

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY



On appeal from the Full Court of the Federal Court of Australia

B E T W E E N:

RUDY FRUGTNIET

Appellant

-and-

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION

Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

This outline is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

1. The Full Federal Court concluded that the Tribunal is permitted, when reviewing a decision made by the ASIC under s 80(1)(f) of the *NCCP Act*, to take into account spent convictions that ASIC was bound to disregard in making the decision being reviewed.
 - a. The Full Court reasoned that this followed from the ordinary meaning of s 85ZZH(c) of the *Crimes Act*.
 - b. The Full Court also reasoned that there is no inconsistency between s 85ZZH(c) of the *Crimes Act* and s 43 of the *AAT Act* that requires resolution, relying on the principle in *Drake*¹ that the task for the Tribunal is to determine whether the original decision was correct on the material before the Tribunal.

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589.

2. Determining the concurrent operation of two statutes of the same legislature involves a two-stage process. First, any uncertainty in each statute must be resolved. Second, any inconsistency requiring resolution can then be discerned.²
3. Section 80 of the *NCCP Act* empowers ASIC to make a banning order. The exercise of power under s 80(1)(f) is subject to the mandatory considerations found in s 80(2). The mandatory considerations are subject to the limitations in Part VIIC of the *Crimes Act*.
4. Part VIIC of the *Crimes Act* required ASIC to disregard the Appellant's spent convictions (s 85ZW).
5. The functions and powers of the Tribunal in a review are governed by the *AAT Act*.
 - a. The effect of sections 25 and 43 of the *AAT Act* are that the Tribunal must perform the function of the original decision-maker (here, ASIC) in accordance with the law as it applied to the original decision-maker.³
 - b. Thus, performing a review of ASIC's decision under s 80, the Tribunal was required to disregard the Appellant's spent convictions, abiding by the legal constraint imposed on ASIC by the combined operation of s 80(2) of the *NCCP Act* and s 85ZW of the *Crimes Act*.
 - c. The procedural powers conferred on the Tribunal by ss 40 and 40A of the *AAT Act* do not override the requirements of s 43.⁴ The Tribunal is not permitted to seek or receive evidence under its procedural powers concerning a matter that by law was an irrelevant consideration for the original decision-maker.
 - d. The conclusion reached by the Full Federal Court, that s 85ZZH(c) applied to the Tribunal's determination on review, can only be arrived at by finding an inconsistency between s 43 of the *AAT Act* and s 85ZZH(c) of the *Crimes Act*, and resolving that inconsistency in favour of s 85ZZH(c).

² *Kocic v Commissioner of Police* (NSW) (2014) 88 NSWLR 159 at [13] per Basten J (with whom Leeming JA agreed at [82]).

³ *Drake v Minister for Immigration and Ethnic Affairs*, (1979) 24 ALR 577 at 589, per Bowen CJ and Deane J; *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41 at 45-46, per Smithers J; *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [133] – [134], per Kiefel J.

⁴ *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [142], per Kiefel J.

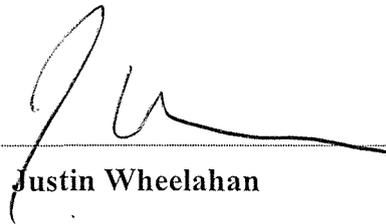
6. Section 85ZZH(c) of the *Crimes Act* should not be construed as implicitly overriding the effect of s 43 of the *AAT Act*.
- a. In the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision—unless it is necessary to imply an intention to that effect.⁵ If the later enactment is one of general application, the operation of the two enactments can be reconciled by application of the principle *generalia specialibus non derogant*.⁶
- b. Two considerations support the application of those principles of construction. The first concerns the generality of Part VIIC of the Crimes Act. The second concerns the anomalies that arise if the contrary construction is adopted.

Dated: 7 February 2019



Michael O'Bryan

Ninian Stephen Chambers



Justin Wheelahan

Owen Dixon West

⁵ *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 138 - 139 [18] per Gummow and Hayne, and at 147 - 148 [47]; *Saraswati v The Queen* (1991) 172 CLR 1 at 17 per Gaudron J.

⁶ *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 276.