

# Australian High Court opens the way to an appeal on liability for amounts equivalent to duty

## Regulating for Globalization

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Licensed premises authorised to hold goods 'under customs control' face a number of noteworthy challenges:

1. the licensing regime is rigorous, setting high standards on applicants to operate premises and those employed in the premises and business;
2. the ongoing compliance obligations are time-consuming and difficult, including, reporting of the movements of people and goods at the premises, security and maintenance of the premises and accounting for goods that pass through the premises;
3. exposure to liability to penalties, whether through prosecution or by way of the issue of Infringement Notices (**INs**) by the Australian Border Force (**ABF**). The highest numbers of INs issued and the largest liabilities relate to offences associated with licensed premises, including movement of goods without authority, unauthorised changes to operations and failures to account for goods under control, as reported in The Goods Compliance Updates provided by the Australian Border Force;
4. further exposure to liability for amounts equivalent to the customs duty payable on goods which may be stolen from premises, primarily tobacco and alcohol which are subject to very high levels of duty. To this end, the ABF is focussing on movement of tobacco and related dutiable products and ensuring that appropriate duties are paid;
5. regular attempts by criminal interests to use licensed premises to illegally move products such as alcohol and tobacco;
6. regular thefts of tobacco and alcohol from its premises;
7. the difficulties in securing appropriate insurance; and
8. the proposal for the creation of additional offences for those dealing with criminal activity at the premises, as well as granting further powers to the ABF as referred to in the recent Federal Budget.

Industry has been active in attempting to assist those operating these important premises. This has included the presence of law enforcement bodies at CBFCA functions, however the issues continue to arise and there are many

reported prosecutions associated with efforts to evade duty properly payable

### **Liability to amounts equivalent to duty**

Without detracting from the significant penalties being issued to those operating and working in such premises, another real focus is the potential liability for those parties for amounts 'equivalent to customs duty' for goods missing from the premises pursuant to section 35A of the *Customs Act 1901 (Act)*. There is a corresponding provision for liability for amounts equal to excise payable for goods held subject to payment of excise.

There has been a long line of reported cases in which it has been held that such liability is almost absolute, including one Federal Court judge who suggested it would only be an 'act of Godzilla' that could relieve a party from liability. However, more recently, it has been questioned whether that liability should only be imposed on the entity holding the licence for the premises or whether it can be extended to officers or employees of those holding the licence on the basis that they could be said to be 'in possession, custody or control' of the premises and the goods. Imposing liability on such persons has been a more recent development where the 'corporate veil' of a company's liability has been 'pierced' to impose liability on officers and employees. A recent example of such liability can be found in the decisions of the Administrative Appeals Tribunal (AAT) and the Federal Court in the 'Zaps Transport' case.

### **Zaps Transport – the AAT and the Federal Court findings**

The decision of the AAT was discussed in detail in [this article](#).. In summary, the AAT found the licensee company liable but extended that liability to include the director and an employee of the company. The extension of liability for amounts equivalent to duty was met with some concern by those in industry – especially when matched with the very broad approach taken by the ABF to liability to customs duty.

The employee alone subsequently appealed to the Federal Court, as the corporate licensee was in liquidation and the director was then bankrupt (so that the case is referred to as *Comptroller General of Customs v Zappia [2017] FCAFC 147*). The Federal Court decided that the AAT had erred in making its finding against the employee and that, based on the material before the AAT, the employee could not be found to have been in such control of the goods to be held liable under section 35A of the Act.

### **Appeal to the High Court**

The Commonwealth (through the Comptroller General of Customs) subsequently sought leave to appeal the decision of the Full Federal Court to the High Court. The High Court only has automatic jurisdiction to hear cases in limited matters (essentially those relating to the Constitution). Parties can apply for special leave to appeal to the High Court and must convince judges of the High Court that the matter is of such significance that it warrants final determination by the High Court. The making of the application reflects the importance placed on the decision of the Full Federal Court and the issue

of liability of employees at a licensed premises. That may suggest that the ABF is keen to press individual identity. The judges of the High Court appear to have agreed as they have granted leave to appeal to the Comptroller General and the matter will be argued before the High Court.

The two grounds for the appeal are:

1. whether the majority of the Full Court erred in holding an employee of a licensee is not capable of being a person who has been entrusted with possession, custody or control of dutiable goods; and
2. whether the majority of the Full Court erred in holding that a statutory demand issued by the ABF to the employee was invalid and of no effect.

### **The costs of the proceeding**

Of particular interest is that the proceedings are being funded by the Australian Tax Office (ATO) pursuant to a programme by which it agrees to fund litigation of general significance. Accordingly, the employee will not be liable to his legal costs or to the legal costs of the ABF should it be successful.

### **The impact of the decision**

The impact of a decision in favour of the ABF could be significant as officers and employees of the operators of licensed premises seek additional protection from liability. However the future effect could be limited by a Budget proposal that customs duty or tobacco be paid at the time of import of tobacco even before entry to licensed premises.

However, if pain persists, those seeking specific advice can always consult their friendly customs and trade lawyer.