

IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY

No: M136 of 2018

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

B E T W E E N:

**RUDY FRUGTNIET**

Appellant

-and-

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**AUSTRALIAN SECURITIES & INVESTMENT COMMISSION**

Respondent

**APPELLANT'S REPLY**

**Part I: Certification**

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

**Part II: Argument in reply**

20 *Procedural powers in the AAT Act*

2. ASIC draws attention to various procedural powers conferred on the Tribunal by the AAT Act, particularly the power to take evidence on oath (s 40(1)) and the power to summons persons to give evidence or produce documents (s 40A).<sup>1</sup> It advances an argument that assumes, by the use of those procedural powers, that the Tribunal has power in all cases to require disclosure of spent convictions and the relevant question is whether and how that power is affected by Part VIIC of the Crimes Act.<sup>2</sup>

3. The assumption is incorrect and the existence of those procedural powers do not bear upon the question raised by the appeal. By application of the principles stated

<sup>1</sup> ASIC written submissions [38].

<sup>2</sup> ASIC written submissions [42].

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in *Drake v Minister for Immigration and Ethnic Affairs*,<sup>3</sup> *Minister for Immigration and Ethnic Affairs v Pochi*<sup>4</sup> and *Shi v Migration Agents Registration Authority*,<sup>5</sup> s 43 of the AAT Act requires the Tribunal to review the original administrative decision subject to the general constraints to which the administrative decision maker was subject, including that regard be had to relevant considerations and that irrelevant considerations be ignored. The procedural powers conferred by s 40 and 40A of the AAT Act do not override the requirements of s 43. As observed by Kiefel J (as her Honour then was) in *Shi*, the issue of relevance “*is not to be confused with the tribunal’s general procedural powers to obtain evidence*”.<sup>6</sup> The Tribunal is not permitted to receive evidence concerning a matter that by law was an irrelevant consideration for the decision maker below.

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4. As stated in the Appellant’s primary submissions, the relevant issue is whether s 85ZZH(c) of the Crimes Act overrides the effect of s 43 of the AAT Act with the result that the Tribunal, on review of an ASIC decision, may take account of spent convictions when ASIC, in making the original decision, was bound by law to disregard them.

#### ***Inconsistency***

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5. ASIC contends that there is no inconsistency between s 43 of the AAT Act and s 85ZZH(c) of the Crimes Act in the context of a review of a decision made under s 80 of the NCCP Act.<sup>7</sup> ASIC’s contention appears to be that the Tribunal’s re-exercise of power under s 80 (or consideration of the re-exercise of power under s 80) differs from ASIC’s exercise of power by reason of the fact that s 80 incorporates Part VIIC of the Crimes Act and that the differential operation of the power does not involve inconsistency.
  6. ASIC’s argument elides a step in the analysis. While the Tribunal’s review is a *de novo* decision, it remains a re-exercise of the power conferred on the original decision maker and is subject to the legal constraints affecting the original decision maker. That follows from ss 25 and 43 of the AAT Act. The function of the Tribunal as stated in s 25(1) of the AAT Act is to review decisions (here a decision of ASIC) made in the exercise of powers conferred (on ASIC) by a relevant

3 (1979) 24 ALR 577 at 589 per Bowen CJ and Deane J.

4 (1980) 44 FLR 41 at 46–47 per Smithers J.

5 (2008) 235 CLR 286 at 325–326, [133] – [134] per Kiefel J.

6 (2008) 235 CLR 286 at [142].

7 ASIC written submissions [58].

enactment (s 80 of the NCCP Act). Under s 43(1), for the purpose of reviewing that decision (of ASIC), the Tribunal exercises the powers and discretions conferred by the enactment on the original decision maker (ASIC). By those provisions, the Tribunal's function and power is confined by the legal constraints applicable to the original decision maker.

7. The foregoing principles were confirmed by this Court in *Shi*.<sup>8</sup> One of the questions considered in that case was whether the Tribunal was permitted to have regard to new facts and circumstances at the time of the review. The Court concluded that the answer to that question depends upon the "*precise nature and incidents of the decision that is the subject of review*".<sup>9</sup>
8. It is common ground that spent convictions were an impermissible consideration for ASIC when exercising power under s 80 of the NCCP Act. Sections 25 and 43 of the AAT Act empowered the Tribunal to review the decision of ASIC under s 80 and, in so doing, to exercise the powers and discretions conferred on ASIC by s 80. In those circumstances, an inconsistency with s 43 would arise if s 85ZZH(c) were to be construed as empowering the Tribunal to have regard to spent convictions.
9. Indeed, ASIC accepts that the Tribunal would not have been permitted to consider spent convictions in the present case if s 80(2) of the NCCP Act had been drafted to provide that ASIC must not have regard "spent convictions" within the meaning of s 85ZM of the Crimes Act.<sup>10</sup> ASIC concedes that, if the section had been so drafted, the constraint would have been applicable to the Tribunal on review and s 85ZZH(c) would have had no application. ASIC's concession correctly recognises that the function and powers given to the Tribunal by ss 25 and 43 of the AAT Act are to review the original decision in accordance with the legal constraints that applied to the original decision maker.
10. In that context, there is no relevant difference between the actual wording of s 80(2) and ASIC's alternative formulation. While s 80(2) refers to Part VIIC of the Crimes Act rather than "spent convictions", the effect of the wording is the same. That is because s 80 empowers ASIC to make a decision and the reference to Part VIIC of the Crimes Act necessarily incorporates the provisions of Part VIIC

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<sup>8</sup> (2008) 235 CLR 286.

<sup>9</sup> (2008) 235 CLR 286 at [43] per Kirby J; see also at [99] per Hayne and Heydon JJ and at [133] and [142] per Kiefel J (with whom Crennan J agreed on that issue at [117]).

<sup>10</sup> ASIC's written submissions at [72].

that are applicable to ASIC. As noted above, s 85ZW is applicable to ASIC, but s 85ZZH(c) is not. Accordingly, s 85ZW is incorporated into s 80(2), but s 85ZZH(c) is not. ASIC's reliance upon the note to s 80(2) as bearing upon the construction of the section<sup>11</sup> is misplaced. The note to s 80(2) is a general description of the operation of Part VIIC of the Crimes Act and the words "in certain circumstances" do not necessarily refer to Division 6 of Part VIIC. The note cannot support a conclusion that the reference to Part VIIC of the Crimes Act in s 80(2) was intended to be a reference to provisions that have no application to ASIC in the making of its decision under s 80.

10 ***Amending the language of s 85ZZH(c) of the Crimes Act***

11. ASIC criticises the Appellant's construction of s 85ZZH(c) on the basis that the Appellant "does not proffer any means by which the language of s 85ZZH(c) is to be read as excluding the Tribunal".<sup>12</sup>
12. The Appellant's construction of s 85ZZH(c) does not require words to be read in or out of the section. The Appellant's construction is based on the *generalia specialibus non derogant* principle. The effect of the principle is to read the general provisions of the later statute as not extending to the specific provisions of the earlier statute, such that the special provisions operate as a proviso to the general provisions.<sup>13</sup> The application of the principle does not require words to be read into the later general provisions. The Appellant's construction of s 85ZZH(c) recognises the conflict with the requirements of s 43 of the AAT Act and leads to a conclusion that s 85ZZH(c) does not implicitly alter the operation of s 43. Section 85ZZH(c) otherwise operates in accordance with its terms. It applies to Federal and State courts and tribunals.
13. For that reason, ASIC's "straw person" rephrasing of s 85ZZH(c)<sup>14</sup> can be rejected.
14. ASIC's contention that the Appellant's construction creates anomalies<sup>15</sup> can be rejected for the same reason. The asserted anomaly arises from ASIC's rephrasing of s 85ZZH(c), not from the Appellant's construction.

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<sup>11</sup> ASIC's written submission [52].

<sup>12</sup> ASIC's written submissions [64].

<sup>13</sup> See *Goodwin v Phillips* (1908) 7 CLR 1 at 14 per O'Connor J; *Smith v Crown* (1994) 181 CLR 338 at 348 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ.

<sup>14</sup> ASIC's written submissions [64].

<sup>15</sup> ASIC's written submissions [68].

15. Similarly, the circumstance postulated at paragraph 70 of ASIC's written submissions does not arise from the Appellant's construction of s 85ZZH(c). If the Minister for Home Affairs is permitted to have regard to spent convictions because of the operation of s 85ZZH(d), on review of that decision the Tribunal is also permitted to have regard to spent convictions by operation of s 43 of the AAT Act. No inconsistency between s 43 and s 85ZZH(c) would arise.

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