Frugtniet v Australian Securities & Investments Commission

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

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

Part VIIC of the *Crimes Act 1904* (Cth)

2. In Part VIIC of the Crimes Act, ss 85ZV and 85ZW are directed to non-disclosure of spent convictions and not taking them into account. Those provisions are expressly stated to be "[s]ubject to Division 6" of Part VIIC. In Division 6, s 85ZZH(c) states that Division 3 does not apply in relation to the disclosure of information to or by, or the taking into account of information by:

> a court or tribunal established under a Commonwealth law, a State law or a Territory law, for the purpose of making a decision, including a decision in relation to sentencing …

3. By reason of s 85ZZH(c) of the Crimes Act, Part VIIC of that Act operates differentially when the decision-making body is the Administrative Appeals Tribunal as compared to when it is ASIC (ASIC's submissions, [53] and [57]).

4. The plain language of s 85ZZH(c) is broad and unambiguous (ASIC's submissions, [28]). The exclusion in that provision applies to all courts and tribunals established under laws of Australia and for the general purpose of making decisions (ASIC's submissions, [29]).

5. When Part VIIC was introduced, the *Administrative Appeals Tribunal Act 1975* (Cth) had been in effect for some 14 years and the Tribunal was the pre-eminent "tribunal established under a Commonwealth law" (ASIC's submissions, [61]). Parliament should be taken to have intended that the exclusion in s 85ZZH(c) would apply to, among other things, the Tribunal and its decision-making on merits review.

6. There are sound policy reasons why Parliament would seek to exclude decision-making of courts and tribunals from the spent convictions regime in Division 3 of Part VIIC: *Kocic v Commissioner of Police* (2014) 88 NSWLR 159, [66], [135] and [138] [**JBA(2) 15: 361-362 and 374-375**] and Australian Law Reform Commission, *Spent Convictions*, Report No. 37, 1987 [**JBA(2) 23: 546-547**] (ASIC's submissions, [62]-[63]).

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The *Administrative Appeals Tribunal Act 1975* (Cth)

7. In reviewing a decision, the task of the Administrative Appeals Tribunal is "to do over again" what the original decision-maker did: *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 315 [100] [**JBA(2) 20: 489**] (ASIC's submissions, [55]).

8. The nature of that task on review of a decision by ASIC to make a banning order is identified by considering the intersecting operation of, in particular, s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) and s 80 of the *National Consumer Credit Protection Act 2009* (Cth): see, for example, *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 312 [93] [**JBA(2) 20: 486**] (ASIC's submissions, [2] and [6]-[44]).

The *National Consumer Credit Protection Act 2009* (Cth)

9. A decision under s 80(1)(f) turns on the state of mind of the decision-maker (ASIC at first instance and then the Tribunal on review). The decision-maker must consider each of the mandatory relevant considerations identified in s 80(2), subject to Part VIIC of the Crimes Act. If the decision-maker considers that a spent conviction is relevant, it must consider it, subject to Part VIIC (ASIC's submissions, [56]).

10. The relevant provisions of the Credit Act, the Crimes Act and the AAT Act engage harmoniously with one another. In particular, s 85ZZH(c) of the Crimes Act is not inconsistent with the operation of s 43 of the AAT Act (ASIC's submissions, [58]-[59]; cf. appellant's submissions, [5] and [36] and appellant's reply submissions, [5]-[10]).

11. Even though:

    a) pursuant to s 43 of the AAT Act, the Tribunal may exercise the power of ASIC under s 80 of the Credit Act; and

    b) in exercising that power, the Tribunal "stands in the shoes" of ASIC and is subject to the same constraint on the exercise of that power;

    the Tribunal, in doing so, is not and does not become ASIC.

12. When the Tribunal exercises the power of ASIC under s 80 of the Credit Act, it is the Tribunal, and not ASIC, that is subject to the constraint on the exercise of that power. That is, it is the Tribunal, and not ASIC, that must have regard to the

matters specified in s 80(2) of the Credit Act and must do so "subject to Part VIIC of the *Crimes Act 1914*".

13. Further, in enacting the Credit Act in 2009, Parliament was cognisant of the operation of Part VIIC of the Crimes Act. Indeed, s 80 and other provisions of the Credit Act make express reference to Part VIIC. Importantly, s 80(2) does not refer specifically to "spent convictions" or the specific statutory provisions in the Crimes Act directed to the disclosure and taking into account of spent convictions. The broader reference in s 80(2) to Part VIIC in its entirety, including Division 6 and s 85ZZH, reflects a deliberate drafting choice about the precise nature of the constraint in s 80(2) and its differential operation for the Tribunal: cf., for example, s 513 of the *Fair Work Act 2009* (Cth) [**JBA(1) 8: 153-154**], s 290 of the *Migration Act 1958* (Cth) [**JBA(1) 9: 184-185**] and s 120 of the *Superannuation Industry (Supervision) Act 1993* (Cth) [**JBA(1) 10: 217-218**] (ASIC's submissions, [72]-[73]).

14. In this matter:

    a) the Tribunal was entitled, in its review of a decision of ASIC to make a banning order against the appellant, to take into account his spent convictions; and

    b) the Full Federal Court was correct to conclude that no error of law attended the Tribunal's decision.

15. The appellant's resort to the principle of *generalia specialibus non derogant* is neither necessary nor appropriate (cf. appellant's reply submissions, [12]). In any event, of the two provisions said by the appellant to be in conflict, s 85ZZH(c) of the Crimes Act is the later and more specific provision, and s 43 of the AAT Act should therefore give way to it to the extent of any inconsistency.

16. The appeal should be dismissed with costs.

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