Federal Court of Australia

Hurley v Collector of Customs [2022] FCAFC 92

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| Appeal from: |  |
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| File number: | WAD 233 of 2021 |
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| Judgment of: | **MOSHINSKY, BANKS-SMITH AND COLVIN JJ** |
|  |  |
| Date of judgment: | 24 May 2022 |
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| Catchwords: | **TAXATION** – customs duty – where the Collector of Customs served a demand for payment on the applicant under s 35A of the *Customs Act 1901* (Cth) – where the relevant goods (alcoholic beverages) were the subject of a periodic settlement permission under which the goods could be delivered into home consumption without being entered for that purpose – where the duty was not payable before or at the time when the goods were delivered into home consumption – where the duty was payable on the next business day after the end of each seven-day settlement period – where the duty on the goods was not paid when due – whether the applicant “[failed] to keep [the] goods safely” within the meaning of s 35A |
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| Legislation: | *Acts Interpretation Act 1901* (Cth), s 15AA  *Administrative Appeals Tribunal Act 1975* (Cth), s 44  *Customs Act 1901* (Cth), ss 30, 33, 35A, 36, 42, 68, 69, 70, 79, 90, 99  *Excise Act 1901* (Cth), ss 58, 60, 61C  *Customs Regulations 2015* (Cth) |
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| Cases cited: | *Caltex Australia Petroleum Pty Ltd v Federal Commissioner of Taxation* (2008) 173 FCR 359  *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378  *Collector of Customs (NSW) v Southern Shipping Co Ltd* (1962) 107 CLR 279  *Comptroller-General of Customs v Zappia* (2018) 265 CLR 416  *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503  *Sidebottom v Giuliano* (2000) 98 FCR 579  *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193  *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 |
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ORDERS

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|  | | WAD 233 of 2021 |
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| BETWEEN: | LAURENCE HURLEY  Applicant | |
| AND: | COLLECTOR OF CUSTOMS  Respondent | |

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| --- | --- |
| order made by: | MOSHINSKY, BANKS-SMITH AND COLVIN JJ |
| DATE OF ORDER: | 24 MAY 2022 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The decision of the Administrative Appeals Tribunal given on 21 September 2021 (in proceedings 2017/7566, 2017/7050 and 2017/7569) be set aside.
3. The decision of the respondent dated 13 December 2017 to make demand for payment of an amount of $1,090,499.27 and the statutory demand issued by the respondent on the same date be set aside.
4. The decision of the respondent dated 3 November 2017 to make demand for payment of an amount of $83,027.54 and the statutory demand issued by the respondent on the same date be set aside.
5. The decision of the respondent dated 13 December 2017 to make demand for payment of an amount of $690,481.38 and the statutory demand issued by the respondent on the same date be set aside.
6. The respondent pay the applicant’s costs of the proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

## Introduction

1. The respondent, the Collector of Customs (the **Collector**), relevantly served three demands for payment of money on the applicant, Mr Laurence Hurley, pursuant to s 35A(1) of the *Customs Act 1901* (Cth). Section 35A(1) relevantly provides that, “[w]here a person who has, or has been entrusted with, the possession, custody or control of dutiable goods which are subject to customs control … fails to keep those goods safely … 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”.
2. Mr Hurley applied to the Administrative Appeals Tribunal (the **Tribunal**) for review of the decisions to make the demands for payment. The sole issue to be determined by the Tribunal was whether Mr Hurley had *failed to keep the goods safely* within the meaning of s 35A(1). The Collector submitted, and the Tribunal found, that Mr Hurley had failed to keep the goods safely within the meaning of the provision. The Tribunal therefore affirmed the decisions to make the three demands (adjusting, by consent, the amount of one of the demands). Mr Hurley appeals on a question of law from the decision of the Tribunal. The original jurisdiction of the Court in this matter is being exercised by a Full Court.
3. The basic facts may be briefly stated as follows. The relevant goods (being alcohol that had been imported into Australia) were the subject of a number of periodic settlement permissions (each referred to as a **PSP** in these reasons) given by the Collector to Liquor Traders Australia Pty Ltd (**LTA**), a company of which Mr Hurley was the sole director, under s 69 of the *Customs Act* (set out later in these reasons). Pursuant to each PSP, LTA was permitted to deliver the goods into home consumption without entering the goods for home consumption (and thus without first paying the duty on the goods). LTA was required to submit a return in relation to the goods on the day after each settlement period referred to in the PSP, and the duty on the goods was payable by LTA at the time when the return was submitted. The relevant goods were delivered into home consumption pursuant to the PSP, but the duty was not paid by LTA. The Collector served demands for payment pursuant to s 35A(1) on Mr Hurley.
4. Mr Hurley accepted before the Tribunal that he had, or had been entrusted with, the possession, custody or control of dutiable goods that were subject to customs control: see the reasons of the Tribunal (the **Tribunal Reasons**) at [14], [54].
5. The key issue before the Tribunal, and on appeal, concerns the correct construction of the phrase “fails to keep [the] goods safely” in s 35A(1). Are these words capable of applying in the present circumstances, where the goods were not lost, destroyed or consumed, and there was no failure to pay duty, while the goods were subject to customs control?
6. For present purposes, the concept of goods being “subject to customs control” is defined in s 30(1)(a)(vi) and (1B), which provide that excise-equivalent goods (which include the goods in issue in the present case) shall be subject to customs control until the first of three events happens. Relevantly for present purposes, one of these events is that the goods are “delivered into home consumption … in accordance with a permission under section 69”. Although the Collector makes a submission to the contrary, in our view on the plain meaning of these provisions, the goods in issue in the present case ceased to be subject to customs control when they were delivered into home consumption pursuant to the applicable PSP.
7. In our view, for the reasons that follow, the phrase “fails to keep [the] goods safely” in s 35A(1) is not capable of applying to the present facts and circumstances. In each of the leading cases on this provision (or an equivalent provision in other legislation), something in the nature of loss, destruction or consumption happened to the goods, resulting in a loss of duty, while the goods were subject to customs control. However, in the present case, nothing relevantly happened to the goods, and there was no loss of duty (because duty was not yet due), while the goods were subject to customs control. The goods were delivered into home consumption in accordance with the applicable PSP, and thereupon ceased to be subject to customs control. In these circumstances, it would be straining the text of s 35A(1) too far to conclude that, in respect of goods that were subject to customs control, Mr Hurley *failed to keep the goods safely*. Further, a contrary construction would tend to undermine the statutory purpose of the permission regime in s 69. The provisions of the Act need to be read in a coherent manner that gives effect to all of its provisions. We note that, had it wished to do so, the Commonwealth could have required LTA to provide security for compliance with the conditions applicable to the PSP, including the payment of duty: see s 42 of the *Customs Act*.
8. Accordingly, the appeal is to be allowed, and the decision of the Tribunal (in the proceedings relating to the three relevant demands) is to be set aside. Further, it is appropriate for the Court to make orders setting aside the relevant decisions of the Collector and the relevant demands for payment.

## Key legislative provisions

1. The version of the *Customs Act* provided by the parties is the version compiled on 1 December 2017. We will refer to that version of the legislation.
2. Section 30 of the *Customs Act* relevantly defines the concept of goods being subject to “customs control” as follows:

**30 Customs control of goods**

(1) Goods shall be subject to customs control as follows:

(a) as to goods to which section 68 applies that are unshipped or that are a ship or aircraft not carried on board a ship or aircraft—from the time of their importation:

…

(vi) if the goods are excise-equivalent goods and are not examinable food—**until whichever of the events mentioned in subsection (1B) happens first**;

…

(1B) The events for the purposes of subparagraph (1)(a)(vi) are as follows:

(a) excisable goods are manufactured and the excise-equivalent goods are used in that manufacture;

(b) **the excise-equivalent goods are delivered into home consumption in accordance with an authority to deal or in accordance with a permission under section 69, 70 or 162A**;

(c) the excise-equivalent goods are exported to a place outside Australia.

(Emphasis added.)

1. Section 33 provides that, during the period in which goods remain subject to customs control, the goods cannot be moved, altered or interfered with except as authorised by or under the *Customs Act*.
2. Section 35A, the key provision for present purposes, relevantly provides:

**35A Amount payable for failure to keep dutiable goods safely etc.**

(1) 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

(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.

…

(2) An amount payable under subsection (1), (1A) or (1B) shall be a debt due to the Commonwealth and may be sued for and recovered in a court of competent jurisdiction by proceedings in the name of the Collector.

(3) In proceedings under the last preceding subsection, a statement or averment in the complaint, claim or declaration of the Collector is evidence of the matter or matters so stated or averred.

(4) This section does not affect the liability of a person arising under or by virtue of:

(a) any other provision of this Act; or

(b) a security given under this Act.

1. Section 35A of the *Customs Act* was considered by the High Court of Australia in *Comptroller-General of Customs v Zappia* (2018) 265 CLR 416 (***Zappia***). The issue in that case was whether the relevant individual “[had], or [had] been entrusted with, the possession, custody or control of dutiable goods” within the meaning of the provision. That issue does not arise in the present case. As noted above, Mr Hurley accepted before the Tribunal that he had, or had been entrusted with, the possession, custody or control of dutiable goods that were subject to customs control.
2. Division 4 of Pt IV deals with the entry, unshipment, landing and examination of goods. In the present case, the goods were imported goods. Both ss 68 and 69 form part of that Division. Section 68 deals with the *entry* of imported goods. This is an administrative process that is effected by the making of a prescribed communication to the Department: s 68(3A), (3B). Section 68 refers to two alternatives: entering the goods for *home consumption* and entering the goods for *warehousing*.
3. Section 69 provides a mechanism whereby a permission may be granted for certain types of goods to be *delivered into home consumption* without being *entered for home consumption*. It refers to goods that are “like customable goods” or “excise-equivalent goods”, expressions that are defined in the *Customs Regulations 2015* (Cth). As noted above, the goods in the present case were excise-equivalent goods. Section 69 relevantly provides:

**69 Like customable goods and excise-equivalent goods**

(1) A person may apply to the Collector for permission to deliver into home consumption like customable goods or excise equivalent goods:

(a) of a kind specified in the application; and

(b) to which section 68 applies;

without entering them for that purpose:

(c) in respect of a recurring 7 day period; or

(d) in respect of a calendar month if:

(i) the person is a small business entity or included in a class prescribed by the regulations; or

(ii) the like customable goods or excise-equivalent goods to be delivered into home consumption are of a kind prescribed by the regulations for the purposes of this subparagraph.

(2) If a person applies in respect of a recurring 7 day period, the person may specify in the application the 7 day period that the person wishes to use.

…

(4) An application must be made in writing in an approved form.

(5) The Collector may, on receiving an application under subsection (1) or advice under subsection (13) or (14), by notice in writing:

(a) give permission to the person to deliver into home consumption, from a place specified in the permission:

(i) like customable goods to which section 68 applies; or

(ii) excise-equivalent goods to which section 68 applies;

to which the application relates without entering them for that purpose; or

(b) refuse to give such a permission and set out in the notice the reasons for so refusing.

(6) If a permission is to apply in respect of a 7 day period, the notice must specify:

(a) the 7 day period for which permission is given; and

(b) the first day of the 7 day period from which permission is given.

(7) If a permission is to apply in respect of a calendar month, the notice must specify the calendar month from which permission is given.

(8) A permission given under subsection (5) in respect of like customable goods or excise-equivalent goods is subject to the following conditions:

(a) if a person’s permission applies in respect of a 7 day period and specifies goods other than gaseous fuel—the condition that, to the extent that the permission relates to goods other than gaseous fuel, the person give the Collector a return, by way of a document or electronically, on the first day following the end of each 7 day period, providing particulars in accordance with section 71K or 71L in relation to the goods that have, during the period to which the return relates, been delivered into home consumption under the permission;

…

(h) the condition that, at the time when each return is given to the Collector, the person pay any duty owing at the rate applicable when the goods were delivered into home consumption;

…

(9) Despite paragraphs (8)(a), (b), (c) and (d), the Collector may determine different conditions for giving the Collector a return if subsection (13) or (14) applies.

(10) A person to whom a permission is given under subsection (5) must comply with any conditions to which the permission is subject.

Penalty: 60 penalty units.

(11) Subsection (10) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the Criminal Code.

1. The holder of a warehouse licence is subject to a number of specific obligations: ss 90 and 99. One of them is that (subject to ss 69 and 70) the holder must not permit warehoused goods to be *delivered for home consumption* unless the goods have been *entered for home consumption* and an authority to deal with them is in force: s 99(2).

## Background facts

1. In the proceeding before the Tribunal, the parties filed a statement of agreed facts. The material agreed facts are set out in the Tribunal Reasons at [21]. The following statement of the facts is substantially based on that paragraph, supplemented by other material before the Court.

### General matters

1. At all material times, LTA held a customs warehouse licence under s 79 of the *Customs Act*. That licence was cancelled on 7 March 2018.
2. From 10 July 2010 to 5 October 2017, LTA held a PSP issued pursuant to s 69 of the *Customs Act*. The PSP granted permission to LTA to deliver into home consumption alcoholic beverages from the LTA bond warehouse at Welshpool, Western Australia (the **LTA bond warehouse**), without entering them for home consumption, on conditions including that:
3. LTA must pay customs duty due and payable in respect of goods delivered into home consumption in a period of seven days;
4. LTA must complete and electronically lodge an Import Nature 30 Declaration (**N30 declaration**) in respect of the goods delivered into home consumption during the period referred to in (a) above; and
5. LTA must pay the customs duty.
6. At all relevant times, Mr Hurley:
7. was the sole director and secretary of LTA;
8. was notified to the relevant authorities in accordance with the warehouse licence as an individual who would participate in the management and/or control of LTA;
9. was notified to the relevant authorities as being an authorised contact in respect of the LTA bond warehouse;
10. was the manager and one of the staff of the LTA bond warehouse; and
11. had sole control of and responsibility for the management of LTA’s business, including stock control and movement; compliance with importation and storage requirements and the lodgement of declarations; and oversight of financial matters such as payments to creditors and cash flow.
12. The relevant alcoholic beverages were “dutiable goods”, “excise-equivalent goods” and not “examinable food”, as those expressions are used in the *Customs Act*.
13. Customs duty and goods and services tax were payable on the relevant alcoholic beverages.
14. At all relevant times, the general practice of LTA in relation to imported alcoholic beverages was as follows:
15. LTA purchased, and imported into Australia, alcoholic beverages from overseas suppliers and manufacturers; the alcoholic beverages were unshipped at the Port of Fremantle, Western Australia;
16. at that point, the alcoholic beverages were entered for warehousing by a customs broker engaged to act on behalf of LTA;
17. the alcoholic beverages were then transported by truck from the Port of Fremantle to the LTA bond warehouse;
18. from time to time, alcoholic beverages were removed by LTA from the LTA bond warehouse; at this point, a truck driver would complete a “removal of stock form” that recorded the quantity and type of each alcoholic beverage removed;
19. alcoholic beverages removed from the LTA bond warehouse would be delivered by truck to LTA’s warehouse at Unit 1, 272 Selby Street, Wembley, Western Australia (**LTA Wembley warehouse**);
20. an employee of LTA collated the removal of stock forms into weekly settlement statements which were forwarded to LTA’s customs broker who then produced N30 declarations by which the alcoholic beverages were entered for home consumption under s 68(3A) of the *Customs Act* and the PSP; and
21. the customs broker would lodge the N30 declaration with Customs; upon lodgement, Customs would direct debit from LTA’s nominated account a sum of money on account of duty, GST and wine equalisation tax payable on the alcoholic beverages.

### Demand/Debt 1

1. During the period from November 2015 to September 2016, there were 55 N30 declarations lodged with Customs by or on behalf of LTA. These N30 declarations stated and it is the fact that:
2. LTA delivered into home consumption certain alcoholic beverages in the period from November 2015 to September 2016 (**First Beverages**);
3. LTA was the owner of the First Beverages; and
4. customs duty was payable on the First Beverages.
5. Even though each N30 declaration was lodged, the customs duty was not paid.
6. From importation until they were removed from the LTA bond warehouse (at least), Mr Hurley had possession, custody or control, or was entrusted with possession, custody or control, of the First Beverages. LTA and Mr Hurley no longer have possession, custody or control of the First Beverages.
7. On 12 October 2016, the Australian Taxation Office (**ATO**) issued a demand to LTA for payment of the shortfall amount of customs duty on the First Beverages, being $1,090,499.27 (**Debt 1**). Officers of the ATO have been appointed as officers of Customs for the purposes of exercising the powers of a Collector under the *Customs Act*.
8. Between 6 February 2017 and 13 April 2018, part payments of Debt 1 totalling $398,405.39 were made by LTA.
9. On 13 December 2017, the ATO issued a demand for payment to Mr Hurley (**Demand 1**) for the amount of $1,090,499.27. The demand was for payment by 17 January 2018.
10. If the First Beverages were entered for home consumption on 13 December 2017, the amount of $1,013,171.30 in customs duty would have been payable (after taking into account the credit referred to below).
11. Since Demand 1 was issued, the Collector has accepted that Debt 1 should be reduced by $77,327.97 for duplication and other errors.
12. On 23 September 2018, the ATO received $88,499.34 under a deed of company arrangement executed by LTA.

### Demand/Debt 2

1. In April 2017, three N30 declarations were lodged with Customs by or on behalf of LTA. These N30 declarations stated and it is the fact that:
2. LTA delivered into home consumption certain alcoholic beverages in the period from November 2016 to January 2017 (**Second Beverages**);
3. LTA was the owner of the Second Beverages; and
4. customs duty in the amount of $83,027.54 was payable on the Second Beverages.
5. Even though each N30 declaration was lodged, the customs duty was not paid.
6. From importation until they were removed from the LTA bond warehouse (at least), Mr Hurley had possession, custody or control, or was entrusted with possession, custody or control, of the Second Beverages. LTA and Mr Hurley no longer have possession, custody or control of the Second Beverages.
7. On 16 May 2017, the ATO issued a demand to LTA for payment of the customs duty on the Second Beverages in the amount of $83,027.54 (**Debt 2**).
8. On 3 November 2017, the ATO issued a demand for payment to Mr Hurley for the amount of $83,027.54 (**Demand 2**). If the Second Beverages were entered for home consumption on 3 November 2017, the amount of $83,027.54 would have been payable in customs duty. The demand was for payment by 1 December 2017.

### Demand/Debt 3

1. Although the Tribunal dealt with a third debt and a third demand, it is unnecessary to refer to these for present purposes.

### Demand/Debt 4

1. During the period from September 2016 to August 2017, there were 37 N30 declarations lodged with Customs by or on behalf of LTA. These N30 declarations stated and it is the fact that:
2. LTA delivered into home consumption certain alcoholic beverages in the period from September 2016 to August 2017 (**Fourth Beverages**);
3. LTA was the owner of the Fourth Beverages; and
4. customs duty in the amount of $690,481.38 was payable on the Fourth Beverages.
5. Even though each N30 declaration was lodged, the customs duty was not paid.
6. From importation until they were removed from the LTA bond warehouse (at least), Mr Hurley had possession, custody or control, or was entrusted with possession, custody or control, of the Fourth Beverages. LTA and Mr Hurley no longer have possession, custody or control of the Fourth Beverages.
7. On 1 September 2017, the ATO issued a demand to LTA for payment of the customs duty on the Fourth Beverages in the amount of $690,481.38 (**Debt 4**).
8. On 13 December 2017, the ATO issued a demand for payment to Mr Hurley for the amount of $690,481.38 (**Demand 4**). If the Fourth Beverages were entered for home consumption on 13 December 2017, the amount of $690,481.38 would have been payable in customs duty. The demand was for payment by 10 January 2018.

### Summary of the amounts claimed

1. By reason of the payments received, and the credits that the Collector accepts ought to be made for duplication and other errors, the amounts now claimed by the Collector are:
2. Demand 1 – $526,266.57;
3. Demand 2 – $83,207.00; and
4. Demand 4 – $690,481.38.

### Sample PSP

1. Part C of the Appeal Book includes a PSP issued to LTA on 19 June 2017 (the **Sample PSP**). We were told during the hearing that this was representative of the PSPs issued to LTA.
2. The Sample PSP has the title “Permission to deliver goods for home consumption without entry”. It is also stated to be Periodic Settlement Permission number 6696. Although unsigned, the document contains a space for it to be signed by an “Officer of Customs”.
3. The first paragraph of the document states:

We grant permission to LIQUOR TRADERS AUSTRALIA PTY LTD to deliver into home consumption goods of a kind specified in the attached schedule at column 2, from the place specified in column 1, without entry.

1. The schedule contains the following details:
2. Column 1 is headed “Establishment” and refers to LTA, Unit 1, 233 Bank Street, Welshpool, Western Australia.
3. Column 2 states: “Goods subject to Customs control – being alcohol”.

Thus, the PSP gave LTA permission to deliver into home consumption goods subject to customs control (being alcohol) from the LTA premises at Unit 1, 233 Bank Street, Welshpool, Western Australia, which is the LTA bond warehouse.

1. The Sample PSP stated that it was issued subject to the *Customs Act* and the following conditions. A number of conditions were set out, including:

**1. Date of payment**

Payment of goods and services tax that has not been deferred and customs duty due and payable in respect of goods delivered into home consumption during the settlement period must be made by the permission holder by 4pm on the next business day after the end of the settlement period.

**2. Method of payment**

Payment will only be accepted by EFT from a nominated bank account on lodgment of the Import Declaration N30.

**3. Time for lodging returns**

You shall complete a return in the form of an Import Declaration N30, in respect of the goods delivered into home consumption pursuant to this permission and lodge the completed return by 4pm of the next business day after the end of the settlement period.

**4. Manner of lodging returns**

The Import Declaration N30 returns shall be lodged electronically.

**5. General conditions**

a) As the permission holder you do not need to enter the specified goods and pay the duty prior to delivery. You should not lodge any individual returns for the specified goods, unless that return is in accordance with all the conditions of this permission. …

1. The Sample PSP contains several definitions, including:

“Settlement period” means a period of seven days commencing on each Monday and concluding at the close of business on the following Sunday.

### No duty payable when delivered into home consumption

1. In the proceeding before the Tribunal, the Collector conceded that at the time that the goods were removed from the LTA bond warehouse, and thereby delivered into home consumption, no duty was payable because of the provisions of the PSP: see the Tribunal Reasons at [26].

## The Tribunal Reasons

1. There were four proceedings before the Tribunal, but only three of those proceedings are relevant for present purposes. (In the fourth proceeding, the Collector sought to withdraw the decision to issue the demand for payment, and the Tribunal made an order setting aside the decision of the Collector.)
2. As the Tribunal stated at [20], the parties refined the issues to a single issue, namely: did Mr Hurley fail to keep safely the dutiable goods that are the subject of the s 35A demands made to Mr Hurley?
3. The Collector’s submissions before the Tribunal were summarised at [22]-[24] of the Tribunal Reasons. As there set out:
4. The Collector relied solely on the contention that Mr Hurley failed to keep the dutiable goods safely as giving rise to a liability on the part of Mr Hurley under s 35A(1) of the *Customs Act*. The Collector contended that a “fail[ure] to keep… goods safely” includes delivering goods into home consumption but failing to pay duty on those goods, *irrespective of when the duty was payable*.
5. The Collector contended that it is not necessary for the dutiable goods to have been subject to customs control when the failure occurred. In the alternative, the Collector contended that the goods continued to be subject to customs control at the time that they were delivered into home consumption.
6. The Collector contended that the purpose of s 35A is the protection of revenue and that that purpose is best achieved by adopting the interpretation of the *Customs Act* posited by the Collector.
7. Mr Hurley’s submissions before the Tribunal were summarised at [25] of the Tribunal Reasons. Mr Hurley submitted that the dutiable goods were delivered into home consumption in accordance with the PSP; duty on those goods was not payable at that time and a subsequent failure by LTA to pay the duty does not render the delivery of the goods in accordance with the PSP irregular, nor does it amount to a failure by Mr Hurley to keep the goods safely.
8. At [26], the Tribunal stated that, applying the ordinary meaning of “fails to keep [the] goods safely”, it was hard to see how the removal of the goods from the LTA bond warehouse, where removal was permitted under the PSP without prior or contemporaneous payment of duty, could be a failure to keep goods safely. The Tribunal noted a concession by the Collector that, at the time that the goods were removed from the LTA bond warehouse, and thereby delivered into home consumption, no duty was payable because of the provisions of the PSP. The Tribunal stated that, in these circumstances, the question was whether there could be a “failure to keep [the] goods safely” by reason of the duty not being paid by the time specified in the PSP.
9. The Tribunal considered the judgment of Sundberg J in *Caltex Australia Petroleum Pty Ltd v Federal Commissioner of Taxation* (2008) 173 FCR 359 (***Caltex***) in detail at [31]-[37] of the Tribunal Reasons. The Tribunal then considered, at [38]-[42], the judgment of the High Court of Australia in *Collector of Customs (NSW) v Southern Shipping Co Ltd* (1962) 107 CLR 279 (***Southern Shipping***) and, at [44]-[46], the judgment of Finkelstein J in *Sidebottom v Giuliano* (2000) 98 FCR 579 (***Sidebottom***).
10. The Tribunal’s core reasoning is at [47]-[57] of its reasons. The Tribunal considered that the observations of Sundberg J at [157] of *Caltex* (extracted later in these reasons)were applicable to the facts of the present case, and led to the result that Mr Hurley failed to keep the goods safely within the meaning of s 35A. The Tribunal reasoned at [53]:

The Applicant’s submissions … ignore the broader meaning that has been given to the phrase “*keeps* [the] *goods safely*” in s 35A(1) of the Act and its equivalent under the Excise Act in cases such as *Caltex* and the cases referred to in *Caltex*, including the High Court in *Southern Shipping* and the Federal Court in *Sidebottom*.

1. After referring to the judgment of the High Court in *Zappia*, and noting that it concerned a different issue, the Tribunal stated at [54]:

… the relevant facts in *Caltex* were the same as the present case, namely the goods were delivered into home consumption at a time when duty was not payable under the PSP. In *Caltex* that delivery, and the subsequent failure to pay duty, was found to constitute an “irregular” delivery of the goods into home consumption and a failure to keep the goods safely. It is that principle, not any principle arising from *Zappia*, that is critical in determining this matter.

1. The Tribunal stated at [55] that, while the relevant reasoning in *Caltex* was obiter dictum, it was still persuasive. The Tribunal stated that it was persuaded by the thorough and careful reasoning of Sundberg J.
2. The Tribunal stated, at [56], that it had “considerable sympathy” for Mr Hurley “who, in effect, did nothing wrong” and who, on an ordinary or lay understanding of the words “keep [the] goods safely”, did so. Nevertheless, the Tribunal concluded, at [57], that Mr Hurley *did* fail to keep the goods safely for the purposes of s 35A(1).

## The appeal on a question of law

1. Mr Hurley appeals on a question of law pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth). The Collector filed a notice of cross-appeal, but this was subsequently discontinued.
2. The notice of appeal identifies a single question of law, which is as follows:

Whether, having found at [56] that in all other respects the dutiable goods were kept safely, the Tribunal erred by construing the operation of s 35A(1)(a) of the Customs Act 1901 (Cth) (the Act) to mean that, where the duty on the dutiable goods is not paid, a person who had possession, custody or control of the goods prior to their delivery into home consumption has failed to hold those goods safely.

1. Mr Hurley contends, in summary, that:
2. The Tribunal held that where a person otherwise satisfies its affirmative obligation in s 35A(1)(a) of the *Customs Act* to keep dutiable goods safe, that person fails to keep those goods safe if, subsequent to the delivery of the goods to “consumer consumption”, the duty is not paid on those goods.
3. In so doing, and having found at [56] that the dutiable goods were otherwise kept safe up to the permitted delivery into “consumer consumption”, the Tribunal erred:
   1. by finding at [57] that the applicant, at the time they were delivered into home consumption, had failed to keep the dutiable goods safe, without identifying any concurrent loss, destruction or consumption of the goods;
   2. by applying a construction of “fails to keep … safely” which expands the meaning to circumstances where there has been no loss, destruction or consumption of the goods at the time of delivery into home consumption.

## Consideration

1. As noted above, the key issue before the Tribunal, and before this Court on appeal, concerns the correct construction of the phrase “fails to keep [the] goods safely” in s 35A(1) of the *Customs Act*. Are these words capable of applying in the present circumstances, where the goods were not lost, destroyed or consumed, and there was no failure to pay duty, while the goods were subject to customs control?
2. The issue is one of statutory construction. The principles of statutory construction are well established. It is sufficient for present purposes to refer to: s 15AA of the *Acts Interpretation Act 1901* (Cth); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39]; *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378 at [24]-[26]; and *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14].
3. Although s 35A(1) has been set out above, for ease of reference we set it out again:

(1) 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

(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.

For present purposes, only paragraph (a) of s 35A(1) is relevant.

1. Section 35A(1) is to be construed in the context of the *Customs Act* as a whole and in light of its legislative purpose. The relevant context includes ss 30 and 69, which have been set out above.
2. Section 35A(1)(a) has three elements, each of which is necessary for liability to arise:
3. the person has, or has been entrusted with, the possession, custody or control of dutiable goods;
4. the goods are subject to customs control; and
5. the person fails to keep the goods safely.
6. In the present case, there is no issue regarding the *first element* of s 35A(1). Mr Hurley accepts that he “[had], or [had] been entrusted with, possession, custody or control” of the relevant goods, which were dutiable goods, from importation until they were removed from the LTA bond warehouse (at least).
7. The *second element* of s 35A(1) set out above is that the goods are subject to “customs control”. This concept is relevantly defined in s 30, which has been set out at [10] above. Section 30(1)(a)(vi) refers to goods that are excise-equivalent goods and are not examinable food. The alcoholic beverages in the present case fall into this category. Section 30(1)(a)(vi) provides that such goods shall be subject to customs control “until whichever of the events mentioned in subsection (1B) happens first”. Section 30(1B) refers to three events. Of these, the only relevant event is that described in paragraph (b), namely “the excise-equivalent goods are delivered into home consumption in accordance with an authority to deal or in accordance with a permission under section 69, 70 or 162A”. In our view, and notwithstanding the Collector’s submission to the contrary, on the plain meaning of these provisions the alcoholic beverages ceased to be subject to customs control when they were delivered into home consumption pursuant to the applicable PSP. This occurred when they were removed from the LTA bond warehouse.
8. The contrary submission advanced by the Collector is that, unless and until the duty on the goods is paid, the goods remain subject to “customs control”. In our view, that submission is irreconcilable with the text of the Act. As explained above, s 30 relevantly provides that the goods shall be subject to customs control until whichever of the events mentioned in subsection (1B) happens first. Of the three events referred to in that subsection, paragraph (b) is the only event that is relevant in the circumstances of this case. Paragraph (b) refers to the goods being “delivered into home consumption” in accordance with a permission under s 69. There is no reference in s 30(1B)(b) to duty on the goods having been paid. Indeed, the evident purpose of the permission regime in s 69 is to allow goods to be delivered into home consumption without duty first being paid on the goods. For these reasons, we reject the Collector’s submission that the alcoholic beverages remained subject to customs control until duty on the goods had been paid.
9. We now turn to the *third element* of s 35A(1) set out above, namely that the person “fails to keep [the] goods safely”. The conclusion reached by the Tribunal was, in essence, that in circumstances where the duty on the goods was not paid, Mr Hurley had failed to keep the goods safely. The Tribunal reached this conclusion notwithstanding the fact that, by reason of the PSP issued under s 69, no duty was payable while the goods were subject to customs control; the duty was payable later, *after* the goods had been delivered into home consumption and ceased to be subject to customs control. The Collector supports the Tribunal’s conclusion and reasoning.
10. In *Southern Shipping*, the High Court gave the words “fails to keep [the] goods safely” in a comparable provision (s 60 of the *Excise Act 1901* (Cth)) a broad interpretation, consistently with the purpose of the provision, being to safeguard the excise revenue. In particular, Dixon CJ (with whom Windeyer J agreed) stated at 287 that “safely” means “safe from loss or destruction”. His Honour stated that the provision places on the person having possession, custody or control “what may be called an absolute duty to keep the goods safe from loss or destruction”. Chief Justice Dixon added that, perhaps the word “absolute” is too strong, “for it may be conceded that it is possible to except inevitable casualty – what once was called ‘Act of God’”. The reasoning of McTiernan J at 290-291 is to similar effect.
11. The reasons of other members of the High Court in *Southern Shipping* emphasise that the purpose of the provision is the protection of the excise revenue, and in broad terms equate a failure to keep goods safely with a failure to ensure payment of the duty on the goods. While these statements may, on their face, appear to support the Collector’s position, it is important to appreciate that these statements were made in a context where the *Excise Act* (at that time) did not contain a provision comparable to s 69 of the present *Customs Act*. Justice Taylor stated at 295:

The provision is not designed to inflict a penalty upon a bailee for some breach of duty imposed by the bailment; it 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.

(Emphasis added.)

1. Justice Menzies stated at 299:

In this setting it is hardly likely that the words “keep … safely” refer to protecting the goods from damage or destruction or anything of that nature; for the safety with which the section is concerned is 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; similarly, the account of the goods that is required is an account which shows an authorized relinquishment of possession, custody and control or, despite an unauthorized loss of possession, custody and control, that the goods have not got into home consumption without the payment of duty or that, notwithstanding the failure to keep the goods safely, Customs control over them is still effective. It follows that excisable goods which have been stolen from a local store cannot be said to have been “kept … safely” and that it could not be a satisfactory account of the missing goods to say merely that they have been stolen, or even that they have been stolen notwithstanding that the person whose duty it was to keep them safely had taken reasonable care to protect them from theft. The words “fails to keep … safely” do not require any fault on the part of the person concerned beyond proof that the goods have not been kept safely in the sense indicated.

1. Justice Owen stated at 304-305:

[The provision’s] purpose is to protect the revenue by ensuring that excisable goods do not go into consumption **by** **devious means** and without excise duty being paid on them.

(Emphasis added.)

1. As indicated above, the High Court was not addressing a situation where goods are delivered into home consumption, without being entered for home consumption, pursuant to a permission granted under a provision comparable to s 69 of the *Customs Act*. The statements of Taylor J, Menzies J and Owen J set out above need to be read with this in mind.
2. In particular, we note that Taylor J referred to excisable goods finding their way into home consumption “by some irregular means”. These words are inapposite in a case, such as the present, where goods are delivered into home consumption pursuant to a permission granted under s 69 of the *Customs Act*. In the present case, the goods were delivered into home consumption in accordance with the applicable PSP, and thus regularly rather than irregularly.
3. The passage from the judgment of Menzies J refers to goods that are subject to “the control of Customs”. His Honour stated that the safety with which the section is concerned is that the goods “do not get out of Customs control into home consumption without the payment of duty”. Again, these words are inapposite in a case where goods are delivered into home consumption pursuant to a permission granted under s 69 of the *Customs Act*. The same observation applies to the passage from the judgment of Owen J.
4. As has already been noted, the issue before the High Court in *Zappia* was different from the issue in the present case. In *Zappia*, the issue was whether the relevant individual had possession, custody or control of the goods. The facts of that case did not involve a permission having been granted under s 69 of the *Customs Act*, and the observations of the High Court about the statutory purpose of s 35A were made in that context: see, for example, at [28]-[29] per Kiefel CJ, Bell, Gageler and Gordon JJ.
5. In each of *Southern Shipping* and *Zappia*, something in the nature of loss, destruction or consumption happened to the goods, resulting in a loss of duty, while the goods were subject to customs control. However, in the present case, nothing relevantly happened to the goods, and there was no loss of duty (because duty was not yet due), while the goods were subject to customs control. The goods were delivered into home consumption in accordance with the applicable PSP, and thereupon ceased to be subject to customs control. In these circumstances, we consider that it would be straining the text of s 35A(1) too far to conclude that, in respect of goods that were subject to customs control, Mr Hurley *failed to keep the goods safely*.
6. Insofar as the Collector submits that, in respect of goods that are subject to customs control, there is a failure to keep the goods safely if the duty on the goods is not paid, *irrespective of when the duty is payable*, we do not accept that submission. The provision refers to a failure to keep goods safely in the context of goods that are subject to customs control. In our view, in circumstances where no duty is payable while the goods are subject to customs control, it cannot be said that there has been a failure to keep the goods safely by reference to events that do (or do not) happen until later in time. We consider that it must be possible to determine, as at the time when the goods cease to be subject to customs control, whether or not there has been a failure to keep the goods safely.
7. We also consider that a contrary construction would tend to undermine the statutory purpose of the permission regime in s 69. The provisions of the *Customs Act* need to be read in a coherent manner that gives effect to all of its provisions. If a person who has possession, custody or control of goods that are subject to customs control could be liable under s 35A(1) if duty is not paid by the obligor *after* the goods are delivered into home consumption pursuant to a PSP, the person would be unwise to allow the goods to be delivered into home consumption. This would tend to undermine the evident purpose of s 69, which is to allow goods to be delivered into home consumption without entering the goods for home consumption.
8. Further, s 36(1) of the *Customs Act* contains an offence provision in substantially the same terms as s 35A(1). The construction adopted by the Tribunal, and contended for by the Collector, if correct, would apply equally to s 36(1). It is unlikely that the Parliament intended criminal liability to attach in circumstances such as those in the present case, where duty was not payable while the goods were in the possession, custody or control of the relevant person and subject to customs control, the goods were delivered into home consumption in accordance with a permission under s 69, and it was only later that the obligor failed to pay the duty: *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at [45] per Gleeson CJ, Gummow, Hayne and Heydon JJ.
9. We note that, had it wished to do so, the Commonwealth could have required LTA to provide security for compliance with the conditions applicable to the PSP, including the payment of duty: see s 42 of the *Customs Act*. Thus, there is a mechanism available under the Act to ensure payment of duty by the obligor in circumstances where a PSP is in place.
10. Insofar as the Tribunal relied, and the Collector relies, on the obiter observations of Sundberg J in *Caltex* at [155]-[157], we consider the facts of that case to be different from those of the present case, and that the case is distinguishable on that basis.
11. The goods in issue in that case were residual oils produced by the applicant (**Caltex**) as a by-product of its refining of crude oil. The applicant then re-used the residual oils by burning them as fuel in its own refinery. The primary holding was that the residual oils were not dutiable goods. However, Sundberg J also considered, in the alternative, the validity of a demand for payment that had been made by the respondent (the **Commissioner**) on Caltex under s 60(1) of the *Excise Act*. As noted above, s 60(1) of the *Excise Act* is comparable to s 35A(1) of the *Customs Act*. Further, the *Excise Act* contained a provision (s 61C) that was comparable to s 69 of the *Customs Act*. Section 61C of the *Excise Act* (set out in *Caltex* at [56])empowered the Commissioner to give permission for specified goods to be delivered for home consumption without the formal entry of the goods under s 58. As noted in *Caltex* at [57], during the relevant period, Caltex held permissions under s 61C in respect of petroleum products manufactured at each of its three refineries. These permissions allowed Caltex to deliver petroleum products for home consumption for each period of one week, without an entry of those products for home consumption being made and passed under the *Excise Act* and without payment of excise duty on those products until the day following the end of each weekly period.
12. At [140], Sundberg J accepted a submission of the Commissioner that the residual oils had been “delivered” for or into home consumption when Caltex dedicated them, as articles of commerce, to consumption as a refinery fuel at its premises: see also [133(c)], [134]. At [149]-[171], Sundberg J considered the issue of the validity of the demand under s 60 of the *Excise Act*. At [155], Sundberg J stated:

If I am correct in finding that [the residual oils] were delivered, then the Commissioner’s control ceased at the time they were delivered (ie when dedicated as refinery fuel oil). However it is not correct to say that s 60 has no application in respect of goods over which the Commissioner’s control has come to an end. The section applies where: (1) a person has or has had possession of excisable goods; (2) the goods are subject to the Commissioner’s control (ie have not been delivered); and (3) there is a failure to keep them safely or a failure to account for them. It seems to me that the requirement (2) for the goods to be subject to control is concerned with and referable to the period during which they are in the possession of the relevant person rather than the time at which the Commissioner relies on the section. The very thing the section is concerned with is the loss of goods (for example, their disappearance without adequate explanation) or the movement of goods into home consumption while subject to control and without the payment of duty. Section 60 it seems to me has no less an application to excisable goods that have ceased to be subject to control, **where the cessation of that control is a result of the manufacturer delivering the goods into home consumption in an unauthorised manner**.

(Emphasis added.)

1. In the last sentence of the above passage, Sundberg J referred to a situation where goods ceased to be subject to the Commissioner’s control as “a result of the manufacturer delivering the goods into home consumption in an unauthorised manner”. That is different from the present case, where the goods were delivered into home consumption (by being removed from the LTA bond warehouse) *in accordance with* the applicable PSP.
2. At [157], Sundberg J stated:

In relation to the failure to keep safely point …, the Commissioner relied on the decision of Finkelstein J in *Sidebottom* 98 FCR 579 and his Honour’s discussion of the purposes of s 60 as explained by the High Court in *Southern Shipping* 107 CLR 279. What is clear from each of those cases is that s 60 imposes an essentially absolute duty to keep goods safely and to ensure they do not find their way into home consumption without the payment of duty. Where that does occur, the goods will have found their way into home consumption “irregularly”, that is, in a manner not authorised by the Excise Act, and s 60 will apply in order that the revenue might be protected. **The Commissioner said that the residual oils found their way into home consumption irregularly when Caltex consumed them without duty having been paid. I agree.** As I said earlier, Caltex’s consumption of the residual oils at its refineries amounted to “home consumption”. **It follows that Caltex’s dedication of the residual oils as refinery fuel oil, without paying excise duty, and subsequent consumption of them by burning them, means that they found their way into home consumption irregularly**. Caltex’s consumption of the residual oils in this manner (by burning and thus using them up or “destroying” them) was therefore a failure to keep them safely within s 60(1)(a). As Dixon CJ said in *Southern Shipping* 107 CLR at 287, the safe keeping comprehended by s 60(1)(a) is the keeping safe from loss or destruction, because “the provision is pointed at the loss of goods involving the loss of excise duty”. Caltex relied on the judgments of Taylor J (at 296) and Menzies J (at 299) in *Southern Shipping* 107 CLR 279 and their Honours’ references to damage or destruction. However, their observations were directed not to a case such as the present (where the “destruction” is the consumption of the residual oils as a fuel) but to a rejection of the proposition that the section imposes a duty of care not to permit goods to be damaged or destroyed.

(Emphasis added.)

1. As the highlighted parts of the above passage indicate, on the facts of the case, Sundberg J found that the residual oils found their way into home consumption “irregularly”. That is to be contrasted with the facts of the present case, where the alcoholic beverages were delivered into home consumption (by being removed from the LTA bond warehouse) *in accordance with* the applicable PSP, and thus regularlyrather than irregularly. *Caltex* is, therefore, distinguishable. If and to the extent that Sundberg J expressed the view that a failure to pay duty *after* the goods have been delivered into home consumption (and thus ceased to be subject to customs control) may bear upon whether or not, in respect of goods that are subject to customs control, the relevant person “[failed] to keep [the] goods safely”, we would respectfully disagree with his Honour, for the reasons given above.
2. In the present case, it was accepted by the Collector that statutory permission under s 69 was conferred by the PSPs and that such permission allowed the goods to be delivered into home consumption without payment of duty. The fact that it was an express condition of the permission that the duty would be paid did not mean that in the event the condition was not met there was a failure to keep the goods safely while they were subject to customs control. Nor could the existence of the condition mean that the goods were subject to some form of ongoing customs control despite the permission. The statutory permission operated to end the period when the goods were subject to customs control. Nor was payment of the duty a condition precedent to the permission or some form of concurrent obligation the performance of which was required in order for there to be permission. A condition of that character would defeat the evident purpose of the permission which was to allow the goods to be delivered into home consumption without payment of the duty (on the basis that the duty would be paid at a later date). Therefore, once the permission was acted upon and the goods were delivered into home consumption, the Collector was left to enforce the condition in respect of goods outside customs control and could not rely upon obligations which applied only whilst the goods had the status of being subject to customs control. The Collector could not then resurrect the status of the goods being subject to customs control by reason of the failure to perform the condition. The Collector was not without means of protection. As we have noted, there was a right to require security. Also, permission could be refused for appropriate reasons.
3. For these reasons, in our view, the phrase “fails to keep [the] goods safely” in s 35A(1) of the *Customs Act* is not capable of applying to the present facts and circumstances.

## Conclusion

1. The appeal is therefore to be allowed. The decision of the Tribunal (in the proceedings relating to the three relevant demands) is to be set aside. Further, it is appropriate for the Court to make orders setting aside the relevant decisions of the Collector and the relevant demands for payment. Accordingly, we will make orders to the effect that:
2. The appeal be allowed.
3. The decision of the Tribunal given on 21 September 2021 (in proceedings 2017/7566, 2017/7050 and 2017/7569) be set aside.
4. The decision of the Collector dated 13 December 2017 to make demand for payment of an amount of $1,090,499.27 and the statutory demand issued by the respondent on the same date be set aside.
5. The decision of the Collector dated 3 November 2017 to make demand for payment of an amount of $83,027.54 and the statutory demand issued by the respondent on the same date be set aside.
6. The decision of the Collector dated 13 December 2017 to make demand for payment of an amount of $690,481.38 and the statutory demand issued by the respondent on the same date be set aside.
7. The Collector pay the applicant’s costs of the proceeding.

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| I certify that the preceding ninety-five (95) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Moshinsky, Banks-Smith and Colvin. |

Associate:

Dated: 24 May 2022