IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M134 of 2018

BETWEEN:

VICTORIAN BUILDING AUTHORITY
Appellant

and

NICKOLAOS ANDRIOTIS
Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. Section 170(1) of the *Building Act 1993* (Vic) provided for registration of a person as a "Domestic Builder Class W – Waterproofing" if, amongst other things, the person satisfied the registration authority that he or she was "of good character". Mr Andriotis was registered as a waterproofer in New South Wales. He applied for registration as a waterproofer in Victoria pursuant to the *Mutual Recognition Act 1992* (Cth). That Act provides for registration in a State of persons registered for an occupation in another State; it contains no good character requirement, but leaves room for the operation of some State laws.

3. The Victorian Building Authority (the **VBA**)[1] refused Mr Andriotis' application and he applied to the Administrative Appeals Tribunal (the **AAT**) for review. The AAT found that Mr Andriotis was not of good character and affirmed the decision. The question is whether the AAT was permitted by the *Mutual Recognition Act* to refuse to register Mr Andriotis in those circumstances.

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[1] The application was made to the Building Practitioners Board, and the original decision on the application was made by the Board. However, with effect from 1 September 2016, the Board was abolished and the registration functions previously conferred on the Board were vested in the VBA. By reason of transitional provisions in the *Building Act*, all decisions and actions of the Board are taken to be decisions and actions of the VBA: see Sch 8, cl 6. Accordingly, these submissions will refer to both the Board (prior to its abolition) and the VBA itself as "the VBA".

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4. Two issues of statutory construction arise, reflecting the two grounds of appeal.

(1) Section 20(2) of the *Mutual Recognition Act* provides that a local registration authority **may** register a person who is registered in a State (the **first State**) and has lodged a valid notice seeking registration for an equivalent occupation in another State (the **second State**). Section 21(3) provides that the local registration authority **may**, subject to Pt 3, refuse a grant of registration. Is the discretion to refuse registration, conferred by ss 20(2) and 21(3), confined to the circumstances in s 23(1)?

(2) Section 17(1) of the *Mutual Recognition Act* sets out the mutual recognition principle, which provides that a person registered in the first State is entitled to registration in the second State. Section 17(2) sets out the exception to the "mutual recognition principle" by allowing for the operation of certain local laws in the second State. Ground 2 concerns the scope and operation of the exception in s 17(2). That issue involves two subsidiary questions.

(a) Does the exception in s 17(2) operate to qualify the "entitlement" to be registered in s 20(1)?

(b) Is a "good character" requirement in a State law within the exception?

PART III: SECTION 78B NOTICE

5. Notice under s 78B of the *Judiciary Act 1903* (Cth) is unnecessary.

PART IV: DECISIONS BELOW

6. The decision of the Full Court of the Federal Court is: *Andriotis v Victorian Building Authority* [2018] FCAFC 24. The decision of the Administrative Appeals Tribunal is *Andriotis and Building Practitioners Board* [2017] AATA 378.

PART V: FACTS

7. Mr Andriotis was registered in New South Wales as a waterproofer. Pursuant to s 19 of the *Mutual Recognition Act* he lodged a written notice with the VBA that he be registered as a "Domestic Builder Class W – Waterproofing" under the *Building Act*. By a letter dated 30 November 2015, the VBA notified Mr Andriotis that it had refused to grant him registration because he had not satisfied it that he was of "good character" as required by s 170(1)(c) of the *Building Act*.[2]

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2 *Andriotis* [2017] AATA 378 at [5] [**AB 7**].

8. On 27 March 2017 the AAT affirmed the decision on the basis that it found that Mr Andriotis was "not of good character".[3] In summary, the AAT found that "the evidence supporting Mr Andriotis' application for registration under the Mutual Recognition Act was materially defective and misleading" and he "had not dealt forthrightly, honestly and with candour with registration and regulatory authorities".[4]

9. The Full Court (Flick J; Bromberg and Rangiah JJ) held that the VBA was not entitled to refuse to register Mr Andriotis on that basis.[5] The Full Court set aside the AAT's decision and ordered that the proceeding be remitted to the AAT [**AB 115**].

PART VI: ARGUMENT

A. *MUTUAL RECOGNITION ACT*: THE STATUTORY SCHEME

10. The *Mutual Recognition Act* was enacted pursuant to s 51(xxxvii) of the Commonwealth Constitution, which empowers the Commonwealth Parliament to make laws with respect to "matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States". The Act applied (and continues to apply) in Victoria by reason of s 4 of the *Mutual Recognition (Victoria) Act 1998* (Vic), which adopted the Commonwealth Act.

11. The principal purpose of the *Mutual Recognition Act* is "promoting the goal of freedom of movement of goods and service providers in a national market in Australia": s 3.

12. Part 3 of the *Mutual Recognition Act* deals with the ability of a person who is registered in connection with an occupation in a State to carry on an equivalent occupation in another State: s 16(2).

13. Section 17 (in Div 1 of Pt 3) states the "mutual recognition principle" as follows:

> **Entitlement to carry on occupation**
>
> (1) The mutual recognition principle is that, subject to this Part, a person who is registered in the first State for an occupation is, by this Act, entitled after notifying the local registration authority of the second State for the equivalent occupation:
>
> (a) to be registered in the second State for the equivalent occupation; and
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> (b) pending such registration, to carry on the equivalent occupation in the second State.

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3 *Andriotis* [2017] AATA 378 at [135], [137] [**AB 43, 44**]. The AAT's decision was made under s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), exercising the powers of the VBA.

4 *Andriotis* [2017] AATA 378 at [140], [142] [**AB 44, 45**].

5 *Andriotis* [2018] FCAFC 24 at [41]-[42] (Flick J) [**AB 88**], [108], [125] (Bromberg and Rangiah JJ) [**AB 105, 109-110**].

(2) However, the mutual recognition principle is subject to the exception that it does not affect the operation of laws that regulate the manner of carrying on an occupation in the second State, so long as those laws:

(a) apply equally to all persons carrying on or seeking to carry on the occupation under the law of the second State; and

(b) are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation.

14. Section 19 (in Div 2 of Pt 3) provides for the lodgement of a written notice to the local registration authority. The notice must contain specified information and make statements on specified issues relating to the person's registration in the first State: s 19(2). The person lodging the notice must consent to the making of inquiries of and the exchange of information with the authorities of any State regarding the person's activities in the relevant occupation or otherwise regarding matters relevant to the notice: s 19(2)(h). Local registration authorities have an obligation to furnish any information about registered persons that is reasonably required by the local registration authority of another State: s 37.

15. Section 20 deals with the "entitlement" to registration. It relevantly provides:

Entitlement to registration and continued registration

(1) A person who lodges a notice under section 19 with a local registration authority of the second State is entitled to be registered in the equivalent occupation, as if the law of the second State that deals with registration expressly provided that registration in the first State is a sufficient ground of entitlement to registration.

(2) The local registration authority may grant registration on that ground and may grant renewals of such registration.

(3) Once a person is registered on that ground, the entitlement to registration continues, whether or not registration (including any renewal of registration) ceases in the first State.

(4) Continuance of registration is otherwise subject to the laws of the second State, to the extent to which those laws:

(a) apply equally to all persons carrying on or seeking to carry on the occupation under the law of the second State; and

(b) are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation.

...

(6) This section has effect subject to this Part.

16. Under s 21(1) registration must be granted within one month. However, s 21(3) provides that "the local registration authority **may**, subject to this Part and within one month after the notice was lodged, postpone or refuse the grant of registration"

(emphasis added). If none of those steps is taken, the person is entitled to registration immediately at the end of the one month period and no objection may be taken to the notice on any of the grounds on which refusal or postponement may be effected, "except where fraud is involved": s 21(4).

17. Section 22 provides for postponement of registration, relevantly as follows:

Postponement of registration

(1) A local registration authority may postpone the grant of registration if:

(a) any of the statements or information in the notice as required by section 19 are materially false or misleading; or

(b) any document or information as required by subsection 19(3) has not been provided or is materially false or misleading; or

(c) the circumstances of the person lodging the notice have materially changed since the date of the notice or the date it was lodged; or

(d) the authority decides that the occupation in which registration is sought is not an equivalent occupation.

(2) If the grant of registration has been postponed, the local registration authority may in due course grant or refuse the registration.

18. Section 23 provides for refusal of registration, relevantly as follows:

Refusal of registration

(1) A local registration authority may refuse the grant of registration if:

(a) any of the statements or information in the notice as required by section 19 are materially false or misleading; or

(b) any document or information as required by subsection 19(3) has not been provided or is materially false or misleading; or

(c) the authority decides that the occupation in which registration is sought is not an equivalent occupation and equivalence cannot be achieved by the imposition of conditions.

19. Division 3 sets out "Interim arrangements" that apply after the lodgement of a notice until the grant or refusal of registration. The person who has lodged the s 19 notice is taken to be registered ("deemed registration"): s 25. The person may carry on the occupation subject to the limits of the person's registration in the first State and any conditions applying to the deemed registration in the second State: s 27.

20. In summary, the *Mutual Recognition Act* establishes a scheme that provides for persons carrying on an occupation in one State to obtain registration in the second State, through

notification to the local registration authority in the second State, and then registration by that authority.

(1) Lodgement of a notice does not create an absolute entitlement to registration or to carry on the occupation, because notification alone does not effect registration.

(2) Registration in the second State is subject to the notice and accompanying documents not being materially false or misleading, and subject to the making of inquiries about the person's activities in the relevant occupation.

(3) The circumstances in which registration may be refused include where the notice is affected by materially false or misleading information, but are not exhaustively defined.

The scheme thus provides persons registered for an occupation in one State with a presumptive, but neither automatic nor absolute, entitlement to registration in an equivalent occupation in other States.

B. THE APPLICABLE PROVISIONS OF THE *BUILDING ACT*

21. At the time of the VBA's determination, s 170(1) and (2) of the *Building Act* provided:

> (1) The Building Practitioners Board must register an applicant in each category or class applied for if it is satisfied that the applicant—
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> (a) has complied with section 169; and
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> (b) either—
>
> (i) holds an appropriate prescribed qualification; or
>
> (ii) holds a qualification that the Board considers is, either alone or together with any further certificate, authority, experience or examination equivalent to a prescribed qualification; and
>
> (c) is of good character; and
>
> (d) has complied with any other condition prescribed for registration in that category or class.
>
> (2) The Building Practitioners Board may refuse to register an applicant if the requirements of subsection (1) are not met.

22. Mr Andriotis' application for review was lodged on 29 December 2015 and heard on 23 and 24 August 2016 [**AB 7, 46**]. After the hearing, but before the AAT's decision, s 170 was amended by the *Building Legislation Amendment (Consumer Protection) Act*

2016 (Vic) (the **Amending Act**). Relevantly, with effect from 1 September 2016,[6] the Amending Act substituted a new s 170(1)(c): "is a fit and proper person to practice as a building practitioner, having regard to all relevant matters, including the character of the applicant". The AAT's decision was given on 27 March 2017.

23. In its reasons for decision, the AAT applied the earlier version of s 170(1)(c); it did not advert to the amendments to s 170. In the Full Court, Flick J observed that no submission was made that the AAT should have applied s 170(1)(c) as amended.[7]

24. The VBA contends that the AAT correctly applied the *Building Act* as in force at the time of Mr Andriotis' application.[8] Schedule 8 to the *Building Act* contains a series of
10 transitional provisions relating to the Amending Act. None deal with the amendments to s 170,[9] but cl 4(3) provides that applications to the Victorian Civil and Administrative Tribunal for merits review of determinations of the Building Practitioners Board made before the commencement date of the Amending Act may be "continued and completed in accordance with the old provisions".[10] The implication is that the legislative intention with respect to the amendments effected by the Amending Act was that they would not apply to merits reviews of the Board's decisions instituted prior to the commencement of the Amending Act.[11]

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6 See endnotes to the *Building Act*; the amendment to s 170(1)(c) was contained in s 20(2) of the Amending Act.

7 *Andriotis* [2018] FCAFC 24 at [31] [**AB 84**].

8 In any event, if the AAT should have applied the *Building Act* as in force at the time of its decision, it makes no difference in the circumstances of this case. "Character" remains a mandatory consideration under the substituted s 170(1)(c), and the AAT had made a positive finding that Mr Andriotis was **not** of good character: *Andriotis* [2017] AATA 378 at [135], [137] [**AB 43, 44**].

Further, the issue of which version of s 170(1)(c) was applicable arises only with respect to Ground 2, relating to s 17(2) of the *Mutual Recognition Act* and the continued operation of some State laws. The issues raised by Ground 1 are independent of the operation of s 170(1)(c).

9 See *Building Act*, Sch 8. Clause 17 of that Schedule provides that the Governor in Council may make regulations containing provisions of a transitional nature. The *Building (Building Legislation Amendment (Consumer Protection) Act 2016) Transitional Regulations 2017* (Vic) do not contain any regulations relevant to the amendments to s 170 of the *Building Act*. Nor do the transitional provisions deal with reviews by the AAT.

10 Other provisions also reveal an intention that processes commenced under the old provisions are to be continued under those provisions: see cl 4(1) of Sch 8 to the *Building Act*.

11 See also s 14(2) of the *Interpretation of Legislation Act 1984* (Vic).

C. GROUND 1: THE S 20(2) DISCRETION

Section 20(2) confers a discretion to grant or refuse registration

25. Section 20(1) of the *Mutual Recognition Act* provides that a person registered for an occupation in the first State who lodges a notice under s 19 with the local registration authority in the second State is "entitled" to be registered in an equivalent occupation in the second State "as if … registration in the first State is a sufficient ground of entitlement to registration". Section 20(2) then provides that "the local registration authority **may grant** registration on that ground" (emphasis added).

26. In addition, s 21(3) provides that "the local registration authority **may**, subject to [Pt 3], … **refuse** the grant of registration" (emphasis added). Finally, s 22(2) provides that, if registration has been postponed, the local registration authority "**may** in due course **grant or refuse** the registration" (emphasis added).

27. The VBA contends that use of the word "may" in s 20(2) means that the local registration authority (the VBA, and the AAT exercising the same powers) had a discretion to grant, or to refuse to grant, registration to Mr Andriotis. That argument is supported by the additional uses of "may" in ss 21(3) and 22(2).

28. The Full Court rejected the VBA's contention that s 20(2) conferred a discretion. Flick J said:[12]

> Section 20(2) is an enabling provision which confers power upon … a "*local registration authority*" to grant registration by reference to registration that has been secured in [another State]. … Notwithstanding the term "*may*", s 20(2) is not a conferral of a generally expressed discretionary power to refuse registration to a person who has secured registration elsewhere.

29. While the Full Court was correct to conclude that s 20(2) does not confer a generally expressed discretionary power to refuse registration, it erred in not recognising that the section does confer a limited residual discretion, which is to be exercised consistently with the *Mutual Recognition Act*.

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12 *Andriotis* [2018] FCAFC 24 at [68] (Flick J) [**AB 95**]. Bromberg and Rangiah JJ expressed the same conclusion at [108]-[110] [**AB 105**].

30. ***First***, s 33(2A) of the *Acts Interpretation Act 1901* (Cth) provides the starting point for how the word "may" in s 20(2) is to be understood:[13]

> Where an Act assented to after the commencement of this subsection provides that a person, court or body may do a particular act or thing, and the word ***may*** is used, the act or thing may be done at the discretion of the person, court or body.

31. Section 33(2A) has been described as imposing an "absolute rule of construction".[14] The provision confirms the general position at common law[15] and avoids any uncertainty that could arise absent the statutory rule. As explained in the Explanatory Memorandum for the Bill by which s 33(2A) was inserted: "Parliamentary Counsel never draft 'may' as meaning 'shall'. It is proposed to define 'may' as always importing a discretion."[16]

32. Section 33(2A) is subject to s 2(2) of the *Acts Interpretation Act* which provides that the application of its provisions is "subject to a contrary intention".[17] However, a very clear contrary intention would be required to displace s 33(2A) in any legislation enacted after the commencement of that section. The *Mutual Recognition Act* does not disclose such a contrary intention, for reasons addressed at paragraphs 34 to 39 below.

33. ***Second***, and in any event, the use of the word "may" in a statute is ordinarily understood to confer discretion.[18] The appellate courts construing s 20(2) of the *Mutual Recognition Act* in *Re Tkacz; Ex parte Tkacz*[19] and *Re Petroulias*[20] understood it in this way. Words such as "may grant" are ordinarily understood as facultative, so that where

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13 The sub-section was inserted into the *Acts Interpretation Act* by the *Statute Law (Miscellaneous Provisions) Act 1987* (Cth); that is, before the commencement of the *Mutual Recognition Act*.

14 *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 304 [36] (Gaudron J). See also *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 336 [134] (Gummow J).

15 *SCI Operations* (1998) 192 CLR 285 at 304 [36] (Gaudron J). See also *Ward v Williams* (1955) 92 CLR 496 at 505-506.

16 Commonwealth, Senate, Statute Law (Miscellaneous Provisions) Bill 1987, Explanatory Memorandum at 6.

17 Section 2 in its current form was inserted by the *Acts Interpretation Amendment Act 2011* (Cth) with effect from 27 December 2011. Previously, s 2(1) provided: "Except so far as the contrary intention appears, this Act applies to all Acts, including this Act."

18 *Ward* (1955) 92 CLR 496 at 505 (the Court).

19 (2006) 206 FLR 171 at 187 [64]-[65] (Martin CJ, Murray and Templeman JJ). The Full Court of the Supreme Court of Western Australia there referred to the use of "may" rather than the imperative "shall". The conclusion was based on the statutory text and context; their Honours did not refer to s 33(2A) of the *Acts Interpretation Act*.

20 [2005] 1 Qd R 643 at 652 [30] (de Jersey CJ, with Davies JA agreeing at 656 [53]).

the preconditions to the lawful exercise of a power are fulfilled, the decision-maker retains a discretion, subject to the statutory context.[21]

34. The statutory context of s 20(2) confirms that "may" is used in its ordinary sense of conferring a discretion:

(1) The *Mutual Recognition Act* uses the contrasting mandatory term "must" in other provisions of Pt 3 that confer functions on the local registration authority: see ss 21(1), 24 and 27(5).[22]

(2) Part 3 of the *Mutual Recognition Act* also uses "may" in other contexts where it necessarily confers a discretion: see, for example, ss 23(2), 27(4), 29(1) and (2), 31(1) and (2), and 33(2).[23]

(3) Other provisions indicate that matters other than those identified in the s 19 notice may be relevant to the exercise of the local registration authority's power to register. Section 19(2)(h) requires the applicant to give consent to "the making of inquiries of, and the exchange of information with, the authorities of any State". Those inquiries are not limited to the matters the subject of the notice, but extend to "the person's activities in the relevant occupation or occupations".[24]

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21 *Commissioner of State Revenue v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 64 (Mason CJ). See also *Kim v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 38 AAR 304 at [19]-[22] (Kiefel J) (Minister retained a "residual discretion" not to cancel a visa under s 134(2) of the *Migration Act 1958* (Cth) even if the statutory conditions for cancellation were satisfied, having regard to the use of the word "may" and the statutory context); *Gribbles Pathology (Victoria) Pty Ltd v Minister for Health and Aged Care* (2000) 106 FCR 1 at 10 [33]-[35] (Finn J) (a provision stating that the Minister "may approve the grant of the licence only if" certain conditions are satisfied under s 23DND(4) of the *Health Insurance Act 1973* (Cth) meant in context that the Minister maintained the discretion to refuse even if the conditions were satisfied).

22 See, eg, *Commissioner for Superannuation v Hastings* (1986) 70 ALR 625 at 631 (Woodward, Keely and Wilcox JJ); *Gribbles* (2000) 106 FCR 1 at 10 [34] (Finn J).

23 See *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645 at 660 [32] (French CJ, Crennan, Kiefel and Bell JJ) ("cognate expressions in a statute should be given the same meaning unless the context requires a different result").

24 As observed by de Jersey CJ in *Re Petroulias* [2005] 1 Qd R 643 at 652 [26]: "That licence assumes the relevance of matters which may fall outside the strict confines of s 19(2)(d) for example. The expression 'information ... regarding the person's activities in the relevant occupation ... or otherwise regarding matters relevant to the notice' is broad, and would embrace the pendency of serious criminal charges alleging among other things dishonesty." See also at 652 [31].

35. ***Third***, the indirect language of s 20(1) in providing that a person who lodges a notice under section 19 with a local registration authority is "entitled to be registered ... as if the law of the second State that deals with registration expressly provided that registration in the first State is a sufficient ground of entitlement to registration" falls short of compelling registration. If s 20(1) had the effect that lodgement of the notice meant that the person **must** be registered (subject only to s 23), s 20(2) would have no work to do.

36. The conclusion that the words "entitled to be registered" do not describe an immediate, unqualified right to registration (accompanied by a correlative duty of the local registration authority) is confirmed by the fact that the whole of s 20 is, by sub-s (6), expressed to be subject to Pt 3. Relevantly, s 23(1) identifies circumstances in which the local registration authority may refuse to register a person. Those circumstances are not stipulated to be exhaustive; nor is there any basis for implying into the statutory regime the proposition that s 23 is an exhaustive statement of the circumstances in which registration may be refused.[25] Contrary to the Full Court's conclusion,[26] allowing for refusal beyond the circumstances of s 23 would not undermine the mutual recognition scheme. Rather, the scheme contemplates that, if a notice that complies with s 19 is lodged, the person is eligible to be registered, subject to disentitling circumstances.[27]

37. ***Fourth***, accepting that the *Mutual Recognition Act* was designed to facilitate "freedom of movement of ... service providers" by making it quicker and easier to obtain registration in other States, legislation "rarely pursues a single purpose at all costs".[28] It cannot be assumed, *a priori*, that the *Mutual Recognition Act* always operates in the way that most favours freedom of movement.

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25 *Re Tkacz* (2006) 206 FLR 171 at 187 [67] (the Court).

26 *Andriotis* [2018] FCAFC 24 at [48] (Flick J) [**AB 89**], [110] (Bromberg and Rangiah JJ) [**AB 105**].

27 Cf *In Re Davis* (1947) 75 CLR 409 at 418 (Starke J), 424 (Dixon J, with Williams J agreeing): a requirement that every candidate approved by the Barristers Admission Board as fit and proper "shall be admitted as a barrister by the Court" was facultative only, and did not mean that "disqualifying circumstances" could be disregarded.

28 *Carr v Western Australia* (2007) 232 CLR 138 at 143 [5] (Gleeson CJ), quoted in *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 632 [40] (the Court).

38. That is underscored by the potentially harmful consequences of such an approach, of which the instant case provides an example. The AAT found, on multiple grounds, including evidence of dishonesty, that Mr Andriotis was not "of good character".[29] If he has an entitlement to be registered as a waterproofer, subject only to s 23 (which may or may not be engaged[30]), and thus to be held out as fit to practise, members of the Victorian public with whom he may deal may suffer harm.

39. The potentially harmful consequences of an interpretation that compels registration where the local registration authority is aware of serious matters bearing on a person's character, including dishonesty, suggest this was not the statutory intention.[31] The preservation of a limited residual discretion is not inconsistent with the effective operation of the scheme; rather, it supports the effective operation of the scheme.

40. This approach to the scheme is supported by the decision of the Court of Appeal of the Supreme Court of Queensland in *Re Petroulias*. The Court held that a Victorian solicitor charged with serious criminal offences involving dishonesty was not entitled to be registered as a solicitor in Queensland. As de Jersey CJ said:[32]

> It is difficult to conceive the legislatures intended a local authority would be obliged to register a person in [the solicitor's] situation …
>
> It would be detrimental to the public interest, and untenably inconvenient, were the legislation to require the local authority to register an applicant in that case, and thereby hold him out as fit to practise in this jurisdiction, pending separate proceedings in the other State to determine, for example, whether his registration should be suspended. That is why the local authority is not by the legislation denied all discretion …

41. To similar effect are the observations of the Full Court of the Supreme Court of Western Australia in *Re Tkacz*.[33]

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29 These included the AAT's conclusion that there were serious doubts as to whether he had any of the experience he claimed to have had (see *Andriotis* [2017] AATA 378 at [130]-[131]); and that he had "admitted that he was not familiar with the *Building Act* or regulations or codes dealing with building" (at [133]) [**AB 42, 43**].

30 *Andriotis* [2018] FCAFC 24 at [69] (Flick J) [**AB 95**], noting that the question of refusal under s 23 was the subject of the VBA's Notice of Contention [**AB 56**], which is to be dealt with by the AAT on remitter.

31 See *Samad v District Court of New South Wales* (2002) 209 CLR 140 at 153-154 [37] (Gleeson CJ and McHugh J) (referring to the undesirable and unintended consequences that would follow if "may" were interpreted to mean "must).

32 *Re Petroulias* [2005] 1 Qd R 643 at 652 [29]-[30] (with Davies JA agreeing at 656 [53]).

33 (2006) 206 FLR 171 at 187-188 [68] (Martin CJ, Murray and Templeman JJ).

42. Contrary to the reasoning of Bromberg and Rangiah JJ,[34] it is not possible to distinguish *Re Petroulias* and *Re Tkacz* on the basis that they concerned the Court's inherent discretion to regulate the admission of legal practitioners. That would lead to the result that there is a discretion under s 20(2) in relation to the registration of legal practitioners, but no other occupations. But there is nothing in the nature of the courts' inherent jurisdiction, or in the terms of the *Mutual Recognition Act*, to suggest s 20(2) operates in this bifurcated way. To the contrary, it is clear from s 18(3) of the *Mutual Recognition Act* that the occupation of legal practitioner is intended to be regulated by that Act, including "admission as a legal practitioner by a court".[35]

10 ***The confined nature of the discretion***

43. The discretion to refuse registration conferred by s 20(2) is not a discretion that is "general" or "unstructured". The VBA does not contend that s 20(2) permits refusal of registration on "any ground".[36] The discretion is a narrow one, confined by the context of the *Mutual Recognition Act*.

44. It is neither possible nor appropriate to define the outer limits of the discretion.[37] However, guidance is obtained from various aspects of the *Mutual Recognition Act*.

45. ***First***, the criteria in s 19(2)(d), (e) and (f) focus on matters reflective of whether a person may have engaged in conduct which attracts disciplinary action or restrictions on the right to practise. For example, the s 19 notice must state that the applicant is not the
20 subject of disciplinary proceedings (including any preliminary investigations or action that might lead to such proceedings): s 19(2)(d). Assume, however, that an inquiry made under s 19(2)(h) shows that the applicant has engaged in conduct likely to result in a disciplinary proceeding, but a proceeding has not yet commenced. That is the type

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34 *Andriotis* [2018] FCAFC 24 at [98] **[AB 102]**.

35 In *Re Tkacz* (2006) 206 FLR 171 at 182 [41] the Legal Practice Board of Western Australia contended that if the *Mutual Recognition Act* was to be interpreted so as to remove the courts' residual jurisdiction in relation to the legal profession then the Act would be invalid because it would "deprive the Supreme Courts of the States of an essential aspect of their character as courts". The Court there held that "it could not be said that a legislative regime which requires a supreme court of a state to recognise and give effect to a determination made by a supreme court of another state with respect to the suitability of an applicant for admission to practice as a legal practitioner so compromises the judicial integrity of the former court as to render it an inappropriate repository of Commonwealth judicial power": at 182 [42]. No constitutional point is taken in this matter, which does not concern a legal practitioner.

36 Cf *Andriotis* [2018] FCAFC 24 at [68] (Flick J) **[AB 95]**, [108] (Bromberg and Rangiah JJ) **[AB 105]**.

37 *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 758 (Dixon J).

of circumstance that a local registration authority may take into account in exercising its limited discretion to refuse to register a person who has given a s 19 notice.

46. ***Second***, the scheme of the *Mutual Recognition Act* demonstrates a concern with the accuracy and reliability of the information in the s 19 notice: the statements and other information in the notice must be verified by statutory declaration (s 19(5)), and registration may be refused if any statement or information in the notice, or any document provided with it, is materially false or misleading (s 23(1)). However, there are certain categories of information that are not addressed in the notice, but may nevertheless be materially relevant to a person's registration in an occupation. For example, registration in the first State may be dependent on completion of certain academic or training qualifications. The local registration authority in the second State may become aware that the document evidencing completion of that qualification, which was relied on to obtain registration in the first State, was false or fraudulently procured. That document is not required to be submitted with the s 19 notice,[38] and no category of information in the notice requires verification of information of this kind,[39] so it would not be open to refuse registration on that basis under the terms of s 23.

47. It is consistent with the scheme of the *Mutual Recognition Act* that the discretion conferred by s 20(2) would enable refusal of registration of a person who, while having completed the notice:

(1) is, the facts show, a potential subject of disciplinary proceedings by reason of his or her conduct or omissions (although the basis may not be known to the first State's registration authority and so not yet investigated);

(2) obtained his or her original registration fraudulently; or

(3) is not of good character.

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38 The only document required to accompany the notice is "the original or a copy of the instrument evidencing the person's existing registration (or, if there is no such instrument, by sufficient information to identify the person and the person's registration)"; and the person must certify in the notice that the accompanying document is the original or a complete and accurate copy of the original: s 19(3) and (4).

39 Thus the situation considered in *Scott v Law Society of Tasmania* [2009] TASSC 12 at [45] (Crawford CJ, Slicer and Evans JJ) of an erroneous statement in respect of s 19(2)(d) of the *Mutual Recognition Act* would not apply. See also *Prothonotary v Comeskey* [2018] NSWCA 18 (concerning s 18 of the *Trans-Tasman Mutual Recognition Act 1997* (Cth), which is the equivalent of s 19).

48. In the Full Court, Bromberg and Rangiah JJ acknowledged the potential problem posed by fraud, recognising that "[t]he legislature cannot be supposed to have intended that a person who has obtained registration in a State through fraud should obtain the benefit of the mutual recognition principle".[40] Their Honours considered that it would be open in such a case for the local registration authority "to refuse the application on the basis that such a person is not eligible to lodge, and has not lodged, 'a notice under section 19' as is required by s 20(1)".[41]

49. Their Honours did not, however, address the source of a power to look behind a s 19 notice which on its face complies with the statutory requirements in the *Mutual Recognition Act*. Nor did they explain why it would be more consonant with the statutory scheme to permit flexibility in what is to be treated as a "notice under s 19" than to recognise that s 20(2) confers a narrow discretion on the part of the local registration authority to refuse registration in circumstances of this kind.

50. Flick J proposed an alternative solution: while the entitlement to registration was not subject to any discretion under s 20(2), it would be subject to "immediate revocation" through the mechanisms of disciplinary action.[42] That approach is artificial and overly technical. It is not apparent how such an approach is consistent with the statutory objective of promoting the goal of freedom of movement of service providers[43] and removing "inefficiencies" in the regulatory regimes for occupations.[44]

51. Nor can it be assumed that disciplinary action under the second State's legislative scheme would be open or effective to respond to conduct occurring prior to registration in the occupation (whether in the first or second State), given that grounds for disciplinary action in State legislation may be expressed by reference to conduct occurring in the context of the practice of the occupation[45] or may require a nexus to the person's status of practitioner of the relevant occupation.[46]

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40 *Andriotis* [2018] FCAFC 24 at [124] [**AB 109**].

41 *Andriotis* [2018] FCAFC 24 at [124] [**AB 109**]

42 *Andriotis* [2018] FCAFC 24 at [51] [**AB 91**].

43 *Mutual Recognition Act*, s 3.

44 Commonwealth, House of Representatives, Mutual Recognition Bill 1992, Explanatory Memorandum at 2 [4].

45 See, eg, *Building Act*, s 179(1)(b)-(f), (i)-(n) as presently in force. It is questionable whether the ground in 179(1)(h) — "the practitioner has obtained the practitioner's registration under this Part or any required insurance on the basis of information or a document that was false or

52. For these reasons, giving "may" in s 20(2) the meaning it is presumed to have by s 33(2A) of the *Acts Interpretation Act* is consistent with the statutory intention, not contrary to it. Indeed, acceptance of the view that there is no discretion beyond the power found in s 23 of the *Mutual Recognition Act* would lead to unacceptable, if not absurd, consequences.

D. GROUND 2: S 17(2) AND THE "MUTUAL RECOGNITION PRINCIPLE"

53. The second ground of appeal relates to the Full Court's construction of the exception to the "mutual recognition principle" in s 17(2) of the *Mutual Recognition Act* (set out at paragraph 13 above). The broad purpose of this exception is to ensure that local laws that regulate the "manner of carrying on an occupation" will apply equally to all persons who are carrying on their occupation in the second State. That is, the exception preserves the operation of certain State laws.

54. Two questions arise. First, does s 17(2) operate to qualify the mutual recognition principle and thus any "entitlement" to registration? Second, if the answer is "yes", is s 170(1)(c) of the *Building Act* a law that falls within the exception in s 17(2), so that it could be applied by the VBA (and the AAT) as a basis for refusing Mr Andriotis' application for registration?

Section 17(2) qualifies the mutual recognition principle

55. Section 17(1) sets out the mutual recognition principle, which is that, "subject to [Pt 3]", a person registered in a State for an occupation is entitled to be registered in other States for the equivalent occupation.

56. Section 17(2) states that "the mutual recognition principle is subject to" an exception which has three elements.

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misleading" could apply where registration has not been obtained under the *Building Act* but by reason of the provisions of the *Mutual Recognition Act*. It is also unclear whether s 179(1)(g) — "the Authority believes on reasonable grounds that the practitioner is no longer a fit and proper person to practise as a building practitioner" — would apply in relation to matters preceding the practitioner's registration or where the Authority did not believe the practitioner to be a fit and proper person at the time of registration. See also *Queensland Building and Construction Commission Act 1991* (Qld), s 74B. Cf the provisions in question in *Comeskey* [2018] NSWCA 18: s 297 of the *Legal Profession Uniform Law* includes, in the definition of professional misconduct, "conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law": see at [297].

46 See, eg, *Building Work Contractors Act 1995* (SA), s 21(1).

(1) First, it only applies to laws that regulate the "manner of carrying on an occupation".

(2) Second, the laws must apply equally to all persons carrying on the occupation.

(3) Third, the laws must not be based on the "attainment or possession of some qualification or experience relating to fitness to carry on the occupation".

57. Section 20 also refers to the exception, but in different terms. It provides, in s 20(4), that once a person obtains registration under s 20(1), the continuance of registration is subject to local laws provided that, first, they apply to all persons carrying on the occupation and, second, the laws are not based on the "attainment of some qualification or experience". The requirement in s 17(2) that the laws regulate the "manner" of carrying on an occupation is missing.

58. In the Full Court, Bromberg and Rangiah JJ held, in effect, that s 17(2) did not qualify s 17(1), nor the entitlement to registration in s 20(1).[47] Their Honours regarded s 17(2) as operating only in the context of laws regulating "the post-registration carrying on of an occupation", dealt with in s 20(4).[48] They concluded that "s 20(4) is intended to give practical expression to the exception contained in s 17(2)".[49] But this construction does not accord with the language of s 17 and its position in the *Mutual Recognition Act*.

59. ***First***, s 17 should be read as a whole, and not approached as if its two sub-sections operate independently. The whole of s 17 is, in its terms, directed to the operation and the ambit of the mutual recognition principle.[50] Sub-section (1) states a principle, and sub-s (2) states that the principle "is subject to the exception" then set out. Section 17(1) also states expressly that it is "subject to this Part". It is only the application of the **whole** of the principle (as defined and limited) that provides the foundation of the "entitlement" to registration and to carry on an occupation.

60. ***Second***, the language of s 17(2)(a) indicates that s 17(2) is intended to have operation in the field of registration, and not simply with respect to the subsequent carrying on of the

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47 *Andriotis* [2018] FCAFC 24 at [103], [106] [**AB 104**].

48 *Andriotis* [2018] FCAFC 24 at [111]-[113] [**AB 105-106**].

49 *Andriotis* [2018] FCAFC 24 at [113] [**AB 106**].

50 This would also have been consistent with Bromberg and Rangiah JJ's finding that the mutual recognition principle "is concerned with registration as well as the ability to carry on an occupation" and that s 17(2) provides an exception "to the mutual recognition principle as set out in Part 3": *Andriotis* [2018] FCAFC 24 at [103] [**AB 104**].

occupation: it extends the exception to laws that apply equally to persons "carrying on **or seeking to carry on** the occupation" (emphasis added).

61. ***Third***, the title of the section, "Entitlement to carry on occupation",[51] suggests that it is the entirety of s 17, comprising the mutual recognition principle and the stated exception to it in s 17(2), that embodies (and regulates) the entitlement to be registered and then to carry on the occupation.

The good character requirement falls within the exception in s 17(2)

62. Bromberg and Rangiah JJ also erred in holding that the "good character" requirement in s 170(1)(c) of the *Building Act* was not properly characterised as a law that regulated the "manner of carrying on an occupation".[52] Their Honours appeared to take the view that a law regulating the manner of carrying on an occupation could only be a law that regulated the post-registration carrying on of the occupation, and not a law regulating registration itself.

63. In reality, a good character requirement may be **both** a prerequisite to carrying on an occupation **and** a description of the manner in which it is to be carried on. The only relevant inquiry is whether the requirement is a law that regulates the manner of carrying on an occupation. The purpose of a good character requirement is to protect the public by ensuring that the practitioner carries on his or her occupation in a professionally appropriate manner.[53] That is a sufficient answer to the question relevantly posed by s 17(2). Whether it might **also** be characterised in some other way is irrelevant.

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51 Which may be considered in the construction process in determining "the scope of a provision": see *Silk Bros Pty Ltd v State Electricity Commission of Victoria* (1943) 67 CLR 1 at 16 (Latham CJ, with Rich J and McTiernan J agreeing).

52 *Andriotis* [2018] FCAFC 24 at [125] [**AB 109-110**]; see also at [95], [113], [115] [**AB 102, 106, 107**]. Flick J's reasoning focused on s 17(2)(b), and did not address whether the good character requirement was a law that regulated the "manner" of carrying on an occupation: at [50]-[51] [**AB 90-91**].

53 See *McBride v Walton* [1994] NSWCA 199 at [22] (Kirby P). See also *Building Act*, s 4(1)(a) (one objective of that Act is "to protect the safety and health of people who use buildings and places of public entertainment").

64. Finally, the Full Court erred in holding that the "good character" requirement was "some qualification or experience", so as to take it outside the operation of the exception by reason of s 17(2)(b).[54]

65. The Full Court relied in part on the fact that, in the definition of "occupation" in s 4(1) of the *Mutual Recognition Act*, "character" is specified as "an example of what it means by 'qualification'".[55] Section 4(1) contains the following definition of "occupation" (emphasis added):

> ***occupation*** means an occupation, trade, profession or calling of any kind that may be carried on only by registered persons, where registration is wholly or partly dependent on the attainment or possession of some qualification (for example, training, education, examination, experience, character or being fit or proper), and includes a specialisation in any of the above in which registration may be granted.

66. It may immediately be noted that this is not a definition of "qualification", and cannot be taken as a definition of "qualification" to encompass character. However, it may also be accepted that the examples given indicate that "qualification", as used in the definition of "occupation", has a broad meaning that encompasses "character". It is well established that cognate expressions in a statute should be given the same meaning unless the context requires a different result.[56] The VBA contends that, in this case, the text and the context **do** indicate that "qualification" in s 17(2)(b) bears a different, and narrower, meaning.

67. ***First***, the text of s 17(2)(b) requires that "qualification" has a narrower meaning than in s 4(1). Section 17(2)(b) refers to laws "not based on the attainment or possession of some **qualification or experience** relating to fitness to carry on the occupation" (emphasis added). That is, "experience" is **distinct from** a "qualification". In contrast, the definition of "occupation" uses "experience" as an example of a qualification: that is, as something that falls within the term "qualification", not something distinct from it. Thus the term "qualification" in s 17(2)(b) **cannot** have the same meaning as the term "qualification" as used in the definition of "occupation".

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54 *Andriotis* [2018] FCAFC 24 at [50]-[51] (Flick J) [**AB 90-91**], [91]-[98] (Bromberg and Rangiah JJ) [**AB 100-102**].

55 *Andriotis* [2018] FCAFC 24 at [92] (Bromberg and Rangiah JJ) [**AB 101**].

56 *Kline* (2013) 249 CLR 645 at 660 [32] (French CJ, Crennan, Kiefel and Bell JJ); *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 92 ALJR 134 at 139 [21] (the Court).

68. ***Second***, the context provided by Pt 3 indicates that the narrower meaning of "qualification" in s 17(2)(b) does not extend to character. Precisely the same phrase — "laws … based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation" — is used in s 20(4), which carves such laws out from applying to a person once registered. If "some qualification or experience" is construed as extending to character requirements, it would produce absurd or unintended consequences, because a person's registration in the second State could never be revoked on the basis that he or she ceased to be of good character.

69. Ultimately, the term "qualification" in s 17(2)(b) must be interpreted in a way that is not entirely consistent with its use in the definition of "occupation" in s 4(1). The term "qualification" has the same meaning in both s 17(2) and s 20(4). A harmonious reading of those sections requires the conclusion that "qualification" in s 17(2)(b) does not encompass requirements as to character. Thus a character requirement in a State law, such as s 170(1)(c) of the *Building Act*, qualifies the mutual recognition principle. A law of that kind continues to apply notwithstanding the *Mutual Recognition Act*, so as to permit refusal of registration.

PART VII: ORDERS

70. The following orders are sought:

    (1) The appeal be allowed.

    (2) Orders 1 and 2 of the Full Court of the Federal Court made on 21 February 2018 be set aside and in their place it be ordered that the appeal be dismissed.

PART VIII: ESTIMATE

71. The appellant estimates that it will require 1.5 hours for oral argument.

Dated: 5 October 2018

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