

VICTORIAN BUILDING AUTHORITY v ANDRIOTIS (M134/2018)

Court appealed from: Full Court of the Federal Court of Australia
[2018] FCAFC 24

Date of judgment: 21 February 2018

Special leave granted: 17 August 2018

In March of 2015, the Respondent was granted an ‘Endorsed Contract Licence–Waterproofing’ by New South Wales Fair Trading. When he applied for mutual recognition of that Licence by the relevant authority in Victoria, his application was refused on the basis that he was not of good character.

There exists in Australia a scheme for mutual recognition of occupations across State and Territory borders. The legislative objective of recognising qualifications is to be found in the *Mutual Recognition Act 1992* (Cth) (the Recognition Act’). The Recognition Act was enacted pursuant to s 51 (xxxvii) of the Constitution, namely the power of the Commonwealth legislature “*to make laws for the peace, order and good government of the Commonwealth with respect to... matters referred to the Parliament of the Commonwealth by the ...Parliaments of any state or States*”, following an intergovernmental agreement of the Commonwealth, States and Territories.

The “principal purpose” of the Recognition Act is found in s 3, that being to promote “the goal of freedom of movement of goods and service providers in a national market in Australia.”

Section 17 of the Recognition Act provides that:

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*
- b) *Pending such registration, to carry on the equivalent occupation in the second State.*

Section 20 of the Recognition Act provides that 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.*

On 3 June 2015, the Respondent applied to the (then) Building Practitioners Board ('the Board', being the predecessor to the Victorian Building Authority (the 'VBA')) for registration as a 'Domestic Builder Class W – Waterproofing.'

Section 170 of the *Building Act 1993* (Vic) ("the Building Act") provides that:

- 1) *The Building Practitioners Board must register an applicant in each category or class applied for if it is satisfied that the applicant –*
 - a) *has complied with section 169; and*
 - b) *either –*
 - i) *holds an appropriate prescribed qualification; or*
 - ii) *holds a qualification that the Board considers is, either alone or together with any other 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.*

On 30 November 2015, the Board informed the Respondent that the Application for registration had been refused under s 170(2) on the ground that he was not of good character, pursuant to s 170(1)(c) of the Building Act.

The Respondent appealed to the Administrative Appeals Tribunal ('the Tribunal'), who affirmed the decision not to grant the Respondent registration on the basis that he was not of good character. The Tribunal relied on the fact that the Respondent had made a number of false statements during the course of the hearing as well as his lack of 'respect for the law or for technical and professional codes,' as the bases for this finding. The Tribunal held that it was open to make this finding, as the qualification of good character under s 170(1)(c) was a law that regulated the 'manner of carrying on an occupation' and as such was an exemption from the entitlement to mandatory mutual recognition under s 17(1) of the Recognition Act.

The Respondent then 'appealed' to the Federal Court of Australia. (The applicant invoked the original jurisdiction of the Federal Court under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) and the Chief Justice of the Federal Court directed it be heard by the Full Court of that court as there were a number of other applications pending in the Federal Court awaiting its outcome. Thereafter the application was treated in effect as an 'appeal' to the Full Court).

The Full Court, constituted by Flick, Bromberg and Rangiah JJ allowed the appeal, finding that the Tribunal erred in concluding that it was entitled to apply the good

character qualifications required by s 170(1)(c) of the Building Act and made orders remitting the case to the Tribunal for determination in accordance with the law.

The VBA appealed to the High Court. The Appellant argues that whilst the Commonwealth's Recognition 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. The Victorian Building Act required an applicant to satisfy the registration authority, amongst other things, that he or she was "of good character". The Respondent contends that on their proper construction there is no inconsistency between s 17(2) of the Recognition Act and s 170(1)(c) of the Building Act. This is because the latter is a law based on the possession of some qualification relating to the applicant's fitness to carry on the occupation. Accordingly, it can have no operation in relation to interstate applications for registration via the Recognition Act, although it continues to operate in relation to local applicants for registration under the Building Act itself. It follows that an interstate applicant for registration under the Victorian Act via the Recognition Act must establish different matters from a local applicant; the two statutes are different but parallel paths to the same destination.

The grounds of appeal are:

1. That the Full Court erred in holding that s 20(2) of the *Mutual Recognition Act 1992* (Cth) did not permit a local registration authority to refuse to register the Respondent, a person registered as a waterproofing technician in New South Wales, for an equivalent occupation under the *Building Act 1993* (Vic) in circumstances where the authority found the Respondent not to be of good character.
2. That the Full Court erred in holding that:
 - a. The exception to the mutual recognition principle in s 17(2) of the *Mutual Recognition Act 1992* (Cth) does not qualify the 'entitlement' to be registered under s 20(1);
 - b. The 'good character' requirement in s 170(1)(c) of the *Building Act 1993* (Vic) is not a law regulating the 'manner' of carrying out the occupation of building practitioner within the meaning of s 17(2); and
 - c. The 'good character' requirement is a law based on 'the attainment or possession of some qualification or experience relating to fitness to carry on the occupation' within the meaning of s 17(2)(b).

The Appellant has filed a Notice of a constitutional matter. None of the Attorneys-General has intervened in response to that Notice.