



DEPARTMENT OF HOME AFFAIRS NOTICE

No. 2019/19

Implications of *Comptroller General of Customs v. Zappia* [2018] HCA 54

The High Court of Australia handed down its decision in the case of *Comptroller General of Customs v. Zappia* [2018] HCA 54 on 14 November 2018. The full judgement is available at <http://eresources.hcourt.gov.au/downloadPdf/2018/HCA/54>.

This Notice complements the Australian Taxation Office (ATO) Decision Impact Statement (S91/2018) of 17 January 2019, available at <https://www.ato.gov.au/law/view/document?DocID=LIT/ICD/S91-2018>.

Issues Decided by the Court

The High Court considered the scope of subsection 35A(1) of the *Customs Act 1901* (Customs Act), regarding the failure to keep dutiable goods safely.

Subsection 35A(1) provides that where a person has, or has been entrusted with, the possession, custody or control of dutiable goods which are subject to customs control and the person fails to keep those goods safely or does not account to the Collector for those goods, the person shall pay an amount equal to the amount of customs duty that would have been payable on those goods.

In *Comptroller General of Customs v. Zappia*, the High Court considered whether an employee of the holder of a warehouse licence could meet the description of 'a person who has, or has been entrusted with, the possession, custody or control of dutiable goods which are subject to customs control'.

The High Court unanimously held that section 35A is concerned with persons who have the *de facto* ability to keep goods safely and to prevent goods passing into home consumption without the payment of duty. The Court in this case found the employee had possession, custody or control of the goods before the goods were stolen from the warehouse and had failed to keep those goods safely.

The decision affirmed that the statutory purpose of section 35A is to motivate persons who have the ability to keep dutiable goods safely, or to account to the Collector for the goods, to do so.

In construing section 35A, the majority of the High Court held that the terms 'possession', 'custody' or 'control' refer to holding a degree of power or authority in relation to dutiable goods, sufficient to enable a person to meet the obligations to keep the goods safely or account for the goods to the satisfaction of a Collector. Importantly, such power or authority need not be exclusive or paramount and may be subordinate to another person or authority.

A person may therefore be subject to section 35A even if their possession, custody or control of goods is subject to the direction of another person.

Practical Implications

The Department of Home Affairs (Home Affairs) draws attention to the High Court's opinion that any person who possesses the appropriate degree of power or authority in relation to dutiable goods falls within the ambit of section 35A. Several different persons, such as directors (including 'shadow directors'), shareholders, officers or employees, may each possess power or authority to the requisite degree within a chain of command or hierarchy of responsibility.

The High Court's decision confirmed that section 35A of the Customs Act confers broad powers on ABF and ATO Officers. Those powers extend to persons involved in the operation and management of licensed premises, even when they are not the licence holder.

In practice, this means that entities and persons entrusted with the possession, custody or control of dutiable goods under customs control should manage risks appropriately, particularly when dealing with high risk goods subject to excise-equivalent duties. Risk mitigation measures could include risk assessments, providing appropriate physical and personnel security, and implementing suitable integrity measures and insurance arrangements.

Further information

For further information about any of the matters covered by this Notice, please contact importexportpolicy@homeaffairs.gov.au.

[signed]

Matthew Duckworth
Assistant Secretary
Customs and Border Revenue Branch
10 May 2019