10**) at [36], [42]
 - FC [111], [81]–[84], [101]–[104]

E. Disposition of the appeal

12. There is no need to remit the matter to the AAT, because the facts found by the AAT sufficiently establish that the respondent had the possession, custody or control of the stolen goods: AS [64]; ARS [19]; cf FC [35], [37] (Davies J), [99], [120] (plurality).

F. Notice of contention

13. Ground 1 should be dismissed for the reasons advanced on the appeal, while Grounds 2–6 are misconceived, alleging that the Full Court failed to find matters that it did in fact find. Given the factual findings made by the AAT (summarised at [3] above), there is no basis on which the Court could allow Ground 7 and affirmatively conclude that the respondent did *not* have the possession, custody or control of the stolen goods: ARS [19]; cf RS [73]–[80].

Dated: 8 August 2018

Stephen Donaghue
Solicitor-General of the
Commonwealth

David Thomas

Rowan Minson

Counsel for the Appellant