

**IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY**

**No S91 of 2018**

BETWEEN:



**COMPTROLLER-GENERAL OF CUSTOMS**

Appellant

AND:

**DOMENIC ZAPPIA**

Respondent

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**RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS**

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## A. CERTIFICATION

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1. This outline is in a form suitable for publication on the internet.

## B. OUTLINE

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2. The Full Court held that the AAT had erred in law at [31] as to the meaning of “control” in s.35A(1): [119] (CAB<sup>1</sup> 61).
3. The Full Court also held that that was the only basis for the AAT’s decision: [61], [119], [37] (CAB 46, 61, 39).
4. The various aspects of the majority’s construction of “control” in s.35A(1) are clear  
10 from “a number of matters” ([116], CAB 60) in the majority reasons:
  - (i) the person must have *the* control – not just *some* control: [116], [98] (CAB 60, 56);
  - (ii) the control must be complete control (not some control or limited control): [119], [102] (CAB 61, 57);
  - (iii) the control is physical control: [116] (CAB 60);
  - (iv) the control is a form of control whereby the relevant person has the capacity to discharge the (almost absolute) duty of keeping the goods safe: [99], [120], [103], [115] (CAB 56, 61, 57, 60);
  - (v) the control is a form of control whereby the relevant person has the capacity to  
20 discharge the responsibility of accounting to the Collector in the manner contemplated by s.37 (i.e., principally, by demonstrating that the goods have been dealt with in accordance with the Act): [115], [99], [120], [103] (CAB 60, 56, 61, 57).
5. The majority rejected as wrong in law ([119], CAB 61) the approach adopted by the AAT at [29] and [31].
6. Thus the majority construction both positively endorses various aspects of a form of paramount dominion (see [4] above) and also rejects the AAT’s approach to control.
7. Consequently, the majority concluded that “the kind of control” exercised by a person  
30 acting in the capacity of an employee of a licensed warehouse was “not generally of [the] kind” envisaged by the section and that a number of matters “point against” s.35A(1) being “understood as directed” to that “kind” of control: [116], [105], [112] (CAB 60, 58, 59).

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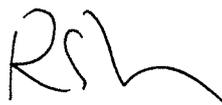
<sup>1</sup> Core Appeal Book filed 24 April 2018.

8. It is submitted that the majority's construction was correct and that the majority was correct to reject the AAT's approach.
9. The majority's construction is supported by a number of matters: see [10]-[15] below. Those same matters are inconsistent with (and tell against) the AAT's approach.
10. The majority's construction accords with the well-understood meaning and connotations of the ordinary English expression "has the control of", particularly in contradistinction to the notion of the exercise of some degree of subordinate periodic control, and to the notion of the capacity to exercise some degree of periodic control. Common examples of the use of the phrase demonstrate this.
- 10 11. Further, common meanings of the individual words in the phrase "has the control of" also support the majority's construction (and not the approach of the AAT):
  - (i) "has" - cf "exercises"
    - "hold" or "possess" oneself: cf exercises on behalf of another
  - (ii) "the" - cf "some" or "a"
    - FC [98], [116] (CAB 56, 60)
    - has connotations (in context) of paramountcy
  - (iii) "control of" - cf "control over".
12. Moreover, s.35A is adjacent to s.36 which uses the same words in creating three criminal offences: FC [89] (CAB 53). "The operation of the criminal law should be as certain as possible": *Taikato v R* (1996) 186 CLR 454 at 466. The words in s.36 should be construed in accordance with settled principles of construction for the interpretation of statutory criminal offences (*Beckwith v R* (1976) 135 CLR 569 at 576) which may involve resolving doubtful or ambiguous words in favour of the accused. Given the immediate context, the words "has the control of" should be interpreted in the same way in ss.35A and 36. Further, that the provision is penal also imports the principle that the imposition of such a penalty should be "certain and its reach ascertainable by those who are subject to it": *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at [48].
- 20  
30 13. In addition, s.35A is itself "penal or quasi-penal in character": *Murphy v Farmer* (1988) 165 CLR 19 at 28-29: FC [97] (CAB 55-56). Although penal provisions are perhaps not construed quite as strictly as they once were, those who contend that a penalty must be inflicted must show that the words "distinctly enact" that consequence; and if the words are equally capable of two constructions only one of which would inflict a penalty, the alternative construction must be adopted: *Murphy* at 29.

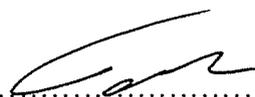
14. Also, the responsibility to keep goods safe in s.35A(1)(a) is almost an absolute duty: *Collector of Customs (NSW) v Southern Shipping Co Ltd* (1962) 107 CLR 279 at 287. This also informs the meaning of “control”: the control envisaged is a form of paramount control the various aspects of which are (so far as possible) conducive to and consistent with the effective discharge of that absolute duty. The majority’s construction accords due emphasis to this: [99], [120], [103], [115] (CAB 56, 61, 57, 60).
15. And s.35A(1) (with s.37(b)) also imports a responsibility to ensure that the goods are at all times dealt with in accordance with the *Customs Act*: “whilst he is in possession of the goods it is his responsibility alone to ensure that the goods do not irregularly find their way into home consumption”: *Southern Shipping* at 296. That also informs the meaning of “control”: the control envisaged is a form of paramount control the various aspects of which are conducive to ensuring that that responsibility is both able to be discharged and able to be discharged effectively. The majority’s construction of “control” accords with this: [115], [99], [120], [103], [115] (CAB 60, 56, 61, 57, 60).
16. Conversely, there is a number of difficulties with the AAT’s approach to the construction of “control”.
17. The first appeal ground is misconceived. None of the various paragraphs of the majority reasons state that an employee could *never* be the person who has the control of goods within s.35A. In particular, paragraphs [116] and [105] do not say this. The statements made about employees are consequential on the construction adopted by the majority (see [4] above), rather than an essential integer of that construction. The correct reading of the majority reasons is as set out at [7] above.
18. The other attacks made by the Comptroller-General on the majority reasons are either unsustainable or insufficient to impugn the essential correctness of the majority construction.<sup>2</sup>



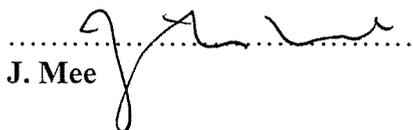
30 G. O’L. Reynolds



R. S. Angyal



D.P. Hume



J. Mee

8 August 2018

<sup>2</sup> The Respondent does not press the following paragraphs of his written submissions: 18 (last sentence), 19 (last sentence), 21 (last sentence), 29, 31-32, 39-41, 44 and 60-63.