

BETWEEN:

COMPTROLLER-GENERAL OF CUSTOMS

Appellant

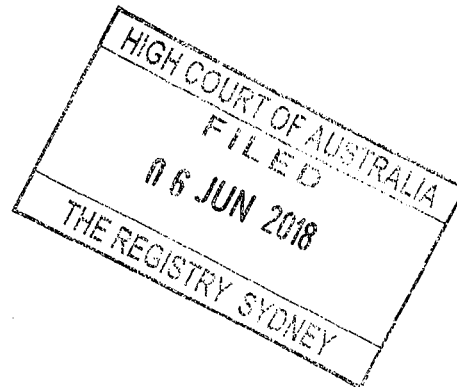
and

10

DOMENIC ZAPPIA

Respondent

RESPONDENT'S SUBMISSIONS



Filed on behalf of the respondent by:

Date of this document: 6 June 2018

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RESPONDENT'S SUBMISSIONS

PART 1: CERTIFICATION

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

PART II: ISSUES ARISING

2. This appeal does not raise the question set out in [2] of the appellant's submissions. It raises the following question, in which the highlighted text indicates differences from the question posed by the appellant: On the proper construction of s 35A(1) of the *Customs Act 1901* (Cth) (**Act**), is an employee of a warehouse licensee *acting in the course of his or her employment* capable of having, or being entrusted with, the possession, custody or control of dutiable goods, *when the acts relied on to establish that the employee is capable in these respects are the same acts as those establishing that the licensee has, or has been entrusted with, the possession, custody or control of those goods.*

3. In the respondent's submission this is the correct question, having regard to the judgment of the majority in the Full Court. The second highlighted portion of text arises from the finding of the majority at [104] that:

20 "[S]uch control as the Tribunal found Domenic to have exercised appears to be no more than an exercise of his duties a manager. In discharging those duties, he was acting as the human agent of Zaps, and not in any sense on his own account. He was the instrument (or at least one of the instruments) by which Zaps discharged its responsibilities."

It arises also from the opinion expressed by the majority at [116] as to "the improbability (in the absence of express words to that effect) that the statute would impose a liability on employees who act as no more than the human agents of those who do have the possession custody or control of the bonded goods." The
30 respondent contends that the question set out above in [2] should be answered "no".

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4. If the Court finds that the question should be answered “yes”, this appeal also raises the question whether there were sufficient facts found by the AAT to permit this Court to determine that the respondent did not have control over the goods for the purposes of s 35A(1)(a) of the Act. The respondent contends that there are sufficient facts to establish that finding, and accordingly no remittal to the AAT is required.

PART III: CERTIFICATION

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

PART IV: MATERIAL FACTS

6. The respondent does not contest the material facts set out in Part V of the appellant’s submissions. The respondent submits that the additional facts in the following paragraphs also are material.
7. The letter from the appellant to Zaps Transport (Aust) Pty Ltd (**Zaps**) dated 15 April 2015 which revoked Zaps’ rights under licence to store bonded (“customable”) tobacco and tobacco goods contained the following: FFC Appeal Book C pp 242-248:

“As from 15 April 2015, Zaps Transport (Aust) Pty Ltd (Zaps Bond) is not licensed to receive, store or move customable tobacco or customable tobacco products at establishment FW82A, located at 327-329 Woodpark Road, Smithfield NSW 2164. ...

All customable tobacco and tobacco products must be removed from Zaps Bond by close of business 23 April 2015. ...

The movement of goods must not occur without express permission from the ATO. ...”
8. The respondent was not present at the warehouse when the Stolen Goods were stolen from the warehouse: FFC Appeal Book C pp 115-20.

9. Letters from the appellant to each of Zaps, John Zappia and the respondent dated 29 June 2015 each in part stated that: FFC Appeal Book C p 108:

“You were entrusted with the possession, custody or control of dutiable goods.”

10. The statutory demand served on Zaps dated 27 August 2015 contained an attachment headed “Decision under section 35A of the Customs Act”: FFC Appeal Book C p 120. Paragraph 1 of that decision stated that Zaps “has, or has been entrusted with, the possession, custody or control over certain dutiable goods ...”.

10 The “Statement of facts and reasons” forming part of that document in part stated:

“1 You operate a warehouse and storage enterprise ...”
2 Richlands Express Pty Ltd ... entrusted you with tobacco products for storage at your premises. ...
4 You are a person who has (or has been entrusted with) possession, custody or control of the goods stored at your premises. ...
6 The cigarettes stolen on 23 May 2015 from your premises were the goods owned and entrusted to you by Richlands.”

11. There are no other facts in the “Decision under section 35A of the Customs Act” demonstrating that Zaps had the possession, custody or control, or was entrusted with the possession, custody or control of the cigarettes.

12. A similar statutory demand was served on the respondent: FFC Appeal Book C pp 126-129. Paragraph 1 of that decision similarly stated that the respondent “has, or has been entrusted with, the possession, custody or control over certain dutiable goods ...”. The “Statement of facts and reasons” forming part of that document in part stated:

30 “1 *You are the General Manager of ... Zaps ...*
3 Richlands Express Pty Ltd ... entrusted Zaps with tobacco products for storage at your premises. ...
5 *As General Manager of Zaps, you are a person who has (or has been entrusted with) possession, custody or control over the goods stored at Zaps premises. ...*

6 The cigarettes stolen on 23 May 2015 from Zaps premises were the goods owned and entrusted to Zaps by Richlands.”

(emphases added)

13. There are no other facts in the “Decision under section 35A of the Customs Act” demonstrating that the respondent had the possession, custody or control, or was entrusted with the possession, custody or control of the cigarettes.

10 14. The AAT found as a fact that Zaps (being the warehouse licensee and a corporation) had the possession, custody and control of goods subject to customs duty, and that it had been entrusted with the possession, custody and control of those goods: AAT [16]-[19].

15. The respondent’s evidence before the AAT was that he always ran all decisions by his father, and followed his father’s directions: FFC Appeal Book C p 292:45; p 296:35-43.

16. The AAT found that the control exercised by the respondent over the goods “was subordinate to that of his father and – ultimately – that of the company”: AAT [30].

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PART V: ARGUMENT

Summary of responses to the appellant’s contentions

17. The appellant contends that the majority in the Court below failed to construe “the possession, custody or control” as a “composite expression”. However, the appellant fails to explain how a set of six alternative possibilities can constitute a “composite expression”. It also fails to explain what difference it would make if the expression were, as submitted, a “composite expression”. The appellant complains that the majority concluded that one of the words in the expression (namely, “possession”) required a narrow construction, and then used that to
30 construe all three words narrowly. However, there is no indication that this in fact was the majority’s reasoning. Rather, the majority’s conclusions were based on a number of factors, including the use of the definite article and the overall context.

18. The appellant contends that 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. However, this was not the majority's reasoning. Their reasoning was instead based on circumstances where acts of employees said to establish liability under s 35A(1) were performed in the course of their employment and were the same acts as those relied on to establish that the employer had, or had been entrusted with, the possession, custody or control of those goods.

10 19. The appellant contends that its approach allows a principled distinction to be drawn between employees who are liable under s 35A(1) and those who are not, saying at [37] that "[a] junior storeman with no capacity to determine whether goods come into or leave the warehouse is unlikely to satisfy the test". But if such an employee wheeled a trolley-load of cigarettes around the warehouse too fast, it would correctly be described as "out of control", illustrating that the appellant's approach puts even the most junior employees at risk.

Legislative intent

20 20. The appellant's contention that Parliament intended s 35A to operate such that liability for unpaid customs duty can be imposed on employees of warehouse licensees who are simply carrying out their employment duties, without any fault on their part, is an extreme position. It has significant implications for such employees, for the licensed warehouse industry and potentially beyond. One would expect the statute to use very clear words to express such an intention. Section 35A does not contain such words.

21. Many laws exhibit a general policy intended to protect employees from personal liability.¹ An employee who acts within the course of his or her employment is an agent of his or her employer, and the employer is vicariously liable for torts

¹ For example, general laws such as the *Employees Liability Act 1991* (NSW) or specific laws such as s 19C *National Measurement Act 1960* (Cth).

committee by the employee. Generally, an employer is required to protect the employee from liability for such torts.²

- 10 22. There are some contexts where employees can be personally liable for their own actions within the course of their employer's business.³ But it is indeed rare (if not unheard of) for an employee to be exposed to potential liability for a risk (such as the risk of, in effect, an administrative penalty equal to the amount of unpaid tax) for which his or her employer is primarily responsible and which the employer could insure against, in a regime akin to strict liability imposed without any fault on the part of the employee.
- 20 23. The appellant (at [31]) alludes to the fact that s 35A (and its equivalent under the *Excise Act 1901* (Cth)) may sometimes produce what might be thought to be unfair results. The appellant notes that the word "fails" in s 35A does not import any fault element, and that liability can be imposed even though reasonable precautions were taken: [31].
- 20 24. Section 35A may well exhibit a policy intention of prioritising the protection of Commonwealth revenue ahead of considerations of individual fairness. However, it has not previously been held that an employee, acting in the course of his or her employment, could be liable for the unpaid customs duty of its employer under that section. Indeed, it would be a significant policy stretch to do so. Given the extent to which laws generally seek to protect employees from liability, it would indeed be surprising if, and improbable that, Parliament intended it to have this effect.
- 30 25. In the present case, the statutory demand issued to the respondent was for \$188,032. This is a significant amount, compared to the wages of the average employee. Were this Court to find that employees could be liable under this section, one could imagine the effect this might have on the licensed warehousing industry. It may become extremely difficult, if not impossible, for warehouse licensees to find employees willing to take on such a risk.

² See *Employees Liability Act 1991* (NSW) and its equivalents in other jurisdictions.

³ For example, misleading and deceptive conduct: see *Houghton v Arms* (2006) 225 CLR 553.

26. Where in the wording of s 35A does the appellant find support for the proposition that Parliament intended such a drastic outcome? One would expect to find at least a specific mention of employees. Instead, all that the appellant can point to are the general words “the possession, custody or control”.

27. The appellant’s reference to the policy intent of protecting Commonwealth revenue (at [29]ff) does not provide any reason to construe and apply the provision in an unprincipled manner, or to read into it words that are simply not there.

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Central construction issue

28. The appellant fails to deal with the central question of construction arising from s 35A(1). The AAT found as a fact that Zaps (being the warehouse licensee and a corporation) had the possession, custody and control of goods subject to customs duty, *and* that it had been entrusted with the possession, custody and control of those goods: AAT [16]-[19]. As a corporation, of necessity, Zaps could act only through human agents. The human agents were its director John Zappia and its General Manager Domenic Zappia, the respondent. All the matters demonstrating that Zaps had the possession, etc, of the goods thus consisted of acts of those persons.

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29. The central question of construction of s 35A(1) therefore is whether Parliament intended that the *same* acts could be relied on by the Comptroller-General for the purpose of demonstrating that those natural persons *also* had (or had been entrusted with) the possession or the custody or the control of the goods, in their own right.

30. In the AAT, Deputy President McCabe initially expressed the conventional view that the presence of the “corporate veil” prevented his having regard, as evidence that the officers or employees themselves had possession, etc, to acts of those officers or employees that resulted in Zaps having possession, etc. Ultimately, however, the AAT accepted the Comptroller’s submission that it should “look behind the veil and impose liability on those who shelter behind it”: AAT [28]-[29].

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31. This, with respect, was a remarkable jump in logic. There is simply nothing in s 35A from which it could be inferred that some exception to the established separate legal entity doctrine was intended. Can such an intention be inferred merely from the ordinary words “the possession, custody or control”? In the respondent’s submission it simply cannot. The established law on “piercing the corporate veil” is clear and rigorous. There can be cases where a court finds that a statute contains an implied requirement that acts of a company be ascribed to its members. But it will do that only where there is a clearly discernible policy and the statute would not achieve its aims unless a requirement to look behind a company were implied.⁴ Further, piercing the corporate veil generally involves looking through the company to the acts of *members*, not acts of *employees*. In the respondent’s submission there is nothing in s 35A from which an intent to “pierce the corporate veil” can be inferred.

32. To “look behind the veil and impose liability on those who shelter behind it” means, according to the AAT, that s 35A imposes liability on an officer or employee who was acting in accordance with his or her duty to the company or his or her contract of employment and, therefore, *acting as the company*. That the AAT actually meant this to be the consequence of its holding is clear from AAT [29], where it held that “Corporate officers might exercise *control* in the relevant sense *in the course of discharging their responsibilities*” (first emphasis in original; second emphasis supplied). The AAT thus effectively concluded that officers and employees of Zaps are personally liable under s 35A *despite the acts by which they became subject to s 35A constituting acts of the corporate licensee*.

33. In the Full Federal Court, the dissenting judgment of Davies J did not deal with this central problem. Her Honour regarded the construction problem as simply requiring a determination of how little control an employee of the licensee could possess in order to be subject to a Court order to pay unpaid customs duty.

⁴ Austin and Ramsay, Ford’s Principles of Corporations Law, 14th edition, [4.245].

34. The majority's judgment, however, pays appropriate attention to the underlying issue; hence the several references to acts of employees of a licensee necessarily being acts of natural persons by which the licensee exercised possession, etc, of the goods: For example, at [104]:

“[S]uch control as the Tribunal found Domenic to have exercised appears to be no more than an exercise of his duties as manager. In discharging those duties, he was acting as the human agent of Zaps, and not in any sense on his own account. He was the instrument (or at least one of the instruments) by which Zaps discharged its responsibilities.”

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35. Further, at [110], quoting Tobias JA:

“An officer may well carry on the company's business and his or her decisions may control the manner in which the company's property is held, used, acquired or disposed of. However, this does not vest in that officer (including ... even a managing director), with such control and dominion over the property of the company as to change the physical custody of that property from the possession of the company to the possession of the officer in the sense that that officer then has the immediate right to possession of, or the possessory title to, the company's property entitling him or her to sue for trespass or conversion in his or her own name.”

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36. Further, at [111]:

“[I]f the Parliament had intended s 35A to operate in relation to employees in a way which was different from conventional understanding, it is to be expected that it would have made that plain by express words, and it has not.”

37. Further, at [116]:

“In summary, we consider that a number of matters indicate that s 35A(1) is not to be understood as directed to the kind of control exercised by an employee of a licensed warehouse, acting in that capacity. Those matters include the fact that the term control appears to be used in the sense of physical control, the use of the definite article “the” indicates that s 35A

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refers to the person who has the control and not merely some control; that the control exercised by employees is not generally of that kind; and the improbability (in the absence of express words to that effect) that the statute 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.”

38. The appellant’s submissions fail to identify this issue, let alone deal with it.

10 ***Consequences of the appellant’s contentions***

39. If the appellant’s contentions were correct – namely, that the acts of the respondent as an employee were acts by which Zaps (the corporate licensee) exercised control over the goods – it would produce some absurd results for commerce.

40. Consider, for example, a case of a company which has a single shareholder, single director and single employee, all of which is the same natural person, and where the company does not engage any other agents. In this case, the company can only act through that one natural person. The acts of that natural person as employee, in the course of his or her employment with the company, will be acts of the company.
20 No acts of any other person will constitute acts of the company. The separate legal entity doctrine applies, and the mere fact that the company is effectively represented by only one person is no reason to pierce the corporate veil.

41. If it were the case that the acts of this sole employee in relation to the possession, custody or control of a thing by the company were *also* to be regarded as possession, custody or control of that thing by the employee in its own right, as a separate person, it would follow that *such a company could never exclusively possess that thing*. Yet concepts of exclusive possession are fundamental in commerce and in property law. It would be quite extraordinary for this Court to
30 make this finding as a general proposition.

42. Indeed, directly contrary to such a proposition, the majority in the Court below referred to High Court authority to the effect that possession is usually understood

as *requiring* exclusive possession. The majority referred to the following passage from *Moors v Burke* (1919) 26 CLR 265, at 271:

“Possession is proved by various acts varying with the nature of the subject matter. *But exclusiveness is essential*. That, of course, does not mean that several persons may not in concert have and exercise that exclusive possession as against the rest of the world”. (emphasis in original)

10 43. If, on the other hand, the appellant is contending for such a finding only in the context of s 35A, but not as a more general proposition, it is not clear what in the wording of that section provides a basis for such a finding. The respondent contends that there is nothing from which this conclusion could be drawn.

20 44. If, unlike the example above, a company is represented by more than one employee, and the company is found to have possession of a thing by reason of the acts of those employees, the acts of any one employee may constitute the *entirety* of the acts used to demonstrate possession etc on behalf of the company, or they may alternatively only constitute a *subset* of them. However, the acts of those persons will never be *different* acts from those of the company (as long as they are within the course of employment). If those acts are not different acts, then it cannot be said that they separate constitute *separate* possession or *separate* control, by the company and by the employee.

Use of the definite article – “the” possession, custody or control

45. Section 35A(1) refers to “a person who has, or has been entrusted with, *the* possession, custody or control of dutiable goods which are subject to customs control” (emphasis added).

30 46. The majority of the Court below (correctly, in the respondent’s submission) concluded (at [68], [86]ff) that the expression “the possession, custody or control”, properly construed, means “*the* possession, *the* custody or *the* control” (emphasis added). While they observed that it is possible that more than one person may have control of goods at any particular time, they inferred that there was support for the inference that “s 35A selects for the burden it contemplates only those who have

the control of the goods at material times, and not those who have only *some* control” (emphasis in original): at [98]. Here, as noted above in [16], the AAT found as facts that the respondent’s control over the goods “was subordinate to that of his father and – ultimately – that of the company”: AAT [30].

10 47. Even if (contrary to the submissions above) it would be possible to regard an employee as having some control over goods in circumstances where those acts were used to establish the control of his or her employer, the majority must be correct in holding that the legislation was aimed at persons with “the” control rather than merely “some” control, having regard to the significant consequences for those persons under the Act. The majority stated that “we consider it appropriate to understand [s 35A] as directed to those who do have the capacity to keep the goods safe or to account for the goods to the satisfaction of a Collector when requested to do so”: at [99]. Davies J agreed with this construction at [35], saying that “it is also necessary to consider whether the control exercised by the person extends to control over the safe keeping of the goods or accounting for them as required by s. 37.”

20 48. The majority drew some support for this view from equivalent wording in s 36, under which it is an offence for a person to who has, or has been entrusted with, the possession, custody or control of the goods, to “fail” to keep them safely. A person whose control is subordinate to that of several others lacks the ability to keep the goods safe and surely could not be liable for the criminal offence of “failing” to keep them safe.

30 49. The appellant contends (at [38]ff of its submissions) that s 35A speaks of “a person”, not “the person”, and contrasts this with the use of the term “the person” in s 35(1A) and (1B). The appellant contends that such language provides no basis for confining the operation of s 35A(1) to a single person: at [39].

50. However, the majority did not confine the operation of s 35A(1) to a single person, but rather, interpreted concepts of “possession” or “control” to mean *complete* possession (ie “the” possession) or *complete* control (ie “the” control). This was

inferred by reference to, among other things, the word “the” preceding “possession, custody or control” (ie “the” possession, custody or control, as opposed to merely “possession, custody or control”).

10 51. The appellant further contends (at [46(b)]) that to speak of exclusive possession is directly contrary to the statutory language, which also speaks of a person who has been “entrusted with” the possession, custody or control. However, there is no contradiction. It is perfectly possible to conceive of a circumstance where, for example, a warehouse licensee has been entrusted with the possession of goods by the owner of the goods, and the licensee in turn parts with possession (while still being the person that was “entrusted”) and gives that possession to a third party.

20 52. Given that the AAT found as a fact that Zaps (being the warehouse licensee and a corporation) had the possession, custody and control of goods subject to customs duty, *and* that it had been entrusted with the possession, custody and control of those goods (AAT [16]-[19]), it would follow that the respondent did not separately have “the control” for this purpose. There was no finding by the AAT that Zaps only had such control in concert with the respondent. On the contrary, the AAT found that the respondent’s control “was subordinate to that of his father and – ultimately – that of the company”: AAT [30]. With respect, if such “control” was subordinate in this manner, it cannot constitute control for this purpose.

Composite expression

53. The appellant (at [18] and [41]ff) contends that the majority failed to construe “possession, custody or control” as a composite expression, by carving it up into its individual parts, by concluding that one of parts requires a narrow construction, and on that basis to construe all three parts narrowly.

30 54. This aspect of the appellant’s submissions is puzzling. It submits that “the possession, custody or control” is a “composite expression”, without explaining how a set of six disjunctive possibilities can be such an expression. (By contrast, the phrase “the possession, custody *and* control” would be a composite expression.) The appellant fails to explain what difference it would make if the expression were,

as submitted, a “composite expression”. In particular, the appellant does not explain why the set of six disjunctive terms set out in the majority’s judgment (at [68]) does not produce the widest possible meaning of the expression as a whole, catching as it does any person who satisfies any of the six possibilities. This is not a case where the *ejusdem generis* rule applies (namely, that general words which follow specific words in a list must be construed as referring only to the types of things identified by the specific words). The expression in question here does not involve a combination of general and specific words.

10 55. The appellant complains that the majority concluded that one of the words in the expression (namely, “possession”) required a narrow construction, and then used that to construe all three words narrowly. There is no indication that this in fact was the majority’s reasoning. Rather, the majority reached its conclusions based on a number of factors, including the use of the definite article (see [45]ff above) and the overall context.

56. Contrary to the appellant’s submissions, the majority stated (correctly with respect) that:

20 “the words “possession”, “custody” and “control” are used disjunctively, thereby implying that a person may have either the possession or the custody or the control of goods. This may suggest that the terms “custody” and “control” are intended to encompass circumstances which are insufficient to amount to possession of goods”.

30 This statement deals also with Justice Davies’ and the appellant’s contention that the majority’s construction is deficient because it considers each of “possession”, “custody” and “control” in isolation from each other (FC [31]; appellant’s submissions [35]). The contrary is true because, in applying the provision, one first considers whether a person has possession, conscious all the while that if that criterion is not satisfied, one can fall back onto the less-inclusive concepts of custody and control. Davies J in fact recognised at [32] both the disjunctive nature of the phrase and that proper construction of it requires one to construe each of “*the possession*”, “*the custody*” and “*the control*” by reference to each other:

“The use of the disjunctive ‘or’ indicates that the word “control” is not intended to bear the same connotation as “possession” and that the section is intended to have application to persons wider than persons having (or entrusted with) ‘possession’ or ‘custody’.)”

57. Accordingly, it is incorrect to say that the majority’s construction goes no further than the narrowest component of the phrase; the opposite is true.

Purpose of the introduction of s 35A

10 58. The appellant contends (at [56]) that:

“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. 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 with under s 92 – namely, the licensee of a bonded warehouse.”

20 59. This, with respect, is simply incorrect. Clearly, s 35A is capable of extending to persons other than the warehouse licensee, without the necessity to find that it must extend to employees. The example given at [51] above is instructive.

Authorities

60. Although there are some authorities to the effect that an act of an employee of a company can constitute in law both the act of the company and the act of the individual, those authorities can easily be distinguished from the present case.

30 61. In *Hamilton v Whitehead* (1988) 166 CLR 121, it was held that an act of a company by an act of its managing director could constitute an offence by the company (offering a prescribed interest) and also the offence of aiding and abetting by the managing director of the company’s offering a prescribed interest. This was because one of the consequences of incorporation is that “one person may function in dual capacities”, with the result that “one act by one man ... is in law both the act of the company and the separate act of himself as an individual”: at 128. The

managing director in that case was “the mind of the company” so that it was liable as principal; but that did not gainsay his liability as an accessory under the particular section providing for accessorial liability: at 127-128; see also *Houghton v Arms* (2006) 225 CLR 553 at 567.

10 62. In *Houghton v Arms*, it was found that two employees had engaged in misleading or deceptive conduct in the course of the business of their employer, despite the fact that it was their employer’s “trade or commerce” and not their own. The court commented that “in the world of tort the status of an individual as an employee does not divest that person of personal liability for wrongful acts committed while an employee. There is no reason for treating the text of s 9 any differently ...”: at 566.

20 63. However, both of those cases were concerned merely with *acts*, and responsibility for those acts. These cases are however fundamentally different from the present scenario, which involves legal concepts of *possession, custody or control*. It is one thing to say that an act of an employee might constitute in law both the act of the employer and the act of the employee (from the point of view of liability for those acts), but it is quite another thing to say that such acts can constitute (for example) *control* by both employer and employee, which is oxymoronic. These are fundamentally different concepts. None of those authorities deal with the concepts of possession, custody or control, and accordingly are not instructive on this point.

64. In the context of possession, custody or control, the appellant refers to a number of cases; again none is instructive in the present case.

30 65. The appellant refers (at footnote 34) to passages from *The Anderson Group Pty Ltd v Tynan Motors Pty Ltd* (2006) 65 NSWLR 400, which in turn refers to passages from Holdsworth, *A History of English Law* (1942) referring to the custody of a servant and the possession of the master. The appellant also refers to similar passages from Pollock and Wright, *An Essay on Possession in the Common Law* (1888).

66. However, that same Pollock and Wright authority also noted that “[t]here has certainly been a good deal of fluctuation in the language of our books” (p58), and the majority in the Court below referred to another passage from that authority, as follows (p58; see also [107] FC):

“... the servant ... would not be supposed by any ordinary observer to have the physical custody of the thing otherwise than on his master’s behalf and at his master’s disposal”.

10 67. In any event, the present case is not a case in which it was suggested that the respondent in any way had personal custody of the relevant goods (being goods stored in a warehouse), as opposed to (for example) personal custody of a single portable chattel. The respondent could not in any way be said to have had personal custody of the goods stored in the warehouse. Indeed, the goods were stolen in a break-in that occurred when the respondent was not at the premises.

20 68. Further, the appellant’s letter to Zaps dated 15 April 2015 revoked Zaps’ rights under licence to have possession, custody and control of bonded (“customable”) tobacco and tobacco goods at the warehouse. However, it was not permitted to move them without the appellant’s consent (which had not been given by the break-in, despite having been requested). It is difficult to see how even Zaps, much less the respondent, could have had possession, custody or control of the goods at the time of the break-in, in light of the appellant’s revocation of its licence to store bonded tobacco goods. Their hands were effectively tied.

Inconsistencies in the appellant’s approach

69. The appellant contends (at [20] and [37]) 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 licensed warehouse or not.

30 70. Ironically, the “Statement of facts and reasons” in the “Decision under s 35A of the Customs Act” attached to the statutory demand served on the respondent did not recite any facts or reasons for s 35A applying to the respondent other than his being the General Manager of Zaps. The appellant criticises the majority judgment for

concluding that s 35A does not apply to the respondent because he is an employee, yet its decision that s 35A applied to the respondent turned entirely on his being an employee of Zaps.

10 71. The “Statement of facts and reasons” forming part of the document accompanying the statutory demand served on Zaps stated that “Richlands Express Pty Ltd ... entrusted you with tobacco products for storage at your premises”. It then stated that “You are a person who has (or has been entrusted with) possession, custody or control of the goods stored at your premises”. The statutory demand served on the respondent contained a slight variant on this wording; it stated that: “Richlands Express Pty Ltd ... entrusted Zaps with tobacco products for storage at your premises”. It then stated that “As General Manager of Zaps, you are a person who has (or has been entrusted with) possession, custody or control over the goods stored at Zaps premises”. Similarly, letters from the appellant to each of Zaps, John Zappia and the respondent dated 29 June 2015 each in part stated that: “You were entrusted with the possession, custody or control of dutiable goods.”

20 72. However, if the cigarettes had been entrusted to Zaps by their owner Richlands, how and by whom did they come to be entrusted to the respondent (if indeed the statutory demand is suggesting that this is the case)? This suggests two separate acts of entrustment, first of Richlands to Zaps, and then separately of Zaps to the respondent. However, there is no evidence that there was a separate entrustment to the respondent, in its own personal capacity and separately from the company.

PART VI: NOTICE OF CONTENTION

30 73. The respondent wishes to contend that the decision of the Court below should be affirmed but on the ground that the Court below erroneously decided or failed to decide some matter of fact or law, as set out in the respondent’s Notice of Contention.

74. As referred to in [63] of the appellant’s submissions, the majority of the Court below considered that, if they were wrong on the question of statutory construction, the matter should be remitted to the AAT for further consideration according to

law. Justice Davies also considered a remitter appropriate. The Full Court thus was unanimous that the AAT had applied the wrong legal test: [40], [41] and [120].

75. The appellant contends (at [64] of the appellant's submissions) that the facts found by the AAT, while stated at a high level of generality, nevertheless sufficiently demonstrate that the respondent was a person who was, or who was entrusted with, possession, custody or control of the goods at the time of their theft from the warehouse. As a result, it submits that it is open to this Court to set aside the Full Court's orders and to allow the AAT's decision to stand.

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76. The respondent agrees with the appellant that the facts found by the AAT are sufficient to dispose of this case without remittal to the AAT. However, contrary to the appellant's submissions, the respondent submits that the facts found by the AAT sufficiently demonstrate that the respondent was *not* a person who was, or who was entrusted with, possession, custody or control of the goods in the relevant sense.

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77. The respondent's evidence before the AAT was that he always ran all decisions by his father, and followed his father's directions: FFC Appeal Book C p 292:45; p 296:35-43. The AAT found as facts that the respondent's control over the goods "was subordinate to that of his father and – ultimately – that of the company": AAT [30].

78. As noted above at [12], the appellant's demand on the respondent under s 35A(1) was solely based on his holding the position of General Manager of Zaps. Despite this, it led no evidence before the AAT as to the respondent's powers and responsibilities in that position with respect to the goods.

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79. The majority of the Court below referred to a number of factual matters demonstrating limitations on the respondent's control, including (at [104]) that:

- a. such control that the respondent exercised was subject to the direction and supervision of his father, John;

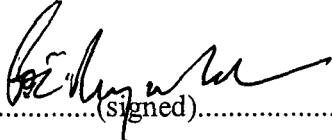
- b. his control was of the day-to-day kind relating broadly to “operational” matters, not to “situational” matters; and
- c. importantly, it was not open to the respondent to relocate the cigarettes to another warehouse.

10 80. Having regard to these significant limitations on the respondent’s powers and authority, the respondent submits that this Court should find (based on these facts) that the control exercised by the respondent did not extend to safe-keeping of the goods or accounting for them as required by s 37. Accordingly, the respondent was not a person who was, or who was entrusted with, the possession, custody or control of the goods at the relevant time for the purpose of keeping them safely pursuant to s 35A(1)(a) or for the purpose of accounting for them to the satisfaction of a Collector pursuant to s 35A(1)(b). Accordingly, he was not subject to s 35A(1).

PART VII: ESTIMATE

20 81. It is estimated that 2 hours 20 minutes will be required for the presentation of the oral argument of the respondent.

Dated 6 June 2018



.....(signed).....

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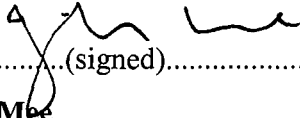
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