IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S 91 OF 2018**

BETWEEN: **COMPTROLLER-GENERAL OF CUSTOMS**
Appellant

DOMENIC ZAPPIA
Respondent

SUBMISSIONS OF THE APPELLANT

PART I CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES ARISING

2. The appeal raises the following question: on the proper construction of s 35A(1) of the *Customs Act 1901* (Cth) (**Act**), is an employee of a warehouse licensee capable of having, or being entrusted with, the possession, custody or control of dutiable goods?

3. That question should be answered "Yes".

PART III SECTION 78B, *JUDICIARY ACT 1903* (CTH)

4. The appellant considers that no notice need be given under s 78B of the *Judiciary Act 1903* (Cth).

PART IV CITATIONS

5. First instance: *Zaps Transport (Aust) Pty Ltd v Comptroller General of Customs* [2017] AATA 202.

6. Full Federal Court: *Zappia v Comptroller General of Customs* [2017] FCAFC 147.

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PART V FACTS FOUND OR ADMITTED

7. At all relevant times, Zaps Transport (Aust) Pty Ltd (**Zaps**) operated a bonded warehouse in Smithfield, New South Wales (**Warehouse**) pursuant to a warehouse licence issued under Part V of the Act (**Licence**): AAT [3], [5]; Full Federal Court (**FC**) [10], [11], [48].

8. At all relevant times until 15 April 2015, the Licence authorised Zaps to store, *inter alia*, tobacco and tobacco products at the Warehouse: AAT [5], [6]; FC [11], [50]. On 15 April 2015, after there had been four separate incidents of theft of cigarettes from the Warehouse, the Licence was varied by the then CEO of Customs[1] so as to withdraw Zaps' authority to store tobacco and tobacco products at the Warehouse: AAT [8]; FC [12], [50].

9. Following the change to its Licence, Zaps sought permission from Customs to move the remaining cigarettes to other licensed premises. On 23 May 2015, prior to that permission being given (on 27 May 2015), there was a further break-in at the Warehouse during which 400,000 cigarette sticks were stolen (**Stolen Goods**): AAT [9]; FC [12], [51].

10. The Stolen Goods were dutiable and were found by the AAT to have not been kept safely, within the meaning of s 35A(1) of the Act: AAT [13]; FC [18].

11. The respondent, Domenic Zappia (**Domenic**), was employed as Zaps' "general manager" and "warehouse manager": AAT [23]; FC [10], [49]. Domenic was the son of John Zappia (**John**), the director of Zaps: AAT [22]–[23]; FC [10], [49]. John and Domenic's names were provided to the Australian Taxation Office (**ATO**) in accordance with a condition of the Licence requiring Zaps to identify in writing the persons "participating in the management or control of the warehouse": AAT [6], [7]; FC [11], [49].

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[1] The office of the CEO was renamed the Comptroller-General on and from 1 July 2015: *Customs and Other Legislation Amendment (Australian Border Force) Act 2015* (Cth).

12. Domenic was employed to oversee operations at the Warehouse.[2] Domenic directed what was to happen to warehoused goods on a day-to-day basis. He made the operational decisions at the Warehouse and had operational control, albeit that he delegated some matters to staff. He exercised authority under which he could accept and release goods. He oversaw what happened to the goods and was responsible for what happened to them, subject to the direction of John. If he gave orders with respect to the goods, the other employees of Zaps followed them. He also attended to the documentation required for Customs' purposes.

13. Consistently with his operational role, Domenic met with officers from the ATO on 25 May 2015 to discuss what had happened to the Stolen Goods: AAT [26], [31]; FC [23], [24]. Domenic represented Zaps in those dealings without John being present: AAT [26]; FC [24].

14. On 27 August 2015, a Collector served a notice of statutory demand on each of Zaps, John and Domenic under s 35A of the Act (together, **Notices**), requiring payment of the amount of the duty payable on the Stolen Goods, being $188,032: AAT [10]; FC [13], [52], [54].

15. Each of Zaps, Domenic and John applied to the Administrative Appeals Tribunal (**Tribunal**) for review of the decision to issue the relevant Notice to them. Each was unsuccessful. Pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth), Domenic appealed the Tribunal's decision to the Federal Court of Australia, which, constituted as a Full Court, unanimously allowed the appeal. No appeal was brought by Zaps (which is in liquidation) or by John (who is a bankrupt): FC [16].

PART VI ARGUMENT

Summary

16. The majority in the Federal Court (White and Moshinsky JJ) held that s 35A(1) of the Act is not to be understood as directed to the kind of control exercised by an employee of a warehouse licensee because, properly construed, it refers to a person who has *the*

[2] The findings outlined in this paragraph are at AAT [23]–[26] and [31]; see also FC [18]–[24].

control, and not merely *some* control, of the relevant goods, and employees do not have control of that kind (ordinarily being no more than the human agent of those who have "the possession, custody or control" of dutiable goods): FC [116]. Their Honours held that the statutory demand issued to Domenic must therefore be set aside because the Tribunal erred in law in finding that Domenic had "control", "even though he was an employee and even though he had incomplete control over the goods": FC [119].

17. Justice Davies disagreed with the majority's construction of s 35A. Her Honour declined to construe s 35A(1) "in a way that meant that an employee, acting lawfully, could never be liable under that section": FC [36]. Instead, she held that whether s 35A was engaged in relation to a person "must depend on the facts in each case": FC [36].

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18. The approach of Davies J on this issue should be preferred. The majority failed to construe the composite expression "the possession, custody or control" in s 35A(1) as a whole. Instead, their Honours construed the word "possession" in isolation in a way that required exclusive possession and then, despite denying they were doing so, used that construction to construe "control" as subject to the same limitation: FC [98], [111]. No attempt was made by the majority to give content to the word "custody".

19. The majority's approach imposes a "bright line" limitation on s 35A so as to remove from its scope any person acting in an employment relationship with a warehouse licensee. That limitation is not supported by the statutory text or context. It is also

20 contrary to the legislative history of the Act and the evident purpose underlying s 35A.

20. The correct position is that whether or not a person has, or has been entrusted with, the "possession, custody or control" of dutiable goods is a question of fact in every case, be they an employee of a warehouse licensee or not.

21. Once s 35A(1) is properly construed, the uncontested factual findings made by the Tribunal are sufficient to support the conclusion that Domenic was a person who had, or had been entrusted with, the possession, custody or control of the Stolen Goods at the time they were stolen. It follows that the Notice issued to Domenic was valid.

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The statutory scheme

22. Before considering s 35A itself, it is useful to set out relevant aspects of the statutory scheme of which it forms part.

23. Cigarettes imported into Australia attract customs duty and are therefore "dutiable goods" within the meaning of s 4 of the Act.[3] The obligation to pay duty falls, in the first instance, on the "owner" of the goods in question,[4] and that duty must be paid at the time of entry of the goods for "home consumption".[5] However, importers of dutiable goods may store them in a bonded warehouse that has been licensed under Pt V of the Act and, provided dutiable goods remain in such a warehouse, they are subject to customs control and do not enter home consumption, with the consequence that duty is not yet payable. [6]

24. A warehouse licence may be granted on application to the Comptroller-General of Customs.[7] The application must set out, *inter alia*, the name and address of the following persons:[8]

    (a) if the applicant is a company, each director, officer or shareholder of the company who would participate in the management or control of the warehouse; and

    (b) each employee of the applicant who would participate in the management or control of the warehouse.

25. The Comptroller-General is prohibited from granting a warehouse licence if he or she concludes that any of the persons identified in the application as participating in the management and control of the warehouse is not a fit and proper person so to participate.[9] Criminal liability is imposed by s 36 upon persons who fail to keep goods

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3 *Customs Tariff Act 1995* (Cth), ss 15, 16, 19AB, 19AC, Sch 3, ch 24; FC [4].

4 Act, s 165(1)(a). See further the discussion at [61] below.

5 Act, s 132AA(1), item 1.

6 Act, ss 68, 69, 71C, read with s 30(1)(a)(vi) and 30(1B)(b).

7 Act, ss 79 and 80.

8 Act, s 80(d), read with ss 81(1)(c) and (d).

9 Act, s 81(1)(c) and (d).

safely where the goods were subject to customs control and the person had, or had been entrusted with, the possession, custody or control of the goods.

26. At all relevant times, s 35A(1) provided as follows:

> 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
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> (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.

27. An amount payable under s 35A(1) is a debt due to the Commonwealth at the suit of the Collector: s 35A(2). Nothing in s 35A affects the liability of a person arising under or by virtue of any other provision of the Act: s 35A(4)(a).

28. Section 35A(1) has been in force in materially identical terms since 1957.[10] Prior to 1957, liability for duty in respect of missing warehoused goods was confined to the licensee of the warehouse under s 92 of the Act.[11] The Federal Court has correctly recognised that s 35A "has a greater scope of operation than s 92" and "covers a wider class of persons", imposing liability not only on the holder of a warehouse licence but on "every person entrusted with the care of dutiable goods."[12]

29. This Court has long recognised the importance the Act ascribes to ensuring that dutiable goods are not entered for home consumption without the payment to the Commonwealth of the requisite duty. As early as 1906, O'Connor J explained:[13]

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10 Section 35A was inserted into the Act by s 5 of the *Customs Act 1957* (Cth).

11 Section 92 relevantly provided that "[t]he licensee of every warehouse shall ... (4) [p]ay the duty on all warehoused goods removed from his warehouse except by authority and on all warehoused goods not produced to the officer on demand unless such goods are accounted for the satisfaction of the Collector."

12 *Drew v Dibb* (2008) 169 FCR 320 at [6].

13 *R v Lyon* (1906) 3 CLR 770 at 784.

> The whole policy of the *Customs Act,* as indicated by a number of sections, is that, from the time of importation until the time of paying duty, the customs shall not lose control of the articles imported. That is indicated directly in s 30, which provides that imported goods shall be subject to the control of the customs from the time of importation until delivery for home consumption or exportation. The object of that provision, if it were necessary to give any reasons for its enactment, is obvious; if once goods go into home consumption, that is, into circulation, it becomes almost impossible to trace them. The only security the customs authorities could have in such a case for the payment of duty would be in most cases the personal security of the importer. Therefore it is, if the Act is to be effective, that all through the dealings with the goods, from the time they are first imported until duty is paid, they must be kept under customs control.

10 30. Section 35A forms a key part of achieving the policy identified by his Honour. It has a relevantly identical analogue in s 60 of the *Excise Act 1901* (Cth) (**Excise Act**), which was considered by this Court in *Collector of Customs (NSW) v Southern Shipping Company Ltd*[14] and to which O'Connor J's statement above has been held to be equally applicable.[15]

31. It is because s 35A of the Act and s 60 of the Excise Act are designed to protect the revenue that they have historically been construed in a broad fashion, notwithstanding that the provisions may sometimes produce what might be thought to be unfair results.[16] With respect to s 60 of the Excise Act, Dixon CJ (with whom Windeyer J agreed) described the section as imposing an "absolute duty" subject only to an Act of
20 God.[17] That construction has since been applied to s 35A of the Act.[18] In particular, the word "fails" in s 35A(1)(a) does not import any fault element.[19] As a result, the

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14 (1962) 107 CLR 279 (***Southern Shipping***).

15 *Southern Shipping* at 289–290 (McTiernan J). See also at 295–296 where Taylor J observed that s 60 of the Excise Act "is a provision which is designed to ensure that the excise revenue shall not suffer if excisable goods, by some irregular means, find their way into home consumption. So much is clear from the provisions of the Act itself." See further at 298 (Menzies J), 304–305 (Owen J).

16 *Drew v Dibb* (2008) 169 FCR 320 at [25].

17 *Southern Shipping* at 287. See also at 305 where Owen J held that s 60(1)(a) imposes an "absolute obligation" on the custodian to preserve the goods against the peril of going into home consumption without payment of duty.

30 18 See, eg, *Drew v Dibb* (2008) 169 FCR 320 at [25].

19 *Southern Shipping* at 288 (Dixon CJ, Windeyer J agreeing), 291 (McTiernan J), 295 (Taylor J), 299 (Menzies J), 304–305 (Owen J).

"task of keeping goods safely cannot be said to have been fulfilled if the goods are stolen even though reasonable precautions were taken"[20] and it is no answer to a request to account under s 35A(1)(b) that the dutiable goods were stolen by a third party.[21] Indeed, s 35A(1)(b) operates as a "drag-net provision" and "exposes every person who has or has been entrusted with the possession, custody or control of excisable goods which are subject to Customs' control to the liability of being requested by the Collector to account for them to his satisfaction."[22]

32. Consistently with a focus on preserving Commonwealth revenue, the "safety" with which s 35A is concerned is not the protection of the dutiable goods from damage but the protection of the Commonwealth revenue by ensuring that "the goods – subject as they are to the control of Customs – do not get out of Customs control into home consumption without the payment of duty".[23]

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The approach of the Full Federal Court

33. The majority (White and Moshinsky JJ) construed s 35A by carving up the expression "the possession, custody or control" into three separate concepts, which were then said to impose liability in "six situations": "namely, on a person who has the possession, or the custody or the control of goods, or who has been entrusted with the possession or the custody or the control of goods": FC [68].

20 34. Having carved up the section, the majority construed "possession" in isolation as referring to "exclusive possession": FC [97]. This was then said to provide support for an "inference" that the concept of "control" should be similarly construed: FC [98]. The majority returned to the term "possession" at FC [106]ff and held that it does not, when used in s 35A, encompass the "possession [of goods] by an employee": FC [111]. It was said to be "but a short step" to conclude that the term "control" should be subject to the same restriction: FC [111]. It followed, in the majority's opinion, that the Tribunal erred because it determined the review adversely to Domenic "even though he

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20 *Southern Shipping* at 290 (McTiernan J).

30 21 *Southern Shipping* at 294–295 (Taylor J), 299 (Menzies J).

22 *Southern Shipping* at 291 (McTiernan J).

23 *Southern Shipping* at 299 (Menzies). See also at 296 (Taylor J).

was an employee": FC [119]. No attempt was made by their Honours to construe the expression "the possession, custody or control" as a whole.

35. By contrast, Davies J held that "[w]here a word forms part of a composite phrase, the approach to construction is to consider the meaning of the word by reference to its context in the composite phrase, not to look at the individual words in isolation from the other words in the phrase": FC [31].[24] Her Honour observed that the construction contended for by the applicant, and adopted by the majority, did not consider the meaning of "control" in the context of the phrase read as a whole, but focused only on the meaning of the word "possession": FC [31]. The result, her Honour said, was to not leave any work for the words "custody" or "control": FC [34]. Justice Davies also noted that, in the present case, a narrow construction would be contrary to the object of s 35A as a mechanism for protecting the revenue: FC [33]–[34].For those reasons, Davies J declined to construe s 35A in a way that meant that an employee, acting lawfully, "could never be liable under that section": FC [36]. Instead, her Honour held that whether s 35A was engaged in relation to a particular person "must depend on the facts in each case": FC [36].

The proper construction of s 35A

36. The task of construction must begin and end with the words actually used by Parliament in s 35A, assessed in the context of the Act as a whole and with regard to the purpose and policy of the provision.[25]

37. **Text**. Textually, there is no doubt that s 35A is capable of applying to an employee of a licensed warehouse if, as a matter of fact, the employee has, or has been entrusted with, "the possession, custody or control" of dutiable goods. As Davies J noted, employment is not the test as to whether s 35A(1) applies: FC [36]. The test is simply whether a person has, or has been entrusted with, the possession, custody or control of

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24 Citing *Sea Shepherd Australia Ltd v Commissioner of Taxation* (2013) 212 FCR 252 at [34] (Gordon J, Besanko J agreeing).

25 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [4] (French CJ), [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

dutiable goods. Matters such as a person's seniority, level of responsibility and operational control over the applicable goods will be among the matters to be taken into account in this assessment. A junior storeman with no capacity to determine whether goods come into or leave the warehouse is unlikely to satisfy the test. By contrast, the manager who decides whether a particular person should be allowed to remove goods from the warehouse fairly obviously does, for otherwise the person who has practical control over whether goods enter into home consumption would stand outside the regime that s 35A creates. The text of that section provides no warrant for generalising as to the control that may or may not be exercised by employees, or for construing s 35A so as to prevent an employee from *ever* falling within the terms of the section.

10 38. Section 35A(1) uses the indefinite article to describe the persons falling within its terms. The section speaks of "a" person (not "the" person) who has, or has been entrusted with, the possession, custody or control of dutiable goods. This suggests there may be more than one such person at a given time. By contrast, s 35A(1A) and (1B) each refer to "the person" and are premised on the conduct of one specific individual or entity (eg, "the person" to whom permission was given under s 71E).

39. While the majority placed weight on the use of "the person" in ss 36(4)(b) and 36(6)(b), those sections each commence with the indefinite article: "A person commits an offence if ... the person ...": cf FC [97] (read with [86]). In that context, the definite
20 article does no more than signify that "the person" is the same person referred to at the beginning of the section. Such language provides no basis for construing a different provision (s 35A(1)) so as to confine its operation to a single person and, on that basis, to conclude that because s 35A(1) applies to the employer, it follows that it cannot apply to employees.

40. Further, s 35A(1) extends not only to a person who "has" the possession, custody or control of dutiable goods, but also to a person who "has been entrusted with" the possession, custody or control of such goods. In this way, Parliament expanded the range of persons whose relationship with dutiable goods is sufficient to fall within the section, by contemplating that at least two persons or categories of persons may fall
30 within the scope of the section in respect of the same dutiable goods at the same time

(i.e. the person "entrusted" with, and the person who actually "has", the possession, custody or control of the goods).

41. **A composite expression – "the possession, custody or control".** Section 35A(1) contains the composite expression "the possession, custody or control". As Davies J recognised at FC [33]–[34], that composite expression and analogous phrases have traditionally been given an expansive construction. While every statute is to be construed on its own merits, the use of such composite expressions ordinarily evidences a "legislative intention to employ the words in their widest sense".[26]

42. More fundamentally, it is wrong to seek to carve up the composite expression "the possession, custody or control" into its individual parts, to conclude that one of the individual parts requires a narrow construction, and on that basis to construe all three parts narrowly.

43. This Court has long recognised that "[t]he unit of communication by means of language is the sentence and not the parts of which it is composed. The significance of individual words is affected by other words and the syntax of the whole."[27] To proceed otherwise is to treat the words of a sentence as "building blocks" whose meaning is not affected by the rest of the sentence – this "is not the way language works".[28] As a result, the Court should not "pull apart a provision, or composite phrase within a provision, into its constituent words, select one meaning, divorced from the context in which it appears, and then reassemble the provision."[29]

44. The problems in carving up a statutory provision or phrase are exemplified by the majority's approach to the construction of s 35A(1) in the present case. At no stage did the majority explain why a construction of the word "possession" that confines its

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26 *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at 533 (Mason J).

27 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396–397 (the Court).

28 Ibid. See also *XYZ v Commonwealth* (2006) 227 CLR 532 at [102] (Kirby J), [176] (Callinan and Heydon JJ).

29 *Sea Shepherd Australia Ltd v Federal Commissioner of Taxation* (2013) 212 FCR 252 at [34] (Gordon J, Besanko J agreeing), citing *Lorimer v Smail* (1911) 12 CLR 504 at 508–510 and *R v Carter; Ex parte Kisch* (1934) 52 CLR 221. See also *XYZ v Commonwealth* (2006) 227 CLR 532 at [19] (Gleeson CJ), [102] (Kirby J), [176] (Callinan and Heydon JJ); *Alphapharm Pty Ltd v H Lundbeck A/S* (2014) 254 CLR 247 at [61] (Crennan, Bell and Gageler JJ).

meaning to "exclusive possession" supports the drawing of an "inference" that the balance of the composite expression is to be similarly confined, rather than the other way around (a possibility acknowledged at FC [83]–[84], but to which the majority did not return). The vice in the majority's approach is that it leads to a construction of the composite phrase that goes no further than its narrowest, individually construed, component. Yet, as Davies J recognised, the section "is intended to have application to persons wider than persons having (or entrusted with) 'possession'": FC [32].

45. Even if it were appropriate to carve up the statute in the way undertaken by the majority, their Honours' conclusion that "possession" in s 35A(1) means "exclusive possession" was itself erroneous. The reasons given for this narrow construction of "possession" were: (a) the fact that "possession" has been construed to mean exclusive possession in some criminal contexts; and (b) the word "the" is used before "possession, custody or control" in s 35A(1): see FC [90]–[93], [97].

46. Neither reason is persuasive:

(a) so far as the *first* reason is concerned, as French CJ recognised in *Momcilovic v The Queen* (a case cited by the majority at FC [75]),[30] the word "possession" has "never been completely logically and exhaustively defined and may vary according to its statutory context." None of the "essential elements" of the concept identified by French CJ included a concept of exclusivity. Further, there are obvious reasons for caution in applying an understanding of a concept developed in criminal law to confine a provision that was drawn widely so as to protect the revenue: FC [90];[31] and

(b) so far as the *second* reason is concerned, the use of the definite article "the" at the start of a composite expression provides no support for a concept of exclusivity. As noted at [40] above, s 35A(1) itself includes both persons who "have" "the possession, custody or control" and persons who have been "entrusted with" "the

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30 (2011) 245 CLR 1 at [16].

31 See Palmer, *Palmer on Bailment* (3rd ed, 2009) at 136 ("it must always be borne in mind that possession under the criminal law (and as employed in a statute) may differ significantly from possession in the civil law") and the authorities cited for that proposition at fn 797.

possession, custody or control". To speak of "exclusive possession" in such a context is directly contrary to the statutory language.

47. Further difficulties arise in connection with the majority's holding that "possession" at general law does not encompass the possession of goods by an employee: FC [106]ff. For a start, the holding is too broad, for the law accepts that there are circumstances in which an employee may have legal possession of his employer's goods, depending on the facts.[32] Moreover, while authority for a qualified form of the proposition exists, the same authorities note that employees typically have *custody* of the relevant goods,[33] and in some cases it is recognised that employees have "actual" or "de facto" *possession* of the goods,[34] which of itself creates a legal right to possess enforceable against all who cannot show a superior right.[35]

48. These aspects of the authorities were not grappled with by the majority. Instead, their Honours effectively construed "possession", when used in s 35A, to mean "legal

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[32] For example, where items are handed to the employee to be delivered to the employer, or where the employer evinces an intention to vest the employee with exclusive possession: Pollock and Wright, *An Essay on Possession in the Common Law* (1888), cited at FC [107], at 59–60, 130, 138; *Moore v Robinson* (1831) 109 ER 1346. See further *Burnett v Randwick City Council* [2006] NSWCA 196, cited at FC [109]–[110], at [5] (Hodgson JA), [64]–[88] (Tobias JA, Giles JA agreeing); Palmer, *Palmer on Bailment* (3rd ed, 2009) at 144 ("As a general rule, a servant does not obtain possession of his master's chattels. This rule is subject to wide exceptions and it may be questioned whether it retains any practical value"), Ch 7.

[33] Pollock and Wright, *An Essay on Possession in the Common Law* (1888) at 18 ("the Common Law seems averse to *separating possession in law from physical custody*, where the thing is in an ascertained custody, and does so only in special cases, *as where a servant holds on behalf of his master*"), 26 ("A tailor sends to JS' house a coat which JS has ordered. JS puts on the coat, and then has both physical control and rightful possession in law. JS takes off the coat and gives it to a servant to take back to the tailor for some alterations. Now the servant has physical *control* (in this connexion generally called '*custody*' by our authorities) and JS still has the possession in law"); Stephen, *A Digest of the Criminal Law* (4th ed, 1887) , cited at FC [108], at 222 ("A moveable thing is in the possession of ... the master of any servant, who has the *custody* of it for him, and from whom he can take it at pleasure"); *Burnett v Randwick City Council* [2006] NSWCA 196 at [95] (Tobias JA, Giles JA agreeing) ("[T]here was no evidence of any overt act of the corporate owner of the equipment by which the status of its possession or custody in the hands of the [employee] appellants changed from mere physical *custody* to a right to immediate possession in their personal capacities") (emphasis added).

[34] *Anderson Group Pty Ltd v Tynan Motors Pty Ltd* (2006) 65 NSWLR 400, cited at FC [109], at [42], citing Holdsworth, *A History of English Law* (5th ed, 1942) vol 7 at 448 ("persons [such] as servants or licensees, who have physical *control*, have not got possession. To meet this situation, we talk of the *custody* of the servant and the possession of the master, or of the servant having *actual* and the master having constructive *possession*") (emphasis added).

[35] Pollock and Wright, *An Essay on Possession in the Common Law* (1888) at 91, 93. See also *Gatward v Alley* (1940) 40 SR (NSW) 174 at 180; *Perpetual Trustees & National Executors of Tasmania Ltd v Perkins* (1989) Aust Torts Reports ¶80-295 at 69,201–69,202 (Green CJ).

possession" (as opposed to "actual possession"); regarded as universal the general but not unqualified rule that employees do not have the legal possession of their employer's goods; and then treated "possession" as the leading concept in the composite expression, such that it was but a "short step" to use the meaning given to possession to confine any wider meaning that might normally be given to the other components of the expression (i.e. "custody" and "control"): FC [111]. The majority went so far as to observe that, if Parliament had intended s 35A to operate in relation to employees in a way different from "conventional understanding", then it would be expected to have made that plain by express words: FC [111]. However, the inclusion of "custody" in s 35A(1) suggests that Parliament intended to do just that, bearing in mind that the primary meaning of "custody" is "safe keeping, protection; charge, care, guardianship".[36]

49. In turning to the concept of *control*, the majority held that it was "reasonable to infer" that s 35A(1) was directed to those persons who have the "ability" or "capacity" to keep dutiable goods safe or account for the goods to the satisfaction of a Collector if called upon to do so: FC [99]. From that foundation, the majority simply asserted that employees of a bonded warehouse would not "usually" have such an ability or capacity and that, "in most cases", there will be limitations on the control able to be exercised by them: FC [102]. Employees were said not "usually" to have control over "situational matters" such as the selection of the particular warehouse in which goods are to be kept, the structure or structural integrity of the warehouse, or the security and staffing

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[36] *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at 532 (Mason J). See also *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 403 at 412, where the Court held that r 188(1) of the Excise Regulations 1925 (Cth), which refers to "[e]very person who has the *control or custody* of excisable goods, while such goods are in course of removal, or are in transit coastwise, or are or at an approved place, or until delivery for home consumption or exportation to parts beyond the seas", "would include carriers, warehousemen, wharfingers and perhaps stevedores". That is significant for two reasons: *first*, such persons do not necessarily have legal possession of dutiable goods and it is difficult to see why the addition of the word "possession" to the composite expression would mean they fall outside the expression's scope; and *second*, r 188(1) was the forerunner of s 60 of the Excise Act, as amended by s 4 of the *Excise Act 1952* (Cth), which remains in substantially the same terms today, and of s 35A of the Act, which was inserted by s 5 of the *Customs Act 1957* (Cth) in identical terms to s 60 of the Excise Act: see Second Reading Speech, Excise Bill 1952 (Cth) (House of Representatives, 11 September 1952), 1311–1312 (Eric Harrison, Minister for Defence Production); Second Reading Speech, Customs Bill 1957 (Cth) (House of Representatives, 8 May 1957), 1149 (Frederick Osborne, Minister for Air).

arrangements within the warehouse: FC [102]. According to their Honours, employees are "usually" subject to the direction and control of their employer and "usually" do not exercise control outside working hours: FC [102].

50. The majority returned to this issue in their summary at FC [116], where they noted that their construction was supported by, *inter alia*, the fact that the control exercised by employees is not "generally" of the kind they considered necessary. This was said to be an "important aspect" of "the context" in which the term "control" in s 35A is to be construed and pointed against the term encompassing the control of employees: FC [105].

10 51. The majority's attempt to confine "control" in this way suffers from at least three defects:

(a) *first,* the majority's focus on a person's "ability" or "capacity" to keep goods safely (FC [99]) does not support a construction of s 35A that, *in every case*, denies its applicability to employees. Depending on their seniority and their level of responsibility, it may be quite straightforward to conclude that a particular employee had the ability or capacity to keep dutiable goods safe;

(b) *second*, the majority's focus on what an employee can "usually" do compounded their error. There was no proper basis on which the majority could make findings
20 concerning the "usual" way in which employees operate in relation to a bonded warehouse, and then use those findings to construe the section so as to exclude all employees from its remit. No findings had been made by the Tribunal as to the usual or general manner in which employees of bonded warehouses acted. Nor were the matters in FC [102] sufficiently clear or commonplace that judicial notice could be taken of them, under either s 144 of the *Evidence Act 1995* (Cth) or, if it continues to exist, the general law on this topic;[37] and

(c) *third*, the very qualifiers used by the majority — "usually" and "generally" — admit that no universal position exists. So much was acknowledged by the

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30 [37] See, in relation to the position in NSW, *Gattellaro v Westpac Banking Corp* (2004) 78 ALJR 394 at [17] (Gleeson CJ, McHugh, Hayne and Heydon JJ), which held that judicial notice at general law no longer operates in light of s 144.

majority at FC [101], where they accepted that there "is a sense in which" employees in a bonded warehouse "may be understood to exercise at least physical control over bonded goods" and that, "[d]epending on their position", employees may make decisions about, and/or attend to, the location and disposition of goods, the persons who may have access to the goods, and the protection of the goods while they remain in the warehouse. This recognition acknowledges that the statutory language in s 35A(1) is quite capable of applying to certain employees, depending on the facts. In those circumstances, the majority erred in construing the section so as to deny its application to any and every employee.

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52. Moreover, even if one accepts the majority's reasoning in relation to "control", it is unclear on what basis their Honours concluded that Domenic's control (as the warehouse manager) did not extend to "situational matters" such as the security and staffing arrangements within the warehouse: FC [105].

53. Finally in this context, the majority's approach to construing the concept of "possession" in isolation led them to conclude that the word should be given a narrow construction because s 35A or s 36 — which of the two is unclear — is a "penal provision". If, as FC [97] suggests, the majority considered that the civil consequences provided for in s 35A are penal in nature, that conclusion is doubtful given that, as their

20 Honours had earlier accepted, the evident purpose of s 35A is to provide "some protection to the public", with the result that it should "*not* be given a narrow construction": FC [81] (emphasis added). If, on the other hand, the majority considered that s 36 alone is penal (as suggested by FC [89]), their Honours failed to recognised that the presumption concerning penal provisions is "a rule of last resort".[38] As Kiefel CJ, Keane, Nettle and Edelman JJ recently observed, in rejecting a submission based on that presumption, "[p]enal statutes are to be construed in accordance with ordinary rules of construction".[39]

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[38] *Beckwith v The Queen* (1976) 135 CLR 569 at 576 (Gibbs J).

[39] *Aubrey v The Queen* (2017) 260 CLR 305 at [39].

54. **Statutory purpose and legislative history**. Reference has already been made at [29]–[32] above to the central role played by s 35A in ensuring that the Commonwealth is paid duty (or an amount equivalent to that duty) on dutiable goods that enter home consumption. This statutory purpose supports a construction of s 35A(1) that extends to employees of a licensed warehouse in any case where the employee can be shown to have, or have been entrusted with, the possession, custody or control of dutiable goods.

55. That conclusion is supported by the circumstances in which s 35A was inserted into the Act. At the time of that section's enactment, s 92(4) of the Act already imposed an obligation on the "licensee of every warehouse" to "[p]ay the duty on all warehoused goods removed from his warehouse except by authority and on all warehoused goods not produced to an officer on demand unless such goods are accounted for to the satisfaction of the Collector." Section 35A was introduced in 1957 and, until the repeal of s 92 in 1980,[40] both provisions operated together. From 1980, s 35A alone operated to impose liability in respect of both warehoused goods and goods otherwise under customs control.

56. The evident purpose of introducing s 35A was to *expand* the class of persons who could be rendered liable for the loss of goods, including warehoused goods.[41] Yet the effect of the majority's construction is to confine the operation of s 35A in the present context to the same category of persons as dealt within under s 92 — namely, the licensee of a bonded warehouse. That follows for two reasons. First, according to the majority, an employee of a licensee cannot fall within s 35A because such a person acts merely as the human agent of the licensee and not in any sense on their own account; the employee is simply the instrument by which the licensee discharges its responsibilities: see FC [104]. Second, goods that are held in a licenced warehouse must necessarily

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40 Section 92 was repealed and substituted so as to deal with a different matter (the authorisation of a Collector to permit the owner of warehoused goods to sort, bottle, pack or repack those goods) by the *Customs Amendment Act (No 3)* (1980) (Cth).

41 *Drew v Dibb* (2008) 169 FCR 320 at [6], [9]. It appears that this was done in part to reduce the need for the provision of security for the payment of duty: see Second Reading Speech, Customs Bill 1957 (Cth) (House of Representatives, 8 May 1957), 1149 (Frederick Osborne, Minister for Air). Relevantly, security had before that time been lawfully required under s 42 of the Act of persons not necessarily in legal possession of dutiable goods, such as a ship's agent and a corporation with the management and control of public wharves: see *Mills v Parkes* (1914) 18 CLR 189 and *Marine Board of Hobart v Commonwealth* (1915) 20 CLR 15, respectively.

have been entrusted to the licensee of that warehouse. Accordingly, if s 35A refers to "possession which is exclusive of the possession of others" (FC [97]), no-one other than the licensee could *ever* have *exclusive* possession, and therefore no-one other than the licensee would ever fall within s 35A. That approach has the result that s 35A was substantially redundant for over 20 years following its enactment (until s 92 was repealed).[42] That points strongly against a construction of s 35A that confines it to persons who have exclusive possession or control, such as to exclude employees in all cases.

57. **No improbability**. The final reason given by the majority for their construction was that it was "improbable" that the Act would "impose a liability on employees who act as no more than the human agent of those who do have the possession, custody or control of the bonded goods": FC [116].

58. The "improbability" pointed to by the majority does not arise. Liability under the section only exists if, as a matter of fact, a particular person (whether or not an employee) has, or has been entrusted with, the possession, custody or control of dutiable goods and that person fails to keep the goods safely or does not account for the goods upon request.

59. As Davies J recognised, in some cases it will be clear from the nature of a person's employment that he or she falls within the statutory description. There is no evident improbability in Parliament choosing to hold such a person liable for the duty that would otherwise be payable on the goods. In other cases, it may be concluded that the nature of the person's role and/or their lack of seniority within an organisation is such that they fall outside the section. The question depends upon the facts in each case.

60. The present is a case in point. As noted in Part V above, Domenic was employed as the manager of the bonded warehouse, had operational control of the warehouse, exercised authority over the goods stored therein, was formally identified to the ATO as one of two people involved in the management and control of the warehouse, and liaised directly with the ATO in relation to the Stolen Goods without any other Zaps

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[42] *Drew v Dibb* (2008) 169 FCR 320 at [6] recognises the possibility that, in addition to covering a wider class of persons, s 35A "may" cover a slightly wider class of circumstances.

representative present. There is no evident reason why it should be thought improbable that Parliament intended s 35A to apply to a person with such characteristics, once it is recognised that the object of s 35A was to extend the class of persons against whom duty could be recovered beyond the licensee of a licenced warehouse.

61. Nor is there any reason to think it improbable that Parliament intended s 35A to apply to more than one person or class of persons in respect of the same dutiable goods at the same time, for that is the position even for "the owner" of dutiable goods in respect of liability to pay duty on those goods under s 165. The term "owner" in respect of goods is defined in s 4(1) 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". It follows that *at least* two persons or categories of persons (i.e. a person "being" the owner and a person "holding himself or herself out" to be the owner) may be "the owner" of, and liable to pay duty on, the same dutiable goods at the same time.

Application to the facts as found and the disposition of the appeal

62. Once it is concluded that the majority below erred in finding that an employee of a licensed warehouse is never capable of falling within s 35A(1) of the Act, it follows that the decision to set aside the Notice issued to Domenic by reason of that fact was incorrect: see FC [119]. As a result, the appeal to this Court should be allowed.

63. A question then arises as to what further orders should be made in this Court. Justices White and Moshinsky held that, if they were wrong on the question of statutory construction (as, for the reasons advanced above, they were), the matter should be remitted to the AAT for further consideration according to law: FC [120]. Justice Davies also considered a remitter appropriate notwithstanding her wider construction of s 35A: FC [40], [41]. All three of their Honours adopted this approach because they considered that the Tribunal had failed to consider whether the degree of control over dutiable goods enjoyed by Domenic was sufficient to enliven s 35A(1)(a).

64. In the appellant's submission, the facts found by the Tribunal (set out at [7]–[14] above), while stated at a high level of generality, nevertheless sufficiently demonstrate

that Domenic was a person who was, or was entrusted with, the "possession, custody or control" of the Stolen Goods for the purposes of s 35A(1)(a) at the time of their theft from the Warehouse. As a result, it is open to the Court to set aside the Full Court's orders and to allow the Tribunal's decision to stand. However, if the Court is not minded to adopt that course, it should remit the matter to the Tribunal for further consideration according to law.

PART VII ORDERS SOUGHT

65. The following orders are sought:

10 1. Appeal allowed.

2. Set aside orders 1–3 of the Full Court of the Federal Court of Australia dated 19 September 2017 and, in lieu thereof, order that the appeal be dismissed.

66. The respondent's costs of these proceedings are being borne by the ATO under the ATO Test Case Litigation Program, in accordance with an undertaking given on 4 April 2018. Accordingly, no order for costs is sought against the respondent.

PART VIII ESTIMATE

It is estimated that up to 1.5 hours will be required for the presentation of the oral argument
20 of the appellant.

Dated: 9 May 2018

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