



## HIGH COURT OF AUSTRALIA

15 May 2019

RUDY FRUGTNIET v AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION  
[2019] HCA 16

Today the High Court unanimously allowed an appeal from a decision of the Full Court of the Federal Court of Australia. The High Court held that the Administrative Appeals Tribunal ("the AAT"), on review of a decision by the Australian Securities and Investments Commission ("ASIC") to impose a banning order, is prohibited from taking into consideration a spent conviction within the meaning of Pt VIIC of the *Crimes Act 1914* (Cth) which ASIC was prohibited from taking into account in making the decision to impose the banning order.

In 1978 and 1997, the appellant was found guilty of offences which at all relevant times constituted spent convictions within the meaning of Pt VIIC of the *Crimes Act*. In 2014, a delegate of ASIC made a banning order against the appellant under s 80(1) of the *National Consumer Credit Protection Act 2009* (Cth) ("the Credit Protection Act") on the basis that ASIC had reason to believe that the appellant was not a fit and proper person to engage in credit activities. On a review of the delegate's decision, the AAT took into consideration the appellant's spent convictions. The appellant appealed to the Federal Court on grounds including that the AAT had erred in law in taking the spent convictions into consideration.

Division 3 of Pt VIIC of the *Crimes Act* has the relevant effect that a person whose conviction is spent is not required to disclose to any Commonwealth authority the fact that the person was charged with or convicted of the offence, and that a Commonwealth authority is prohibited from taking account of the fact that the person was charged with or convicted of the offence. Although a Commonwealth authority includes both the AAT and ASIC, s 85ZZH(c) of the *Crimes Act* provides that Div 3 does not apply in relation to the disclosure of information to, or the taking into account of information by, a tribunal established under a Commonwealth law.

Dismissing an appeal from the judgment of the Federal Court at first instance, the Full Court of the Federal Court held that s 85ZZH(c) of the *Crimes Act* entitled the AAT to take into consideration material which ASIC was prevented from taking into consideration by Div 3 of Pt VIIC. By grant of special leave, the appellant appealed to the High Court.

The High Court held that the jurisdiction of the AAT on a review of a decision made by ASIC under s 80 of the Credit Protection Act is unaffected by s 85ZZH(c) of the *Crimes Act*. Except where altered by statute, the jurisdiction conferred on the AAT is to stand in the shoes of the decision-maker whose decision is under review so as to determine for itself, on the material before it, the decision which can and should be made in the exercise of the power conferred on the primary decision-maker. The AAT exercises the same power as the primary decision-maker, subject to the same constraints, and a consideration which the primary decision-maker must not take into account must not be taken into account by the AAT.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*