

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-

**AUSTRALIAN SECURITIES & INVESTMENT COMMISSION**

Respondent

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**APPELLANT'S SUBMISSIONS**



**Part I: Certification**

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

**Part II: Issue**

- 20 2. The issue raised by the appeal is whether the Administrative Appeals Tribunal (**Tribunal**) is permitted, when reviewing a decision made by the Australian Securities and Investments Commission (**ASIC**) under s 80(1)(f) of the *National Consumer Credit Protection Act* 2009 (Cth) (**NCCP Act**), to take into account spent convictions that ASIC was bound to disregard in making the decision being reviewed.
3. The issue concerns the interaction of s 43 of the *Administrative Appeals Tribunal Act* 1975 (Cth) (**AAT Act**) and the provisions of Part VIIC of the *Crimes Act* 1914 (Cth) (**Crimes Act**).
- 30 4. In the present case, s 43 of the AAT Act required the Tribunal to review ASIC's decision in accordance with the law as it applied to ASIC. ASIC was required by s

80(2) of the NCCP Act and s 85ZW of the Crimes Act to disregard the Appellant's spent convictions. The Appellant contends that s 43 of the AAT Act required the Tribunal to make its decision subject to the same legal constraint that bound ASIC.

5. However, s 85ZW was expressly subject to s 85ZZH(c) of the Crimes Act, which stated (relevantly) that Division 3 of Part VIIC (which included s 85ZW) did not apply to decisions of a court or tribunal established under Commonwealth law. The issue that arises 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.
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**Part III: *Judiciary Act 1903, section 78B***

6. The Appellant has considered whether a notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth), and considers that a notice is not required because the appeal concerns the intersection of two Commonwealth statutes and the application of the Crimes Act to Commonwealth authorities, ASIC and the Tribunal.
7. The Respondent has issued a s 78B notice for the reason that the provisions of the Crimes Act in issue on the appeal are also applicable to courts and tribunals exercising power under State laws.

20 **Part IV: *Judgment below***

8. The citation of the decision of the Tribunal at first instance is *Frugtniet v ASIC* [2015] AATA 128.
9. The citation of the decision of the Federal Court on appeal is *Frugtniet v ASIC* (2016) 152 ALD 31.
10. The citation of the decision of the Full Federal Court on appeal is *Frugtniet v ASIC* (2017) 255 FCR 96.

**Part V: *Relevant Facts***

11. On 26 June 2014, a delegate of ASIC made a banning order against the Appellant pursuant to s 80(1)(f) of the NCCP Act. The delegate decided that ASIC had

reason to believe that the Appellant was not a fit and proper person to engage in credit activities.<sup>1</sup>

12. The Appellant applied unsuccessfully to the Tribunal for review of the banning order decision.<sup>2</sup>

13. In making its decision, the Tribunal had regard to various historical matters concerning the Appellant.<sup>3</sup> The historical matters recorded by the Tribunal included the following two matters:

10 a. in 1978, the Appellant was convicted in the United Kingdom on 15 counts of handling stolen goods, forgery, and obtaining property by deception and theft (**1978 UK Convictions**);<sup>4</sup> and

b. in 1997, in the Broadmeadows Magistrates' Court, the Appellant was found guilty of obtaining property by deception in relation to the issue of airline tickets (**1997 finding of guilt**).<sup>5</sup>

14. The Tribunal found that the 1978 UK conviction and the 1997 finding of guilt were relevant evidence of dishonest conduct under ASIC's policy guidelines.<sup>6</sup>

15. The historical matters recorded by the Tribunal included a number of other findings and decisions made by administrative bodies or courts concerning the Appellant in the period from 1995 to 2014.<sup>7</sup>

20 16. The Tribunal concluded that it was satisfied that, having regard to the relevant factors in s 80(2) and s 37(2) of the NCCP Act, it had reason to believe the Appellant was not a fit and proper person to engage in credit activities.<sup>8</sup> The Tribunal affirmed the decision of ASIC's delegate to make a permanent banning order against the Appellant.<sup>9</sup>

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<sup>1</sup> Full Court Reasons [2] [CAB 130] and [32] [CAB 137].

<sup>2</sup> Full Court Reasons [3] [CAB 130].

<sup>3</sup> Full Court Reasons [5] [CAB 130].

<sup>4</sup> Full Court Reasons [7] [CAB 131].

<sup>5</sup> Full Court Reasons [9] [CAB 131].

<sup>6</sup> Full Court Reasons [72] and [73] [CAB 147].

<sup>7</sup> Full Court Reasons [6], [8] and [10] – [30] [CAB 130-137].

<sup>8</sup> Full Court Reasons [45] [CAB 141].

<sup>9</sup> Full Court Reasons [1] [CAB 130]; AAT reasons [59] [CAB 26-27]

**Part VI: Argument**

17. As observed by Basten JA in *Kocic v Commissioner of Police (NSW)*<sup>10</sup> (with whom Leeming JA agreed<sup>11</sup>), determining the concurrent operation of two statutes of the same legislature may be seen as involving a two-stage process. The first stage requires the resolution of any uncertainty or ambiguity attending the meaning of each statute. Only then is it possible to discern whether there is some element of inconsistency which requires resolution.<sup>12</sup> His Honour noted the principles of statutory construction applicable to potential conflict between provisions of a single legislature: that in the absence of express words, an earlier statutory provision is not repealed, altered or delegated from by a later provision unless an intention to that effect is necessarily to be implied.<sup>13</sup>

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18. Consistently with those observations, it is convenient to consider the meaning and effect of the relevant statutory provisions in the following order: first, the decision making power exercised by ASIC, and the laws applicable to ASIC in making its decision; second, the function and power of the Tribunal under s 43 of the AAT Act; and third, the meaning and effect of s 85ZZH(c) of the Crimes Act.

***Decision making power exercised by ASIC***

19. ASIC's decision to make a banning order against the Appellant was made pursuant to s 80(1)(f) of the NCCP Act.<sup>14</sup> That section empowers ASIC to make a banning order against a person if ASIC has reason to believe that the person is not a fit and proper person to engage in credit activities.

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20. The exercise of power under s 80(1)(f) is subject to the requirements and limitations found in s 80(2). Relevantly, s 80(2) prescribes various mandatory considerations for ASIC when exercising power under s 80(1)(f). Those mandatory considerations include (i) any criminal conviction of the person within 10 years before the banning order is proposed to be made and (ii) any other matter ASIC

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<sup>10</sup> (2014) 88 NSWLR 159.

<sup>11</sup> Ibid at 177 [82].

<sup>12</sup> Ibid at 163 [13].

<sup>13</sup> Ibid at 164 [14] - [15] citing *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 138 - 139 [18] and 147 -148 [47] per Gummow and Hayne JJ, in turn citing *Saraswati v The Queen* (1991) 172 CLR 1 at 17 per Gaudron J.

<sup>14</sup> Full Court Reasons [2] [CAB 130].

considers relevant. However, those mandatory considerations are expressly made subject to the requirements of Part VIIC of the Crimes Act.

21. Part VIIC of the Crimes Act is titled Pardons, Quashed Convictions and Spent Convictions. Division 3 of Part VIIC addresses the matter of spent convictions, which are defined by s 85ZM(2). In the proceeding below, it was not disputed that the 1978 UK convictions and the 1997 finding of guilt were spent convictions within the meaning of Part VIIC of the Crimes Act.<sup>15</sup>

10 22. Division 3 of Part VIIC has two operative provisions. First, s 85ZV(2) provides (relevantly) that, subject to Division 6 of Part VIIC, but despite any other Commonwealth law or any Territory law, if a person's conviction of a State offence or a foreign offence is spent, the person is not required, in any State or foreign country, to disclose to any Commonwealth authority in that State or country, for any purpose, the fact that the person has been charged with, or convicted of, the offence. The expression "Commonwealth authority" is defined in s 85ZL to include a body or a tribunal established or appointed for a public purpose by or under a Commonwealth law.

20 23. Second, s 85ZW provides (relevantly) that, subject to Division 6 of Part VIIC, but despite any other Commonwealth law or any State law or Territory law, where under s 85ZV it is lawful for a person not to disclose, in particular circumstances or for a particular purpose, the fact that he or she was charged with, or convicted of, an offence:

a. it is lawful for the person to claim, in those circumstances or for that purpose, that he or she was not charged with, or convicted of, the offence; and

b. anyone else who knows, or could reasonably be expected to know, that s 85ZV applies to the person in relation to the offence shall not, in those circumstances, or for that purpose, take account of the fact that the person was charged with, or convicted of, the offence.

30 24. It is uncontroversial that Division 6 of Part VIIC had no application to the exercise of power by ASIC under s 80(1)(f) of the NCCP Act.

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<sup>15</sup> Full Court Reasons [87] [**CAB 151**].

25. In the proceeding below, it was not disputed that ASIC was precluded by s 85ZW of the Crimes Act from taking into account the 1978 UK convictions and the 1997 finding of guilt when making its decision under s 80(1)(f) of the NCCP Act.<sup>16</sup>

26. The question raised by the appeal below was whether the Tribunal was precluded from taking into account the 1978 UK convictions and the 1997 finding of guilt when reviewing ASIC's decision. The question arose because s 85ZZH(c) of the Crimes Act, within Division 6 of Part VIIC, provides that Division 3 of the Part VIIC does not apply in relation to (relevantly) the taking into account of information by a court or tribunal established under a Commonwealth law, a State  
10 law or a Territory law, for the purpose of making a decision, including a decision in relation to sentencing.

*Review power exercised by the Tribunal*

27. The functions and powers of the Tribunal in a review are governed by the AAT Act. Section 25(1) stipulates that an enactment may provide that applications may be made to the Tribunal for review of decisions made in the exercise of powers conferred by that enactment. Thus, the subject of a review by the Tribunal is a decision made in the exercise of specific powers conferred by an enactment on a decision maker.

28. As noted, ASIC's decision was made under s 80(1)(f) of the NCCP Act. Section  
20 327(1) of the NCCP Act provides for review by the Tribunal of ASIC's decisions made under the NCCP Act (other than certain excluded decisions). Thus, by the operation of s 25(1) of the AAT Act and s 327(1) of the NCCP Act, the Tribunal was empowered to review the decision of ASIC made under s 80(1)(f) of the NCCP Act.

29. Section 43(1) of the AAT Act provides that, for the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:

- a. affirming the decision under review;
- 30 b. varying the decision under review; or

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<sup>16</sup> Full Court Reasons [89] [CAB 151].

- c. setting aside the decision under review and:
  - i. making a decision in substitution for the decision so set aside; or
  - ii. remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.

30. Section 43(6) provides that a decision of a person as varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a person, shall, for all purposes (ignoring irrelevant matters) be deemed to be a decision of that person.

31. Kiefel J (as her Honour then was) explained the meaning and effect of s 43(1) of the AAT Act in the following terms in *Shi v Migration Agents Registration Authority*:<sup>17</sup>

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*“Section 43(1) of the AAT Act provides for the powers that the Tribunal may exercise with respect to matters in respect of which it has jurisdiction. The exercise of the powers conferred by the sub-section is restricted to the Tribunal’s purpose, of reviewing the decision in question. As Sheppard J said in Department of Social Security v Riley, it is not possible to apply s 43(1) to the facts of any case without determining, first of all, what is the decision under review. It may therefore be appreciated that the decision, and the statutory question it answers, should be identified with some precision, for it marks the boundaries of the review.*

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*“Section 43(1) expresses clearly that the Tribunal may exercise all of the powers and discretions conferred upon the original decision-maker. The Tribunal has been said to stand in the shoes of the original decision-maker, for the purpose of its review. In Pochi, Smithers J said that, in reaching a decision on review of a decision of the original decision-maker, the Tribunal should consider itself as though it were performing the function of that administrator **in accordance with the law as it applied to that person.**”*  
(Emphasis added).

32. The reference to *Pochi* was a reference to the decision of the Full Federal Court in *Minister for Immigration and Ethnic Affairs v Pochi*<sup>18</sup>. Although Smithers J was

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<sup>17</sup> (2008) 235 CLR 286 at 325-326 [133] – [134].

<sup>18</sup> (1980) 44 FLR 41 at 46-47.

partly in dissent in the decision, the passage cited has never been doubted and reflects the earlier observations of Bowen CJ and Deane J in *Drake v Minister for Immigration and Ethnic Affairs*<sup>19</sup> concerning the Tribunal that:

“In its review of an administrative decision, it [the Tribunal] is subject to the general constraints to which the administrative officer whose decision is under review was subject, namely, that the relevant power must not be exercised for a purpose other than that for which it exists..., that regard must be had to the relevant considerations, and that matters ‘absolutely apart from the matters which by law ought to be taken into consideration’ must be ignored.”<sup>20</sup>

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33. In the present matter, the Tribunal’s task was to review the decision of ASIC under s 80(1)(f) of the NCCP Act. In doing so, the Tribunal “stood in the shoes” of ASIC and was required to make the relevant decision in accordance with the law as it applied to ASIC.

34. As noted above, by reason of s 80(2) of the NCCP Act, the exercise of power by ASIC under s 80(1)(f) was expressly made subject to the requirements of Part VIIC of the Crimes Act. Part VIIC prevented ASIC from taking into account the 1978 UK convictions and the 1997 findings of guilt (through s 85ZW). That was the law as it applied to ASIC. While s 85ZW was subject to the exclusions stated in Division 6 of Part VIIC, including s 85ZZH(c), that exclusion had no application to ASIC when ASIC was exercising power under s 80(1)(f) of the NCCP Act.

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35. The Tribunal, in conducting a review of ASIC’s decision pursuant to s 43(1) of the AAT Act, was required to act as though it were performing ASIC’s function and was bound by the law as it applied to ASIC. It follows that the Tribunal was prevented, by the combined effect of s 43(1) of the AAT Act and s 85ZW of the Crimes Act, from taking into account the 1978 UK convictions and the 1997 findings of guilt.

#### ***Section 85ZZH(c)***

36. The Full Court found that s 85ZZH(c) authorised the Tribunal to have regard to the Appellant’s spent convictions when reviewing ASIC’s decision under the AAT

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<sup>19</sup> (1979) 24 ALR 577.

<sup>20</sup> Ibid at 589.



Act, even though ASIC was required to disregard them. That conclusion requires s 85ZZH(c) to be read as implicitly overriding the effect of s 43 of the AAT Act. It may be accepted that the Commonwealth can legislate in that manner, altering the legal effect of an earlier enactment (the AAT Act) by a later enactment (Part VIIC of the Crimes Act). However, that conclusion would not readily be drawn where it produces anomalous results. Further, where, as here, the later enactment is one of general application, the operation of the two enactments can be reconciled by application of the maxim *generalia specialibus non derogant*.<sup>21</sup> Consideration of the purpose and history of s 85ZZH supports the application of that maxim in the present circumstances.

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37. Part VIIC of the Crimes Act was enacted by s 10 of the *Crimes Legislation Amendment Act 1989* (Cth). It has broad and general application. It was enacted in response to the Australian Law Reform Commission Report “Spent Convictions”.<sup>22</sup> The general object of the legislation is stated in the Report – addressing the difficulties faced by former offenders arising out of their criminal convictions, balancing the offender’s need to return to full citizenship against the public interest in the prevention and detection of crime and in appropriate decision making in judicial and other contexts.<sup>23</sup> However, as observed by the Full Court below<sup>24</sup>, Part VIIC as enacted departed in several respects from the ALRC recommendations and the ALRC report provides little assistance on the question of construction now raised beyond identifying the general object of the legislation.<sup>25</sup>

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38. The breadth of application of Part VIIC is apparent from its terms. In particular, the intended beneficial provisions of Division 3 (reducing the negative consequences that attach to old [spent] convictions)<sup>26</sup> apply to a broad range of

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<sup>21</sup> cf *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 276, per Fullagar J.

<sup>22</sup> Australian Law Reform Commission, *Spent Convictions*, Report No 37, (1987) (“ALRC Report”).

<sup>23</sup> *Ibid*, p xi.

<sup>24</sup> Full Court Reasons [102] – [103] [CAB 155-156].

<sup>25</sup> The ALRC discussed the proposed exclusion for courts and tribunals in its report. It observed that the rationale for the general obligation to disregard spent convictions has “less force when the decision maker is a court or tribunal. Courts and tribunals apply a well defined and highly structured set of rules in admitting evidence of convictions and determining the weight to be given to the evidence”: [39] at p 24.

<sup>26</sup> cf ALRC Report No 37, p xi.

persons and circumstances bounded by the Commonwealth's legislative powers,<sup>27</sup> including a broad range of "Commonwealth authorities" as defined in s 85ZL. Division 6 provides for exclusions or exceptions to the provisions of Division 3. Those exclusions are also stated in general terms and, in s 85ZZH(c), include courts or tribunals established under Commonwealth law.

39. It is apparent from both the legislative history and text that Part VIIC has general application and is not specifically directed to the circumstance of the Tribunal exercising power under s 43 of the AAT Act. There is nothing in the text or the extrinsic materials that indicates a legislative intention that, in circumstances such as the present, s 85ZZH(c) would override the effect of s 43 of the AAT Act.
40. Part VIIC is able to operate harmoniously with s 43 of the AAT Act in the present circumstances by giving effect to the specific requirements of s 43 of the AAT Act. The function of the Tribunal under s 43 is to review the decision of ASIC in accordance with the law as it applied to ASIC. In carrying out that function, s 85ZZH(c) has no application in the circumstances of this case, because the Tribunal is required to apply the law that applied to ASIC.
41. The Appellant's construction avoids anomalous results. On the contrary construction, where the Tribunal's function is to review a decision "standing in the shoes" of the original decision maker, it would be permitted to have regard to spent convictions even though the original decision maker is prevented by statute from having regard to those matters. If the spent convictions were material to the decision, the review might produce a different outcome by reason of the differing legal requirement being applied to the Tribunal. As discussed further below, this anomalous result is not answered by reference to the principle stated in *Drake*. When reviewing a decision, the Tribunal is permitted to have regard to the evidence before the Tribunal, regardless of whether the evidence was before the original decision maker. However, the Tribunal is not permitted to disregard legal constraints as to relevant evidence that were binding on the original decision maker.

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<sup>27</sup> In respect of convictions of a Commonwealth or Territory offence, the provisions apply generally; in respect of convictions of a State or foreign offence, the provisions apply in respect of Commonwealth authorities: s 85ZV.

42. The anomalous results are highlighted by the provisions of s 43 of the AAT Act. Under s 43(1), one of the decisions that the Tribunal may make is to set aside the decision under review and remit the matter to the original decision maker for reconsideration in accordance with any directions or recommendations of the Tribunal. Where the difference between the Tribunal's decision and ASIC's decision was the relevance of spent convictions, the Tribunal would be constrained from remitting the matter to ASIC because ASIC would remain bound to disregard the spent convictions.

10 43. Further, s 43(6) provides that a decision of a person as varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a person, shall, **for all purposes** (ignoring irrelevant matters) be deemed to be a decision of that person. If s 85ZZH(c) were construed as being applicable to decisions of the Tribunal under s 43(1), the operation of s 43(6) would create a further anomaly. In the present case, had the Tribunal to decided to vary ASIC's decision, or substitute its decision for ASIC's decision, the varied or substituted decision would have been deemed for all purposes to be ASIC's decision, to which s 85ZZH(c) had no application. Thus, s 85ZZH(c) might have applied or not applied, depending on the outcome of the Tribunal's decision.

20 44. These anomalous results are avoided by the Appellant's construction, without detracting from the intended scope of operation of Part VIIC of the Crimes Act.

*Previous authorities*

45. The same or analogous issues were considered by the Federal Court in *Toohey v Tax Agents' Board of Victoria*<sup>28</sup> and by the NSW Court of Appeal in *Kocic*. The arguments advanced by the Appellant on this appeal are consistent with the reasoning of the NSW Court of Appeal majority in *Kocic*.

30 46. In *Toohey*, Middleton J briefly considered the present issue in an analogous context, being a review by the Tribunal of a decision of the Tax Agent's Board under s 251JC(1)(a)(i) of the *Income Tax Assessment Act 1936* (Cth). The argument concerning the application of s 85ZW and s 85ZZH to the Tribunal's review was stated and addressed by his Honour in brief terms, being unnecessary to

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<sup>28</sup> (2007) 171 FCR 291.

the determination of the appeal.<sup>29</sup> His Honour concluded that s 85ZZH(c) applied to the Tribunal when reviewing a decision of the Tax Agent's Board. The decision does not address the issue of construction arising from the intersection of s 43 of the AAT Act and s 85ZZH(c) and, for that reason, is of limited assistance.

47. The decision of the NSW Court of Appeal in *Kocic* directly addresses the issues raised on this appeal, albeit in the context of similar NSW laws. The Commissioner of Police had made a decision refusing to issue a firearms licence to Mr Kocic on the basis that it would be contrary to the public interest, relying on s 11 of the *Firearms Act* 1996 (NSW). The *Criminal Records Act* 1991 (NSW) contained analogous provisions to Part VIIC of the *Crimes Act*. Specifically, s 12 of the *Criminal Records Act* stipulated that, in the application to a person of a provision of an act, a reference to the person's character or fitness is not to be interpreted as permitting or requiring account to be taken of spent convictions. Section 16 provided that s 12 did not apply to proceedings before, or the making of a decision by, a court (which was defined to include a tribunal). A question arose, analogous to the present case, whether the NSW Administrative Decisions Tribunal, when reviewing a decision of the Commissioner to refuse a licence, was permitted to have regard to spent convictions by virtue of s 16 of the *Criminal Records Act* when the Commissioner was not permitted to do so.

48. Basten JA (with whom Leeming JA agreed) concluded that s 16 of the *Criminal Records Act* did not have that operation. His Honour observed that such an operation of s 16 would give rise to anomalous results<sup>30</sup>. The answer to the apparent anomaly lay in an examination of the powers of the NSW tribunal. Section 63 of the *Administrative Decisions Tribunal Act* 1997 (NSW) empowered the NSW tribunal to exercise "all of the functions that are conferred or imposed by any relevant enactment on the administrator who made the decision". Thus, the function of the tribunal was limited to those of the original decision maker (the Commissioner) and was to be exercised according to the same legal principles. The *Criminal Records Act* set the legal parameters for the powers of the Commissioner in dealing with the application for a firearm licence.<sup>31</sup> His Honour concluded that s

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<sup>29</sup> Ibid at 297 [25].

<sup>30</sup> *Kocic v Commissioner of Police (NSW)* (2014) 88 NSWLR 159 at 175 [67].

<sup>31</sup> Ibid at 176-177 [75].

16 of the *Criminal Records Act* would not be construed (“as it were by a side wind”) as altering the scope of the tribunal’s review in the absence of a clear intention that it should have such an operation.<sup>32</sup>

49. White J differed on the operation of s 16 of the *Criminal Records Act*. His Honour considered that s 16 should be construed in accordance with its ordinary meaning.<sup>33</sup> His Honour concluded that s 16 was not a statutory variation on the relevant considerations permitted to be taken into account in making the decision, but was merely a statutory variation on the materials that could be taken into account.<sup>34</sup> In those circumstances, and applying the principle in *Drake* (the question for the Tribunal is whether the decision was the correct or preferable one on the material before the Tribunal, not the material before the original decision-maker), his Honour concluded that there was no inconsistency between s 63 of the *Administrative Decisions Tribunal Act* and s 16 of the *Criminal Records Act*.

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50. The reasoning of the majority in *Kocic* should be preferred. With respect, the distinction drawn by White J between the relevant considerations permitted to be taken into account in making the decision, and the materials that could be taken into account, is artificial and the reliance on *Drake* is misplaced (as discussed further below). The spent convictions were not simply new evidence that was not available to the Commissioner when making his or her decision (in the sense considered in *Drake*); the spent convictions were facts and circumstances of a character that the NSW legislature had determined should be disregarded in the context of certain administrative decisions. Section 12 of the *Criminal Records Act* made them irrelevant considerations at law. The majority was correct in its appreciation that there was potential conflict between the operations of s 63 of the *Administrative Decisions Tribunal Act* 1997 (NSW) and s 16 of the *Criminal Records Act*. The majority was also correct to resolve that conflict in favour of the operation of the specific provision, s 63 *Administrative Decisions Tribunal Act* 1997 (NSW), having regard to the generality of s 16 of the *Criminal Records Act*.

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<sup>32</sup> Ibid at 177 [76].

<sup>33</sup> Ibid at 187 [128].

<sup>34</sup> Ibid at 187 – 188 [129] – [134].

***Reasoning of the Full Federal Court***

51. The Full Court concluded that s 85ZZH(c) of the Crimes Act operated to widen the matters to which the Tribunal could have regard when reviewing the decision of ASIC.<sup>35</sup> The Full Court considered that s 85ZZH(c) should be read according to its ordinary and natural meaning<sup>36</sup> and that that conclusion was supported by:

- a. the principle established in *Drake*;<sup>37</sup>
- b. section 290 of the *Migration Act* 1958 (Cth) and s 513(2) of the *Fair Work Act* 2009 (Cth);<sup>38</sup> and
- c. the (dissenting) reasons of White J in *Kocic*.<sup>39</sup>

10 52. With respect, the principle established in *Drake*, and confirmed by this Court in *Shi*, does not assist in resolving the present question of construction. That principle concerned the nature of the Tribunal's review function as established by the AAT Act. In *Drake*, the Full Court concluded that the function of the Tribunal was an administrative one and the Tribunal was not restricted to the considerations that define the limits of judicial review of administrative decisions. It followed from the nature of the Tribunal's review function that:

20 “The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.”<sup>40</sup>

53. The *Drake* principle does not mean that the Tribunal is free to ignore legal constraints applicable to the original decision maker. So much was expressly stated by Bowen CJ and Deane J in *Drake*. Immediately after stating that the Tribunal may take into account fresh material in making its decision, their Honours also observed that the Tribunal is subject to the general constraints to which the original

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<sup>35</sup> Full Court Reasons [116] [CAB 159].

<sup>36</sup> Full Court Reasons [99] [CAB 154] and [116] [CAB 159].

<sup>37</sup> Full Court Reasons [116] [CAB 159].

<sup>38</sup> Full Court Reasons [99] [CAB 154] and [117] [CAB 159].

<sup>39</sup> Full Court Reasons [118] [CAB 159].

<sup>40</sup> 24 ALR 577 at 589 per Bowen CJ and Deane J.

decision maker is subject, including with respect to matters that the original decision maker is required to disregard.<sup>41</sup>

54. The same point was made by this Court in *Shi*. The Court affirmed the principle stated in *Drake* as a general proposition, that the Tribunal is not confined to the record before the original decision maker. However, the Court noted that the principle stated in *Drake* must give way to statutory limitations governing the original decision maker's decision.<sup>42</sup>

10 55. For those reasons, the principle stated in *Drake* does not assist in resolving the present question of construction. The question in the present matter is not whether the Tribunal can make a *de novo* decision on the material before it (it can). The question is whether, by virtue of s 43 of the AAT Act, the Tribunal is bound by the same legislative constraint that was binding on the original decision maker, ASIC, or whether s 85ZZH(c) ought be construed so as to override that constraint.

20 56. The provisions of the *Migration Act* and the *Fair Work Act* to which the Full Court referred do no assist in the construction of s 85ZZH(c). While in some circumstances a subsequent amending Act may shed light on the meaning of the original words of the enactment,<sup>43</sup> a later amending Act may be based on an erroneous view of the original enactment.<sup>44</sup> Even more caution must be exercised in seeking to construe the provisions of one statute by reference to the provisions of another statute. In any event, the provisions of the *Migration Act* and the *Fair Work Act* to which the Full Court had regard do not assist:

- a. With respect to the *Migration Act*, s 85ZZH(d) states that Division 3 of Part VIIC of the Crimes Act does not apply to a person who makes a decision under the *Migration Act*. By virtue of s 279 of the *Migration Act*, that position is reversed with respect to decisions of the Migration Agents' Registration Authority made under Part 3 of the *Migration Act*. That position is reinforced under s 290(2)(c) which makes express reference to

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<sup>41</sup> 24 ALR 577 at 589 per Bowen CJ and Deane J.

<sup>42</sup> At 301 [46] per Kirby J; at 316 – 316 [99] and [101] per Hayne and Heydon JJ; at 324-325 [133] and [134] per Kiefel J (with whom Crennan J agreed on this issue, at 319 [117]).

<sup>43</sup> *Grain Elevators Board (Vic) v Dumunkle Shire* (1946) 73 CLR 70 at 77 per Latham CJ, 86 per Dixon J.

<sup>44</sup> *Deputy Federal Commissioner of Taxation (SA) v Elders Trustee and Executor Co Ltd* (1936) 57 CLR 610 at 625-6 per Dixon, Evatt and McTiernan JJ.

spent convictions under Part VIIC. None of those provisions assist in addressing the intersection between s 43 of the AAT Act and s 85ZZH(c).

- b. With respect to the *Fair Work Act*, the Fair Work Commission is a tribunal established under a Commonwealth law for the purposes of s 85ZZH(c) of the *Crimes Act*. Accordingly, Division 3 of Part VIIC does not apply in relation to decisions of the Fair Work Commission. Section 512 empowers the FWC to issue an entry permit to a union official if it is satisfied that the official is a fit and proper person. Under s 513(1), the FWC is required to have regard to various matters. Section 513(2) stipulates that, despite s 85ZZH(c) of the *Crimes Act*, Division 3 of Part VIIC applies in relation to the FWC's decision under s 512. Again, none of those provisions assist in considering the interaction of s 43 of the AAT Act and s 85ZZH(c).

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57. With respect to *Kocic*, the reasoning of the majority is more persuasive for the reasons explained above.

### *Relief*

58. The error of law in the Tribunal's decision would result in the decision being set aside if there is a possibility of a different outcome in the absence of error.<sup>45</sup>

59. In the present matter, it may be accepted that the Tribunal reached its decision on the basis of a number of circumstances affecting the Appellant. Nevertheless, it is apparent on the face of the decision that the Tribunal also relied upon the two spent convictions in reaching its decision to impose a ban.<sup>46</sup> The Tribunal also relied on the spent convictions in determining the duration of the banning order, and imposing a permanent ban.<sup>47</sup> The Court is unable to conclude that the spent convictions had no effect on the Tribunal's decision, or that there is no possibility of a different outcome if the spent convictions were disregarded, at least as to the duration of the ban.

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<sup>45</sup> *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 353 per Mason CJ and at 384 per Toohey and Gaudron JJ; *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145 per Mason, Wilson, Brennan, Deane and Dawson JJ.

<sup>46</sup> Tribunal Reasons [38], [40], [50] and [57] [**CAB 20, 21, 24, and 26**].

<sup>47</sup> Tribunal Reasons [59]; [**CAB 26 and 27**].



60. If the appellant is successful on the appeal, the appellant seeks that the costs orders made by the Federal Court on 15 September 2016 and by the Full Federal Court on 12 October 2017 be set aside.

**Part VII: Orders sought**

61. The orders sought are that:

1. The appeal be allowed with costs.
2. The orders of the Full Federal Court made on 12 October 2017<sup>48</sup> be set aside and, in lieu thereof, the following order be made:
  - a) The decision of the Administrative Appeals Tribunal dated 6 March 2015 be set aside and the matter be remitted to the Tribunal for hearing and decision in accordance with the reasons of the Court.
  - b) The order of the Federal Court made on 15 September 2016<sup>49</sup> be set aside.

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**Part VIII: Oral argument**

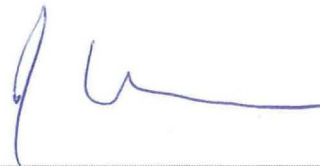
62. It is estimated that the presentation of the Appellant's oral argument will require 1 hour.

Dated: 5 October 2018



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<sup>48</sup> [CAB 177].

<sup>49</sup> [CAB 107].