IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M134 of 2018

BETWEEN: **VICTORIAN BUILDING AUTHORITY**
Appellant

and

NICKOLAOS ANDRIOTIS
Respondent

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RESPONDENT'S OUTLINE OF ORAL ARGUMENT

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Part I:

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

Part II: Outline of propositions

A. Propositions concerning the power to grant registration

2. Read closely, none of the three cases cited by the appellant is authority for its two central propositions. That is, none demonstrates the exercise of a residual discretion in a registering authority to refuse registration where an applicant has complied with the requirements of the *Mutual Recognition Act 1992* (Cth) (***MRA***).

3. *Re Petroulias* [2005] 1 Qd R 643 (**v 2 tab 20**) was an orthodox application of s. 19 of the *MRA*. Mr Petroulias could not make the declaration required by s. 19(2)(d) of the *MRA*, so could not satisfy the requirements of s. 19 of the *MRA*: *Re Petroulias* [15], [18] - [19] (**RS [41] – [43]**). *Scott v Law Society of Tasmania* [2009] TASSC 12 (**v2 tab 23**) is on all fours with *Re Petroulias.*

4. The applicant in *Re Tkacz; Ex parte Takacz* (2006) 206 FLR 171 (**v 2 tab 21**) could satisfy the requirements of s. 19 of the *MRA.* He was entitled to registration by the delegated registering authority. The Court's consideration concerned whether the *MRA* evinced a legislative intention to restrict or curtail the inherent supervisory jurisdiction of superior Courts over legal practitioners: *Re Tkacz* [44], [57] (**RS [44] – [47]**).

5. The *MRA* creates a regime for registration of builders in Victoria pursuant to the *Building Act 1993* (Vic) (***Building Act***) which operates in parallel with the registration regime in Part 11 of the latter Act (**RS [6], [28]**). An applicant under the *MRA* is entitled to registration *"as if the law of the second State that deals with registration expressly provided that registration in the first State is a sufficient ground for entitlement to registration."* (*MRA* s. 20(1))

6. In requiring that an applicant be registered for the relevant occupation in the first State (*MRA* s. 19(2)(a)), the *MRA* presupposes that the applicant has met the registration requirements of that State, including any probity requirements (**RS [69(a)]**), and that the second State accepts those requirements as sufficient (FFC [120], **RS [64]- [65]**).

7. Having received a valid s. 19 notice, an authority in the second State can register the applicant, postpone registration, or refuse registration. Mutually exclusive conditions precedent to each course are specified in the *MRA*: in particular if the power to register is enlivened, then the power to refuse cannot be (**RS [20]**).

8. Since the power to postpone or refuse registration depends on the applicant for registration satisfying the statutory prerequisites to postponement or refusal, s. 20(2) shows a contrary intention to the statutory rule of construction in s. 33(2A) of the *Acts Interpretation Act 1901* (**RS [16]**), which is consistent with the premise and purpose of the mutual recognition principle (**RS [28]**).

9. The appellant's construction (**RS [22] – [23]**) necessitates reading words into the statute, most egregiously a need to read in s.20(1) of the *MRA* "is a sufficient condition" as "is a necessary *but not sufficient* condition" [emphasis added].

10. The registration authority in the second State is entitled to make enquiries to determine the veracity of the declarations made in the applicant's s. 19 notice (**RS [32] – [33]**). But contrary to the position of the appellant (**Reply [9]**), absent some objective event s. 19 does not require the internal subjective examination by an applicant of the whole of his or her past conduct, nor authorize the second State to revisit the circumstances of registration in the first State.

11. The declaration required by s.19(2)(d) must be confined by the terms of that provision. It deals with the existence of disciplinary proceedings (including preliminary investigations *or action* that might lead to disciplinary proceedings) [emphasis added] in another state. Mr Petroulias and Ms Scott could not make the declaration required by s. 19 of the *MRA* because of the occurrence of such events.

12. The Reply at [9] advances the findings of the AAT as to the respondent's character, and the circumstances in which he came to be registered in New South Wales as preventing the applicant from making a valid s. 19 declaration. It calls in aid subs. 56(a) to (c) and (j) of the *Home Building Act 1989* (NSW) (**v 1 tab 8, 105**) (**NSW Act**).

13. But that proposition begs the question: the availability to the AAT of those finding of fact regarding the respondent's character is a central issue in this appeal.

14. Further, no disciplinary action of even a preliminary nature has been taken against the respondent under s. 56 of the NSW Act, which would be the necessary objective event to affect the validity of his s. 19 notice.

B. Propositions concerning the meaning of "qualification" in the *MRA*

15. Accepting that "qualification" in ss. 17(2) and 20(4) of the *MRA* can be construed more narrowly than in the definition of occupation in s. 4(1) of the *MRA* does not compel a construction of those provisions so narrow as to exclude considerations of an applicant's

character. They are apt to cover consideration of any condition of suitability for registration to carry on a particular occupation (FFC [92]; **RS [56]**).

16. In particular s. 17(2)(b) is broad enough to encompass a characteristic inherent to the applicant, including fitness to carry on the occupation. Thus, reading the word "qualification" in s. 17(2)(b) as limited to the attainment of some technical qualification is inapt (**RS [61]**). For example, a residency requirement in a statute might equally be covered.

C. Propositions concerning discipline of registered building practitioners

17. The effect of s. 20(4)(b) of the *MRA* is to preserve the operation of those laws of the second State that regulate the manner in which a person registered pursuant to the Act carries on the occupation in the second State (**RS [66]**).

18. In the instant case, those registered by the VBA via the path afforded them by the *MRA* remain subject, once registered, to the disciplinary procedure established in Division 3 of Part 11 of the *Building Act* (**RS [70]**). That is, *MRA* registrants are subject to the same disciplinary regime as those registered pursuant to section 170 of the *Building Act.*

19. The *MRA* presupposes that the practitioner amenable to that disciplinary procedure was a fit and proper person at the time he or she was registered, just as it presupposes that he or she was otherwise technically qualified for the occupation. Section 179 of the *Building Act* sets out the grounds on which the VBA might take disciplinary action against a practitioner. The assessment called for by s. 179(1)(g) in particular of the *Building Act* thereby has a temporal aspect. It concerns an assessment based on the conduct of a practitioner following registration (**RS [67] – [70]**).

20. In determining whether the ground in s. 179(1)(h) of the *Building Act* is enlivened, the VBA can properly take into consideration information provided by the applicant under the *MRA* to the registration authority of the first State (**RS [72] – [74]**).

Dated: 12 February 2019

KP Hanscombe **TJD Chalke**

KP Hanscombe