

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, NETTLE AND GORDON JJ

COMPTROLLER GENERAL OF CUSTOMS

APPELLANT

AND

DOMENIC ZAPPIA

RESPONDENT

Comptroller General of Customs v Zappia
[2018] HCA 54
14 November 2018
S91/2018

ORDER

1. *Appeal allowed.*
2. *Set aside orders 1, 2 and 3 of the order of the Full Court of the Federal Court of Australia made on 19 September 2017 and, in their place, order that the appeal to that Court be dismissed.*

On appeal from the Federal Court of Australia

Representation

S P Donaghue QC, Solicitor-General of the Commonwealth, with D F C Thomas and R A Minson for the appellant (instructed by Australian Government Solicitor)

G O'L Reynolds SC with R S Angyal SC, D P Hume and J K Mee for the respondent (instructed by Hall Partners)

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CATCHWORDS

Comptroller General of Customs v Zappia

Customs and excise – Customs control – Dutiable goods – Possession, custody or control of dutiable goods – Where company held warehouse licence under *Customs Act 1901* (Cth) – Where dutiable goods stolen from company's warehouse before goods entered for home consumption – Where respondent employed by company as general manager and warehouse manager – Where s 35A(1) of *Customs Act* relevantly provided that a person who "has, or has been entrusted with, the possession, custody or control" of dutiable goods subject to customs control and who fails to keep goods safely shall, on demand by Collector, pay amount equal to customs duty which would have been payable if goods had been entered for home consumption on day of demand – Where respondent served with demand by Collector under s 35A(1) – Where respondent applied to Administrative Appeals Tribunal for review of Collector's demand – Where Tribunal found respondent directed what was to happen to goods on day-to-day basis – Whether respondent was person who "has, or has been entrusted with, the possession, custody or control" of dutiable goods subject to customs control.

Words and phrases – "authority to deal with", "Collector", "customs control", "dutiable goods", "employee", "fails to keep the goods safely", "has, or has been entrusted with", "home consumption", "management or control", "operational control", "owner", "possession, custody or control", "power or authority", "warehouse licence".

Customs Act 1901 (Cth), ss 30, 35A, 36, 37, Pt V.

1 KIEFEL CJ, BELL, GAGELER AND GORDON JJ. This appeal from a judgment of the Full Court of the Federal Court¹, given on appeal on a question of law from a decision of the Administrative Appeals Tribunal², turns on whether an employee of the holder of a warehouse licence can meet the description of "a person who has, or has been entrusted with, the possession, custody or control of dutiable goods which are subject to customs control" in s 35A(1) of the *Customs Act 1901* (Cth) ("the Act"). Contrary to the conclusion of the majority in the Full Court, an employee of the holder of a warehouse licence can meet that statutory description. Moreover, on the facts found by the Tribunal, Mr Domenic Zappia ("Domenic") met that description in his capacity as an employee of Zaps Transport (Aust) Pty Ltd ("Zaps").

The Act

2 "Dutiable goods", within the meaning of the Act, include goods in respect of which customs duty is payable³. Tobacco products are dutiable goods⁴. Customs duty is payable on dutiable goods by the time those goods are entered for home consumption⁵. The customs duty is payable as a debt to the Commonwealth by the "owner" of the goods⁶.

3 The term "owner" in respect of goods is defined for the purposes of the Act to include "any person (other than an officer of Customs) being or holding himself or herself out to be the owner, importer, exporter, consignee, agent, or person possessed of, or beneficially interested in, or having any control of, or power of disposition over the goods"⁷. The object of that definition is "to extend

1 *Zappia v Comptroller-General of Customs* (2017) 254 FCR 363.

2 *Re Zaps Transport (Aust) Pty Ltd and Comptroller General of Customs* [2017] AATA 202.

3 Section 4(1) of the Act (definition of "dutiable goods").

4 See ss 15, 16, 19AB and 19AC and Sch 3 Ch 24 of the *Customs Tariff Act 1995* (Cth).

5 Item 1 of the table in s 132AA(1) of the Act.

6 Section 165 of the Act.

7 Section 4(1) of the Act (definition of "owner").

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to several persons liabilities in respect of the same goods"⁸. The customs duty on the goods "follows the goods until the duties are paid" and "a personal liability arises in the case of any person who becomes owner of the goods before the duties are paid"⁹.

4 By operation of s 30 of the Act, goods imported into Australia become subject to "customs control" and remain subject to customs control until either exported from Australia or delivered into home consumption in accordance with an authority or permission under the Act. Ordinarily, an authority to deliver goods into home consumption must be given by a "Collector", who can be the Comptroller-General of Customs¹⁰ (who has the general administration of the Act¹¹) or an officer of Customs¹², after goods have been entered for home consumption and any applicable customs duty has been paid¹³. During the period in which the goods remain subject to customs control, the goods cannot be moved, altered or interfered with except as authorised by or under the Act¹⁴.

5 The statutory policy which underlies that operation of s 30 was identified by O'Connor J soon after the enactment of the Act. Because goods become difficult to trace once delivered into home consumption or "circulation", goods must "from the time they are first imported until duty is paid ... be kept under customs control" for the protection of the revenue¹⁵.

8 *Wing On & Co Ltd v Collector of Customs (NSW)* (1938) 60 CLR 97 at 104; [1938] HCA 71. See also *Moama Refinery Ltd v Chief Executive Officer of Customs* (2001) 115 FCR 205 at 214 [28].

9 *Wing On & Co Ltd v Collector of Customs (NSW)* (1938) 60 CLR 97 at 106.

10 Section 8(1)(a) of the Act.

11 Section 7 of the Act.

12 Section 8(1)(b) read with the definition of "officer" in s 4(1) of the Act.

13 Section 71C(4) of the Act.

14 Section 33 of the Act.

15 *R v Lyon* (1906) 3 CLR 770 at 784; [1906] HCA 17.

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6 That statutory policy continues in the Act, which, in its amended form, must be read as an integrated whole¹⁶. Relevantly, the policy informs interlocking provisions of the Act designed to facilitate the warehousing of imported goods prior to those goods being entered for home consumption. Where goods are imported, the owner of the goods has the option of entering them for warehousing as an alternative to immediately entering them for home consumption¹⁷. Where the goods are entered for warehousing and any applicable charges or fees have been paid, an authority must be given to the owner of the goods to take the goods into warehousing¹⁸. The warehoused goods must then be stored in a licensed warehouse where they remain subject to customs control under s 30 until such time as the goods are entered for home consumption and a further authority is given, after payment of the applicable customs duty¹⁹.

7 Part V of the Act makes elaborate provision for the grant, suspension and cancellation of warehouse licences by the Comptroller-General. Grant of a warehouse licence is on written application²⁰. Where the applicant is a company, it is required to describe any director, officer, shareholder and employee who "would participate in the management or control of the warehouse"²¹. Any warehouse licence then granted is subject to standard conditions which include that the holder of the licence must notify the Comptroller-General if a person not so described in the application "commences ... to participate" in "the management or control of the warehouse"²². Amongst the circumstances in which the Comptroller-General is prohibited from granting a warehouse licence is if he or she is of the opinion that a director, officer, shareholder or employee of the applicant "who would participate in the management or control of the

16 Section 11B(1) of the *Acts Interpretation Act 1901* (Cth). See *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463, 479; [1995] HCA 44.

17 Section 68(2) of the Act.

18 Sections 68(3B) and 71DJ(1), (4) of the Act.

19 Sections 68(3A) and 71C(1), (4) of the Act.

20 Section 80(a) of the Act.

21 Sections 80(d) and 81(1)(c), (d) of the Act.

22 Sections 82(1)(a) and 82C of the Act.

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warehouse is not a fit and proper person so to participate"²³. Correspondingly, amongst the circumstances in which the Comptroller-General may suspend or cancel a warehouse licence is if he or she is satisfied that a director, officer or shareholder or an employee of the holder of the licence, being a person "who participates in the management or control of the warehouse", is "not a fit and proper person so to participate"²⁴. A person is taken to participate in the management or control of a warehouse for each of those purposes if he or she has authority to "direct the operations of the warehouse" or "direct activities in the warehouse, the removal of goods from the warehouse, or another important part of the operations of the warehouse" or "direct a person who has [such] authority ... in the exercise of that authority"²⁵.

8 The "holder of a warehouse licence" is subject to a number of specific obligations²⁶. One of them is that the holder "must not permit warehoused goods to be delivered for home consumption" unless the goods "have been entered for home consumption" and "an authority to deal with them is in force"²⁷.

9 Within that overall context, s 35A(1) of the Act provides:

"Where a person who has, or has been entrusted with, the possession, custody or control of dutiable goods which are subject to customs control:

- (a) fails to keep those goods safely; or
- (b) when so requested by a Collector, does not account for those goods to the satisfaction of a Collector in accordance with section 37;

that person shall, on demand in writing made by a Collector, pay to the Commonwealth an amount equal to the amount of the duty of Customs which would have been payable on those goods if they had been entered for home consumption on the day on which the demand was made."

²³ Section 81(1)(c) and (d) of the Act.

²⁴ Sections 86(1)(e), (f) and 87(1)(a) of the Act.

²⁵ Section 78(3) of the Act.

²⁶ See ss 90 and 99 of the Act.

²⁷ Section 99(2) of the Act.

5.

10 The Court was informed on the hearing of the appeal that, in practice, officers of the Australian Taxation Office have been appointed as officers of Customs for the purpose of exercising the powers of a Collector under the Act in relation to tobacco products.

11 Like customs duty, an amount payable by a person on whom a demand is made by a Collector pursuant to s 35A(1) is a debt due to the Commonwealth²⁸. Liability to pay that amount does not affect the liability of that person under or by virtue of any other provision of the Act²⁹, including such criminal liability as the person might have under s 36 of the Act.

12 Mirroring the language of s 35A(1)(a) and (b), s 36 of the Act provides that a person who "has, or has been entrusted with, the possession, custody or control" of dutiable goods which are subject to customs control commits an offence of strict liability if the person "fails to keep the goods safely"³⁰ or "when so requested by a Collector, does not account for the goods to the satisfaction of a Collector in accordance with section 37"³¹.

13 Bearing on the operation of s 35A(1)(b), and on the operation of equivalent language in s 36, is s 37 of the Act. Section 37 provides that a person accounts for goods to the satisfaction of a Collector in accordance with that section if, and only if, the Collector sights the goods or (if the Collector is unable to sight the goods) the person satisfies the Collector that the goods have been dealt with in accordance with the Act.

14 A decision of a Collector to make a demand under s 35A(1) is subject to review by the Tribunal³². From the decision of the Tribunal on review an appeal lies on a question of law to the Federal Court³³.

28 Section 35A(2) of the Act.

29 Section 35A(4)(a) of the Act.

30 Section 36(2) and (3) of the Act.

31 Section 36(6) and (8) of the Act.

32 Section 273GA(1)(a) of the Act.

33 Section 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth).

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The facts

15 Zaps operated a warehouse pursuant to a warehouse licence issued to it under Pt V of the Act. Mr John Zappia was the sole director of Zaps. Domenic, his son, was employed by Zaps as its "general manager" and its "warehouse manager". In accordance with the standard condition of its warehouse licence which required such notification, Zaps had notified the Australian Taxation Office that each of Domenic and his father was a person who participated in the management or control of the warehouse.

16 Tobacco products were stolen from the warehouse in a break-in which occurred when none of Zaps' employees were present. Following a meeting between Domenic representing Zaps and officers of the Australian Taxation Office, a Collector served a notice of demand under s 35A(1) of the Act on each of Zaps, Domenic and his father. Each notice asserted a failure to keep the stolen goods safely as required by s 35A(1)(a) and demanded from each respective person payment of an amount equal to the customs duty which would have been payable on the stolen goods if those goods had been entered for home consumption on the day on which the demand was made.

17 Zaps, Domenic and his father each applied to the Tribunal for review of the decision to demand payment from them. Each was unsuccessful; the Tribunal affirmed each decision of the Collector.

18 In affirming the Collector's decisions to demand payment, the Tribunal found that the tobacco products had not been kept safely³⁴, that Zaps had been entrusted with the possession, custody and control of those tobacco products by their owner³⁵, that Domenic's father as the person "in overall command of the business"³⁶ exercised control over the stolen goods and had also been entrusted with that control in his capacity as an officer of Zaps³⁷, and that Domenic also exercised control over the tobacco products³⁸.

34 [2017] AATA 202 at [13].

35 [2017] AATA 202 at [16]-[19].

36 [2017] AATA 202 at [22].

37 [2017] AATA 202 at [30].

38 [2017] AATA 202 at [31].

7.

19 In relation to the control exercised by Domenic, having recounted evidence to the effect that he made the operational decisions at the warehouse, that he oversaw and was responsible for what happened to warehoused goods and that he had operational control of the warehouse subject to needing to refer anything "big" – meaning any decision that might require legal advice or that might have taxation consequences – to his father³⁹, the Tribunal expressed its finding as follows⁴⁰:

"I am also satisfied Domenic exercised control over the goods, albeit that his control was subordinate to that of his father and – ultimately – that of the company. The evidence establishes that he was the one who directed what was to happen to the goods on a day-to-day basis. He exercised delegated authority under which he could accept and release the goods. If he gave orders with respect to the goods, the employees followed them. His operational role was underlined by the fact he met with the officers from the [Australian Taxation Office] ... to discuss what had happened to the goods."

20 Domenic appealed from the Tribunal's decision to the Federal Court. No appeal was brought on behalf of or by his father, who was a bankrupt, or by Zaps, which was in liquidation.

The Full Court

21 The Federal Court was constituted for the purpose of the appeal by a Full Court comprised of Davies, White and Moshinsky JJ. By majority, the Full Court allowed the appeal, set aside the decision of the Tribunal and declared that the demand made by the Collector on Domenic was "invalid and of no effect"⁴¹.

22 The majority, White and Moshinsky JJ, concluded that s 35A(1) on its proper construction "is not to be understood as directed to the kind of control exercised by an employee of a licensed warehouse, acting in that capacity"⁴². The principal steps by which their Honours reached that conclusion were: first, to disaggregate the section's reference to "a person who has, or has been

39 [2017] AATA 202 at [24]-[25].

40 [2017] AATA 202 at [31].

41 (2017) 254 FCR 363 at 392 [138].

42 (2017) 254 FCR 363 at 389 [116].

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entrusted with, the possession, custody or control of dutiable goods" into six distinct applications⁴³; second, to treat the section's disaggregated application to a person who "has" the "possession" of dutiable goods as limited to a person who has exclusive possession of the goods⁴⁴; and third, to treat the section's similarly disaggregated application to a person who has "the control" of dutiable goods as similarly limited to a person who has exclusive physical control of the goods⁴⁵. Control exercised by employees, their Honours opined, "is not generally of that kind"⁴⁶.

23 Adoption of that construction meant that, in the opinion of the majority, the Tribunal had erred in law in its understanding of "control". "It determined the review adversely to Domenic even though he was an employee and even though he had incomplete control over the goods."⁴⁷

24 Davies J disagreed. Her Honour took the view that "the possession, custody or control" in s 35A(1) should be read as a composite phrase in which "possession", "custody" and "control" each connoted a degree "of some right, power or authority to deal with the goods in question"⁴⁸, with the result that the question of liability will "in each case ... depend on the measure of control exercised by the person over the dutiable goods"⁴⁹. Her Honour accordingly declined to construe the section to mean that a person acting in the capacity of an employee and under the direction of someone else "could never be liable under that section"⁵⁰, and noted that the Tribunal found that Domenic exercised "operational control"⁵¹.

43 (2017) 254 FCR 363 at 380 [68].

44 (2017) 254 FCR 363 at 385-386 [97].

45 (2017) 254 FCR 363 at 386 [98], 389 [116].

46 (2017) 254 FCR 363 at 389 [116].

47 (2017) 254 FCR 363 at 389 [119].

48 (2017) 254 FCR 363 at 372 [31]-[32].

49 (2017) 254 FCR 363 at 374 [36].

50 (2017) 254 FCR 363 at 374 [36].

51 (2017) 254 FCR 363 at 374-375 [37]-[38].

25 Her Honour nevertheless considered that the Tribunal erred in law in failing specifically to address the statutory question posed by s 35A(1)(a) of whether the operational control was such that it could be said that Domenic "failed" to keep the stolen goods safely on the occasion of the break-in⁵². On that basis, her Honour would have allowed the appeal and remitted the matter to the Tribunal for reconsideration⁵³, a course which White and Moshinsky JJ would have taken if their conclusion had been wrong⁵⁴.

The appeal to this Court

26 The Comptroller-General, in the appeal by special leave to this Court, argues that Davies J was correct to decline to construe s 35A(1) of the Act in a way that puts an employee beyond the section's reach, and challenges the reasoning which led the majority in the Full Court to the contrary conclusion. The Comptroller-General goes on to argue that the facts found by the Tribunal are sufficient to establish that Domenic both had control of the stolen goods and failed to keep those goods safely on the occasion of the break-in.

27 For Domenic, it is argued that the majority in the Full Court was correct in its ultimate conclusion that the Tribunal erred in law in its understanding of "control" in s 35A(1) of the Act, on the basis that the section's reference to "a person who has ... the ... control of dutiable goods" should be construed in context to connote a person who has "paramount control" as distinct from "subordinate control" of dutiable goods. That narrow construction is argued to be indicated by the "quasi-penal" nature of s 35A(1) and by the use of the same language in the offence-creating provisions of s 36. Although his father might have had paramount control, the argument is that on the facts found by the Tribunal Domenic did not.

Construction of s 35A(1)

28 The description in s 35A(1) of the Act of "a person who has, or has been entrusted with, the possession, custody or control of dutiable goods which are subject to customs control" must be read in light of the statutory purpose of subjecting dutiable goods to customs control, namely, to ensure that customs duty is paid before delivery of those goods into home consumption. The

⁵² (2017) 254 FCR 363 at 374-375 [35], [37]-[38].

⁵³ (2017) 254 FCR 363 at 375-376 [41].

⁵⁴ (2017) 254 FCR 363 at 389 [120].

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description must also be read in light of the obligations imposed by s 35A(1)(a) and (b) on a person who meets that statutory description, breach of either of which, on demand for payment by a Collector, triggers civil liability on the part of that person to pay to the Commonwealth an amount equal to the customs duty which would have been payable on those goods if they had been entered for home consumption on the day of the demand.

29 Stated in affirmative terms, the obligation imposed by s 35A(1)(a) is to keep the dutiable goods safely, including by preventing their entry into home consumption without customs duty being paid. Stated in similarly affirmative terms, the obligation imposed by s 35A(1)(b) when read with s 37 is, on request by a Collector, either to show the dutiable goods to a Collector or to satisfy the Collector that those goods have been dealt with in accordance with the Act.

30 The critical reference within the description to "the possession, custody or control" must be read in that context, recognising that none of the terms "possession", "custody" or "control" has a fixed legal meaning and that the power or authority of a person in relation to a thing connoted by any one or more of those terms in statutory collocation is a question of degree⁵⁵. The individual terms, used disjunctively, serve to indicate both that the requisite degree of power or authority is not closely confined and that the requisite degree of power or authority can arise from such a range of sources that, depending on the circumstances, one term might be more appropriate to use than another.

31 Plainly, the reference within the description is to a degree of power or authority in relation to dutiable goods which need not rise to the level of having such control of, or power of disposition over, the dutiable goods as is needed for a person to be an owner of those goods within the meaning of the Act. Equally plainly, the reference is to a degree of power or authority in relation to dutiable goods which subsists despite those goods being subject to customs control under s 30 and which is sufficient to enable a person to meet the affirmative content of the obligations in s 35A(1)(a) and (b). The combination of the last two of those characteristics yields the relevant discrimin.

32 The reference to "the possession, custody or control" of dutiable goods is appropriately construed as a compendious reference to that degree of power or

55 *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at 519-520, 532-533; [1979] HCA 67. See also *Queensland v Congoo* (2015) 256 CLR 239 at 255 [11], 301-302 [161]; [2015] HCA 17.

authority which is sufficient to enable a person to meet the obligations both to keep those goods safely and, on request by a Collector, either to show the goods to a Collector or to satisfy a Collector that the goods have been dealt with in accordance with the Act. A person who "has" the possession, custody or control of dutiable goods within the meaning of the section is a person who possesses power or authority in relation to those goods to that degree, irrespective of the manner in which that person might choose to exercise that power or authority.

33 This construction of s 35A(1) of the Act is consistent with the construction of an earlier and materially identical provision in s 60(1) of the *Excise Act 1901* (Cth) adopted in *Collector of Customs (NSW) v Southern Shipping Co Ltd*⁵⁶. There a manufacturer had delivered, to a shipping company, excisable tobacco products which had not been entered for home consumption and which therefore remained "subject to the control of the Customs". Pending shipment, and with the knowledge and approval of an examining officer employed by the Department of Customs and Excise, agents of the shipping company had locked the tobacco in a store on a wharf which was owned by the Maritime Services Board of New South Wales. The agents had then handed the keys to the Customs office operated by the Collector of Customs for New South Wales. The wall of the store was broken and the excisable goods were stolen from it. The Collector of Customs afterwards demanded payment of the amount of excise which would have been payable had the goods not been stolen. The questions asked of the Full Court of this Court on a case stated included whether, as a matter of law within the meaning of s 60, the shipping company was "a person who had the possession custody or control" of the excisable goods and "a person who had been entrusted with the possession custody or control" of those goods. Also included in the case stated was a question whether, as a matter of law within the meaning of s 60(1)(a) – the equivalent of s 35A(1)(a) of the Act – the shipping company "failed" to keep those goods safely⁵⁷. To each of those questions the unanimous answer of the Court was affirmative⁵⁸.

34 In so answering those questions, all members of the Court rejected arguments put on behalf of the shipping company to the effect that the "possession, custody and control" of the goods had passed to the Collector of Customs on the handing over of the key "because the Customs had a greater interest in the goods than the [shipping company] who was a mere carrier for

56 (1962) 107 CLR 279; [1962] HCA 20.

57 (1962) 107 CLR 279 at 282.

58 (1962) 107 CLR 279 at 286-287, 289-292, 294-297, 300-302, 304-305, 307.

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reward" and to the effect that the shipping company had not "failed" to keep the goods safely because there had been no "dereliction of duty"⁵⁹.

35 Rejecting the argument that the shipping company had not "failed" to keep the goods safely, McTiernan J said that "[t]he task of keeping goods safely cannot be said to have been fulfilled if the goods are stolen even though reasonable precautions were taken"⁶⁰. Yet his Honour also rejected as too extreme an argument made on behalf of the Collector of Customs to the effect that "fails" in s 60(1)(a) meant no more than "does not" and thereby imposed absolute liability. He said⁶¹:

"Fails' is a word with various meanings. I think that in s 60 its appropriate meaning is that the person concerned is to be liable if he comes short of keeping the goods safely, that is preserving them from loss or damage. The word 'fails' in my opinion is not strong enough to impose upon the person concerned so onerous a duty as that of avoiding the unavoidable. ... *Lex non cogit ad impossibilia*. Paragraph (a) should be read subject only to that presumption."

Dixon CJ, with whom Windeyer J agreed, adopted a similar construction of the word "fails"⁶². The reasoning of the other members of the Court, with the exception of Owen J⁶³, was not inconsistent with this approach⁶⁴.

36 Once it is accepted that s 35A(1)(a) of the Act – and by parity of reasoning s 35A(1)(b) of the Act – imposes an obligation which a person must have the capacity to comply with in order to meet the description of "a person who has, or has been entrusted with, the possession, custody or control of dutiable goods", there is no reason why the power or authority that the person possesses needs to be exclusive or paramount.

59 (1962) 107 CLR 279 at 283-284.

60 (1962) 107 CLR 279 at 290.

61 (1962) 107 CLR 279 at 291.

62 (1962) 107 CLR 279 at 287, 302.

63 (1962) 107 CLR 279 at 305.

64 (1962) 107 CLR 279 at 292, 295, 299.

13.

37 The subject of s 35A(1) is "a person". Consistent with the section's purpose of protecting the revenue, the operation of s 35A(1) is wider than that of a section dealing with, for example, the "holder of a warehouse licence". Several persons may each possess power or authority to the requisite degree within a chain of command or hierarchy of responsibility.

38 Within the scheme of the Act, there is nothing surprising about the potential for several persons to be subject to liability under s 35A(1) for the same amount. Just as an amount of customs duty will be payable on dutiable goods entered for home consumption by each of several persons who meet the definition of "owner" until that amount is paid by some person⁶⁵, so an amount equal to the customs duty which would have been payable on dutiable goods if they had been entered for home consumption will be payable, on demand, by each person who meets the description of "a person who has, or has been entrusted with, the possession, custody or control" of those goods and who fails to comply with an obligation in s 35A(1)(a) or (b) until that amount is paid by some person.

39 Thus, as is implicit in the detail of the licensing regime in Pt V of the Act to which attention has already been drawn, multiple directors, shareholders, officers or employees of the holder of a warehouse licence might have such authority to direct the operations of the warehouse or a part of the operations of the warehouse as to meet the description of "a person who has, or has been entrusted with, the possession, custody or control" of the dutiable goods within their respective spheres of responsibility. The mere fact that one or some of those persons might act subject to the direction of another is insufficient to disqualify any of them from having the requisite degree of power or authority in relation to the dutiable goods.

40 Contrary to the argument advanced on behalf of Domenic, application of that approach to the equivalent language imposing criminal liability in s 36 of the Act does not run counter to the general principle of statutory construction that the imposition of criminal liability should be "certain and its reach ascertainable by those who are subject to it"⁶⁶. The task of identifying the employees of the holder of a warehouse licence on whom that criminal liability is imposed is not

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

66 *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 634-635 [48]; [2013] HCA 36, quoting *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459 at 479 [48]; [2013] HCA 20.

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significantly more difficult than the task of identifying the employees whom the holder of a warehouse licence is obliged to notify as persons who participate in the management or control of the warehouse. It is also incorrect to characterise the civil liability created by s 35A(1) of the Act as "quasi-penal in character"⁶⁷. To construe the common language of ss 35A and 36 in the manner indicated does not involve "extending any penal category"⁶⁸.

Application of s 35A(1)

41 The facts found by the Tribunal were sufficient to establish that Domenic was a person who had the possession, custody or control of the stolen goods and who failed to keep those goods safely. The fact that he had authority to direct what was to happen to the goods in the warehouse on a day-to-day basis was sufficient to establish that he had the requisite degree of power or authority in relation to the goods. And the fact that the goods were stolen from the warehouse during a period in which he continued to have that authority was sufficient to establish that he failed to keep the goods safely.

Orders

42 The appeal is to be allowed. Orders 1 to 3 of the orders made by the Full Court on 19 September 2017 are to be set aside and, in their place, the appeal to the Federal Court is to be dismissed. In accordance with an undertaking given by the Comptroller-General at the time of the grant of special leave to appeal, there is to be no order as to costs.

⁶⁷ cf *Murphy v Farmer* (1988) 165 CLR 19 at 29; [1988] HCA 31.

⁶⁸ *R v Adams* (1935) 53 CLR 563 at 568; [1935] HCA 62.

- 43 NETTLE J. I agree with Kiefel CJ, Bell, Gageler and Gordon JJ and wish to add only the following. As Gibbs A-CJ observed⁶⁹ in *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* ("ANZ"), the meaning that words are to bear depends on the context in which they appear. Thus, where s 264(1) of the *Income Tax Assessment Act 1936* (Cth) gave the Commissioner of Taxation power to require a person to furnish the Commissioner with such information as the Commissioner specified and to produce all books, documents and other papers in the person's custody or under the person's control relating to the person's or any other person's income or assessment, it was apparent from the context that "control" was not limited to legal control but included physical control. As Gibbs A-CJ stated:

"The section is not concerned with the legal relationship of the person to whom the notice is given to the documents which he is required to produce: it is concerned with the ability of the person to whom the notice is addressed to produce the documents when required to do so. ... [A] notice can be given under the section to any person who has physical control of the documents in question ... [but] 'control' in s 264(1) is not limited to physical control, and ... notice could be given to the master, who has legal control of the documents, as well as to the servant [who has physical control]."

- 44 By contrast, in *Goben Pty Ltd v Chief Executive Officer of Customs [No 2]*, where s 33 of the *Business Franchise Licences (Tobacco) Act 1987* (NSW) provided that, if tobacco in excess of a specified quantity were found in a person's possession, custody or control, it should be presumed that the tobacco was possessed for sale and that the person was carrying on tobacco wholesaling, Davies J reasoned⁷⁰ that, because the object of the section was to make possession of tobacco evidence of tobacco wholesaling, the denotation of "possession, custody or control" looked not to the proprietor of the warehouse where the goods were stored but rather to the person on whose behalf the goods were kept.

- 45 In effect, *ANZ* and *Goben* represent the end points of the range of contexts which may inform the meaning of the expression "possession, custody or control" and its cognates. *ANZ* is representative of cases where the context is a statutory provision that has the object of obtaining production of something in a person's custody or control, and which therefore implies that custody or control extends to persons having de facto power of disposition over the thing which is sought to be produced. In contrast, *Goben* is representative of cases in which the

⁶⁹ (1979) 143 CLR 499 at 519-520; [1979] HCA 67.

⁷⁰ (1996) 68 FCR 301 at 307.

context is a statutory provision that has the object of attributing an intent to sell to a person in possession, custody or control of specified goods and which therefore implies that "possession, custody or control" is limited to persons having legal power to sell those goods.

46 This case is of the former kind. The evident object of s 35A(1) of the *Customs Act 1901* (Cth) is the practical one of motivating persons with the ability de facto to keep dutiable goods safely, and to account therefor to the satisfaction of a Collector, to do just that, and to ensure that, if such persons fail to do so, a Collector may recover from them the duty for home consumption payable in respect of the goods⁷¹. The provision is thus concerned not so much with the legal relationship of those persons to the goods in their possession, custody or control as with the ability of those persons in fact to prevent those goods passing into home consumption without the payment of duty. It follows, on the facts of this case and for the reasons given by Kiefel CJ, Bell, Gageler and Gordon JJ, that s 35A(1) should be construed as applying to the respondent.

71 See and compare *Collector of Customs (NSW) v Southern Shipping Co Ltd* (1962) 107 CLR 279; [1962] HCA 20.

