

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

RUDY FRUGTNIET

APPELLANT

AND

AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION

RESPONDENT

Frugtniet v Australian Securities and Investments Commission
[2019] HCA 16
15 May 2019
M136/2018

ORDER

1. *Appeal allowed.*
2. *Set aside orders 2 and 3 of the orders made by the Full Court of the Federal Court of Australia on 12 October 2017 and, in their place, order that:*

"2. Appeal allowed.
3. *Order 1 of the orders made by Bromberg J on 22 August 2016 and the order made by Bromberg J on 15 September 2016 be set aside and, in their place, order that the decision made by the Administrative Appeals Tribunal on 6 March 2015 be set aside and the matter be remitted to the Administrative Appeals Tribunal for reconsideration in accordance with law."*
3. *The respondent pay the costs of the appellant in this Court.*

On appeal from the Federal Court of Australia

Representation

M H O'Bryan QC with J P Wheelahan for the appellant (instructed by SBA Law)

S B Lloyd SC with R C Knowles for the respondent (instructed by Australian Securities and Investments Commission)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Frugtniet v Australian Securities and Investments Commission

Administrative law (Cth) – Administrative Appeals Tribunal – Nature and scope of review – Where appellant's convictions spent under Pt VIIC of *Crimes Act 1914* (Cth) – Where Div 3 of Pt VIIC of *Crimes Act* prohibited Australian Securities and Investments Commission ("ASIC") from taking into consideration spent convictions in deciding to make banning order – Where review of decision of ASIC by Administrative Appeals Tribunal – Where s 85ZZH(c) of *Crimes Act* provided that Div 3 of Pt VIIC does not apply to Commonwealth tribunal – Whether Administrative Appeals Tribunal entitled to take into consideration on review spent convictions which ASIC was prohibited from taking into consideration.

Words and phrases – "banning order", "fit and proper person", "function of the original decision-maker", "review", "spent conviction", "stand in the shoes of the decision-maker".

Administrative Appeals Tribunal Act 1975 (Cth), ss 25, 43.

Crimes Act 1914 (Cth), Pt VIIC, ss 85ZM, 85ZV, 85ZW, 85ZZH(c).

National Consumer Credit Protection Act 2009 (Cth), ss 80, 327.

1 KIEFEL CJ, KEANE AND NETTLE JJ. Section 80(1)(f) of the *National Consumer Credit Protection Act 2009* (Cth) ("the NCCP Act") provides that the Australian Securities and Investments Commission ("ASIC") may 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"¹. Perforce of s 80(2) of the NCCP Act, and s 85ZW of the *Crimes Act 1914* (Cth), ASIC must not take account of "spent convictions" in determining whether it has reason to believe that the person is not fit and proper². Section 327 of the NCCP Act provides for review by the Administrative Appeals Tribunal ("the AAT") of a decision by ASIC to make a banning order. Section 85ZZH(c) of the *Crimes Act* provides in effect, and so far as is relevant, that s 85ZW of the *Crimes Act* does not apply to a tribunal established under Commonwealth law. The AAT is a tribunal established under Commonwealth law. The question for decision in this appeal is whether, on review of a decision of ASIC to impose a banning order, the AAT may take spent convictions into account. For the reasons which follow, the question should be answered, no, and the appeal should be allowed.

Relevant legislative provisions

2 Section 80(1)(f) of the NCCP Act provides that ASIC may 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".

3 "Credit activity" is defined by s 6 of the NCCP Act in substance as including where the person is carrying on a business of providing or performing the obligations or exercising the rights of a provider of a credit service, consumer leases, or mortgages, or the person is a beneficiary of a guarantee or exercises the rights of a beneficiary of a guarantee, or is a person who engages in prescribed credit activities.

4 Read together, ss 81 and 82 of the NCCP Act provide in substance that the effect of a banning order is that the person against whom it is made must not engage in credit activities for the period of the banning order, subject to any express provision allowing the person to do specified acts that the order would otherwise prohibit.

1 Section 6 of the *National Consumer Credit Protection Act 2009* (Cth) sets out when a person engages in a credit activity.

2 In relation to a conviction, the word "spent" has the meaning given in s 85ZM of the *Crimes Act 1914* (Cth).

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5 Section 80(2) of the NCCP Act relevantly provides in substance that (subject to Pt VIIC of the *Crimes Act*), in making a decision whether to impose a banning order, ASIC must have regard to certain considerations including the criminal convictions of the person within ten years before the banning order is proposed to be made and any other matter ASIC considers relevant.

6 Section 85ZW of the *Crimes Act* (which is in Div 3 of Pt VIIC of that Act) provides in substance and so far as is relevant that, subject to Div 6, but despite any other Commonwealth law, or any State law or Territory law, the fact that a person has been charged with or convicted of an offence that is spent shall not be taken into account by a Commonwealth authority.

7 Section 85ZM provides in substance and so far as is relevant that a "conviction" includes a finding of guilt without entry of conviction and that a conviction is a "spent conviction" if the person was not sentenced to imprisonment for the offence, or was not sentenced to imprisonment for the offence for more than 30 months, and the waiting period for the offence has ended. The "waiting period" is defined in s 85ZL, so far as is relevant, as ten years in the case of a person not dealt with as a minor.

8 Section 85ZZH(c) (which is in Div 6 of Pt VIIC) provides, however, in effect that Div 3 of Pt VIIC does not apply, inter alia, to 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.

9 Section 327 of the NCCP Act provides so far as is relevant that a person affected by a decision made by ASIC under s 80(1)(f) of that Act may make an application to the AAT for review of the decision.

10 Section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act") provides so far as is relevant that for the purpose of reviewing a decision, the AAT 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 affirming, varying, or setting aside the decision under review. If the AAT sets aside the decision under review, it must make a decision in substitution for the decision so set aside or remit the matter for reconsideration in accordance with any directions or recommendations of the AAT.

The facts

11 The appellant has a criminal record which includes being convicted in the United Kingdom in 1978 of 15 counts of handling stolen goods, forgery, and obtaining property by deception and theft (for which he was sentenced to a term

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of imprisonment and served two years) and by a finding (in Australia) by the Broadmeadows Magistrates' Court in 1997 that he committed an offence of obtaining property by deception in relation to the issue of airline tickets (for which no conviction was entered but he was fined \$1,000) ("the spent convictions").

- 12 In determining that the appellant was not a fit and proper person to engage in credit activities, ASIC was precluded by s 80(2) of the NCCP Act from having regard to the spent convictions. On application for review of that decision, the AAT approached the review on the basis that it was entitled to, and it did, take the spent convictions into account because the convictions were "evidence of dishonest conduct that [was] relevant under the policy guidelines".

Proceedings below

- 13 On appeal to the Federal Court of Australia on a question of law as to whether the AAT took into account matters it was obliged to ignore, the primary judge (Bromberg J), adopting the reasoning of Middleton J in *Toohey v Tax Agents' Board of Victoria*³ concerning comparable Victorian legislation, as being, in Bromberg J's view, directly on point and not plainly wrong, held⁴ that the prohibition in s 85ZW of the *Crimes Act* against ASIC taking spent convictions into account did not apply to the AAT in the conduct of a merits review of ASIC's decision, by reason of s 85ZZH(c) of that Act. An appeal to the Full Court of the Federal Court (Reeves, Farrell and Gleeson JJ) was dismissed⁵. In reaching their decision, the Full Court were of the view⁶ that the reasoning of White J, in dissent, in *Kocic v Commissioner of Police, NSW Police Force*⁷, regarding comparable New South Wales legislation, was persuasive and fortified their conclusion that the primary judge did not make any error in concluding that the AAT was entitled to take the spent convictions into account.

3 (2007) 171 FCR 291.

4 *Frugtniet v Australian Securities and Investments Commission* (2016) 70 AAR 153 at 172 [75]-[76].

5 *Frugtniet v Australian Securities and Investments Commission* (2017) 255 FCR 96.

6 *Frugtniet v Australian Securities and Investments Commission* (2017) 255 FCR 96 at 121-122 [116]-[118].

7 (2014) 88 NSWLR 159.

The nature of administrative merits review

14 The enactment of the AAT Act established a new and substantially unprecedented⁸ regime of administrative merits review, distinguished principally by the AAT's jurisdiction to re-exercise the functions of original administrative decision-makers⁹. The question for determination by the AAT on the review of an administrative decision under s 25 of the AAT Act is thus whether the decision is the correct or preferable decision¹⁰. That question is required to be determined on the material before the AAT, not on the material as it was when before the original decision-maker¹¹. As Bowen CJ and Deane J held¹² in *Drake v Minister for Immigration and Ethnic Affairs*, however, and has since been affirmed by this Court in *Shi v Migration Agents Registration Authority*¹³, the AAT is not at large. It is subject to the same general constraints as the original decision-maker and should ordinarily approach its task as though it were performing the relevant function of the original decision-maker in accordance

8 Pearce, "The Australian Government Administrative Appeals Tribunal" (1976) 1 *University of New South Wales Law Journal* 193 at 193. Although some Commonwealth decisions were reviewable by a small number of specialist tribunals prior to 1975, there were considerable differences in the procedures and standard of performance of these bodies: see generally Pearce, *Administrative Appeals Tribunal*, 4th ed (2015), ch 1.

9 *Liedig v Commissioner of Taxation* (1994) 50 FCR 461 at 464, adopting and adapting *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 502; [1963] HCA 41; *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 315 [100] per Hayne and Heydon JJ, 324-325 [134] per Kiefel J; [2008] HCA 31. See also Brennan, "The Future of Public Law – The Australian Administrative Appeals Tribunal" (1979) 4 *Otago Law Review* 286 at 288.

10 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589 per Bowen CJ and Deane J, 599 per Smithers J; *Shi* (2008) 235 CLR 286 at 298 [35] per Kirby J, 314 [98] per Hayne and Heydon JJ, 327 [140]-[141] per Kiefel J.

11 *Drake* (1979) 24 ALR 577 at 589 per Bowen CJ and Deane J; *Shi* (2008) 235 CLR 286 at 298 [35] per Kirby J, 314 [98] per Hayne and Heydon JJ, 328 [143] per Kiefel J.

12 (1979) 24 ALR 577 at 589.

13 (2008) 235 CLR 286.

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with the law as it applied to the decision-maker at the time of the original decision¹⁴.

15 Depending on the nature of the decision the subject of review, the AAT may sometimes take into account evidence that was not before the original decision-maker, including evidence of events subsequent to the original decision¹⁵. But subject to any clearly expressed contrary statutory indication, the AAT may do so only if and to the extent that the evidence is relevant to the question which the original decision-maker was bound to decide; really, as if the original decision-maker were deciding the matter at the time that it is before the AAT. The AAT cannot take into account matters which were not before the original decision-maker where to do so would change the nature of the decision or, put another way, the question before the original decision-maker¹⁶. As Kiefel J observed¹⁷ in *Shi*, identifying the question raised by the statute for consideration will usually determine the facts that may be taken into account in connection with the decision. The issue is one of relevance, to be determined by reference to the elements of the question necessary to be addressed in reaching a decision¹⁸.

Construction of the *National Consumer Credit Protection Act 2009* (Cth)

16 In this matter, the question which ASIC was required to decide under s 80(1)(f) of the NCCP Act was whether, having regard to the range of considerations specified in s 80(2), which, perforce of s 85ZW of the *Crimes Act*, excluded spent convictions, the appellant was not a fit and proper person to engage in credit activities.

14 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 670-671 per Smithers J; *Shi* (2008) 235 CLR 286 at 325 [134] per Kiefel J; see also *Liedig* (1994) 50 FCR 461 at 464, adopting and adapting *Mobil Oil Australia* (1963) 113 CLR 475 at 502.

15 *Freeman v Secretary, Department of Social Security* (1988) 19 FCR 342 at 344-345; *Hospital Benefit Fund of Western Australia Inc v Minister for Health, Housing and Community Services* (1992) 39 FCR 225 at 234.

16 *Freeman* (1988) 19 FCR 342 at 344-345; *Hospital Benefit Fund* (1992) 39 FCR 225 at 234; *Shi* (2008) 235 CLR 286 at 327-329 [142]-[145] per Kiefel J.

17 (2008) 235 CLR 286 at 327 [142].

18 *Shi* (2008) 235 CLR 286 at 327 [142] per Kiefel J.

17 Subject, therefore, to any clearly expressed contrary legislative intent, the question which the AAT was required to decide on review of ASIC's decision was whether, having regard to the same specified range of considerations, and thus excluding spent convictions, the appellant was not a fit and proper person to engage in credit activities.

18 Section 80(2) of the NCCP Act does not express a clear contrary legislative intent. The stipulation in s 80(2) that the criteria to which ASIC must have regard is "subject to Part VIIC of the *Crimes Act 1914*" is, in terms, directed only to ASIC; and so, in effect, says nothing about an AAT merits review of ASIC's decisions. As was earlier noticed, AAT merits review of ASIC's decisions under s 80(1) is separately provided for in s 327 of the NCCP Act; and s 327 also says nothing about the criteria to which the AAT may have regard in the conduct of the review.

19 It is necessarily implicit in the stipulation in s 80(2) of the NCCP Act that the criteria to which ASIC must have regard is subject to Pt VIIC of the *Crimes Act* only insofar as that Part is capable of application to ASIC. Section 85ZW of the *Crimes Act* is capable of application to ASIC because it specifies that spent convictions are not to be taken into account by a Commonwealth authority, and ASIC is such an authority. But s 85ZZH(c), which qualifies the operation of s 85ZW in relation to courts and tribunals, is incapable of application to ASIC because ASIC is not a court or tribunal.

20 The respondent contended in effect that it is implicit in the stipulation in s 80(2) of the NCCP Act that the criteria to which ASIC must have regard is "subject to Part VIIC of the *Crimes Act 1914*", and, since s 85ZW (which is within Pt VIIC) is subject in its application to courts and tribunals to the operation of s 85ZZH(c), that the statutory purpose of s 80(2) is not only to subject ASIC to the requirements of Pt VIIC insofar as they are capable of application to ASIC but also to subject the AAT in conducting a merits review of ASIC's decision to the requirements of Pt VIIC insofar as they are capable of application to the AAT. It followed, it was submitted, that the AAT can have regard to spent convictions when conducting its merits review of ASIC's decision because of the operation of s 85ZZH(c).

21 Arguably, it is possible to read s 80(2) of the NCCP Act together with s 85ZZH(c) of the *Crimes Act* as having that effect. The implication is obscure but the fact that the Full Court of the Federal Court have so construed the provision, and that other, first instance judges have construed comparable legislation in a similar light, means that it is a possibility which needs to be confronted. The likelihood of that construction, however, needs to be assessed against the background of the long-standing principles concerning the function of an administrative review tribunal in the conduct of merits review of

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administrative decisions, to which reference has been made. Against that background, it is improbable that Parliament would choose a technique of obscure implication in order fundamentally to alter the nature of administrative merits review of a decision made by ASIC under s 80 of the NCCP Act, or, equally, to alter the nature of merits review of any other administrative decision to which the provisions of Pt VIIC of the Crimes Act apply. A fortiori where, as in the case of s 80(2), there is not a word to suggest in any of the extrinsic materials, including the Explanatory Memorandum and Second Reading Speech, a parliamentary intent to the effect that the AAT was to exercise a function other than the function exercised by ASIC. In light of such a tenuous implication, it is more probable that Parliament did not have an intention of changing the nature of administrative merits review of ASIC's decisions in the way contended for by the respondent.

Comparison against other legislation

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As against that, the respondent submitted that it is apparent from other Commonwealth legislation pertaining to specialist decision-makers that, where there is a legislative intent to exclude the operation of s 85ZZH of the *Crimes Act* in respect of a (secondary) decision-maker conducting a merits review, the legislation expressly so provides or specifically precludes the consideration of "spent convictions" as opposed to generally subjecting the decision to the whole of Pt VIIC of the *Crimes Act*. Reference was made in particular to s 290(2) of the *Migration Act 1958* (Cth), which provides in substance that, in considering whether a person is a fit and proper person to be registered as a migration agent, the Migration Agents Registration Authority ("MARA") must take account of any relevant conviction "(except a conviction that is spent under Part VIIC of the *Crimes Act 1914*)"; to s 513 of the *Fair Work Act 2009* (Cth), which provides in substance that, in deciding whether an official is a fit and proper person to be issued with an entry permit, the Fair Work Commission ("the FWC") must take into account any conviction of the person of a relevant criminal offence but that "[d]espite paragraph 85ZZH(c) of the *Crimes Act 1914*, Division 3 of Part VIIC of that Act applies in relation to the disclosure of information to or by, or the taking into account of information by, the FWC for the purpose of making a decision under this Part"; and to s 120(1)(a) of the *Superannuation Industry (Supervision) Act 1993* (Cth) ("the Superannuation Industry Act"), which, so far as is relevant, defines a "disqualified person" in substance as one convicted of an offence in respect of dishonest conduct and provides, in s 120(4), that "Division 3 of Part VIIC of the *Crimes Act 1914* does not apply in relation to the disclosure of information about a conviction of the kind mentioned in paragraph (1)(a), if the disclosure is for the purposes of this Part".

(i) *The Migration Act 1958 (Cth)*

23 Like ASIC, MARA is an original decision-maker. Its decisions under s 290(2) of the *Migration Act* are subject to merits review by the AAT¹⁹. As the respondent contended, the mechanism in s 290(2)(c) of the parenthetical phrase "(except a conviction that is spent under Part VIIC of the *Crimes Act 1914*)" makes plain that MARA may not take spent convictions into account in making such a decision. Contrary to the respondent's submissions, however, the phrase has nothing, other than indirectly, to do with the AAT. Section 279(2) of the *Migration Act*, to which the respondent did not refer, provides that Div 3 of Pt VIIC of the *Crimes Act* applies in relation to MARA "as if it were a Commonwealth authority for the purposes of that Division". One effect of that stipulation is to engage the operation of s 85ZZH(g) of the *Crimes Act* – that being the only explicit exception applicable to Commonwealth authorities – which provides that Div 3 of Pt VIIC of the *Crimes Act* does not apply to a Commonwealth authority "for the purpose of assessing appointees or prospective appointees to a designated position". It follows that Div 3 of Pt VIIC applies in relation to the exercise of MARA's function under s 290 of the *Migration Act* (because that is not a function of assessing appointees or prospective appointees to a designated position) and so precludes MARA's consideration of spent convictions. Conceivably, MARA's decisions are also capable of characterisation as those of "a person" for the purpose of s 85ZZH(d) but, even if that were so, s 279(1)²⁰ would operate to suspend that exception and so again preclude MARA's consideration of spent convictions.

24 What then is the purpose of the express provision in s 290(2)(c) for the exclusion from consideration of spent convictions? Given the complexity of the *Migration Act*, three possibilities present: the express exclusion of consideration of spent convictions is otiose; the express exclusion of spent convictions is included out of an abundance of caution; or the express exclusion of spent convictions is there for another reason. Of those three, the first is not improbable. In light of the previous structure of the legislation and the timing of amendment²¹, it is possible that a previous, similar form of words was carried

19 *Migration Act 1958 (Cth)*, s 306.

20 Which provides that "[d]espite paragraph 85ZZH(d) of the *Crimes Act 1914*, Part VIIC of that Act applies to this Part".

21 Section 290(2) was inserted into the *Migration Act 1958 (Cth)* in close to its present form by the *Migration Legislation Amendment (Migration Agents) Act 1997 (Cth)*. Section 290(2)(c) was identical to s 290(2)(c) of the present provision. The predecessor provisions to s 290(2) of the *Migration Act 1958 (Cth)*, ss 114T (Footnote continues on next page)

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over into its present form without reflecting fully on the effect of s 279. The second possibility is also not improbable, in view of the risk that, in the absence of such an express exclusion, the stipulation in s 279(2) (that Div 3 of Pt VIIC of the *Crimes Act* applies in relation to MARA "as if it were a Commonwealth authority for the purposes of that Division") might be read as meaning that Div 3 of Pt VIIC applies in relation to MARA in the exercise of its functions under s 290 as if MARA were a Commonwealth authority exercising the function of assessing appointees and prospective appointees. The third possibility is far less likely and while it cannot necessarily be excluded, whatever other reason there might be for the express exclusion it surely cannot be to indicate anything about the function of a tribunal exercising merits review of MARA's decision. The legislation is too complex, and in its material respects far too distinct, to bear meaningfully on the construction of s 80(2) of the NCCP Act.

(ii) *The Fair Work Act 2009 (Cth)*

25 The FWC is not directly comparable to ASIC. It is an original administrative decision-maker for the purposes of s 513 of the Fair Work Act whose decisions are subject to appeal to the Full Bench of the FWC on the application of a person aggrieved or the Minister, and subject to merits review by the Full Bench²². But the FWC is also a tribunal established under a law of the Commonwealth and so, but for the express negation of s 85ZZH(c), s 85ZZH(c) would apply to the FWC. The apparent purpose of the express stipulation in s 513(2) of the Fair Work Act that Div 3 of Pt VIIC of the *Crimes Act* applies in relation to the FWC for the purpose of making a decision "[d]espite paragraph 85ZZH(c) of the *Crimes Act 1914*" is, therefore, to limit the otherwise untrammelled generality of the express direction in s 513(1) of the Fair Work Act that the FWC must take into account any conviction of a relevant criminal offence. In effect, the same result is achieved in relation to ASIC's function under s 80(2) of the NCCP Act by the express prohibition in s 80(2) against ASIC having regard to spent convictions without need of reference to s 85ZZH(c) (because s 85ZZH(c) does not apply to ASIC).

(iii) *The Superannuation Industry (Supervision) Act 1993 (Cth)*

26 The Regulator under the Superannuation Industry Act is not directly comparable to ASIC either. The Regulator for relevant purposes is the

and 114V(2) (which would later become ss 292 and 294(2)), were inserted by the *Migration Amendment Act (No 3) 1992* (Cth). At the time of their insertion, the provisions differed substantially from s 290(2) in its present form.

22 *Fair Work Act 2009* (Cth), ss 604(1), 605(1), 607, 613 and 614.

Commissioner of Taxation, whose decisions under relevant provisions of the Superannuation Industry Act are subject to review by the AAT pursuant to s 344(8) of that Act. The apparent purpose of the express stipulation in s 120(4) of the Superannuation Industry Act that Div 3 of Pt VIIC of the *Crimes Act* does not apply to the disclosure of information to the Commissioner of Taxation for the purposes of Pt 15 of that Act is to *prevent* Div 3 of Pt VIIC of the *Crimes Act* otherwise operating according to its terms to prevent the disclosure of spent convictions to the Commissioner. It is not to exclude the operation of s 85ZZH(c), albeit that s 85ZZH(c) is within Pt VIIC, because the Commissioner is not a court or tribunal established under a law of the Commonwealth and so s 85ZZH(c) does not apply to the Commissioner. If s 85ZZH(c) did apply to the Commissioner, there would be no need to *exclude* the operation of Div 3 of Pt VIIC. By contrast, the purpose of s 80(2) of the NCCP Act is to ensure that Div 3 of Pt VIIC does apply, according to its terms, to ASIC in making a decision under s 80(2).

- 27 In short, none of the legislative provisions contained in other Acts to which the respondent referred suggests that the absence of an express stipulation that s 85ZZH(c) does not apply to the AAT in the conduct of a merits review of ASIC's decision under s 80(2) of the NCCP Act implies a legislative intention that s 85ZZH(c) applies to the AAT in the exercise of that function. Each of the provisions to which the respondent referred is, like s 80(2) of the NCCP Act, silent as to the AAT in the conduct of merits review of administrative decisions and implies nothing about the application of s 85ZZH(c) of the *Crimes Act* to the AAT in the exercise of that function.

The reasoning in *Kocic v Commissioner of Police, NSW Police Force*

- 28 It remains to deal with the Full Court's reliance upon the reasoning of White J in *Kocic*²³. In that matter, s 11(3) of the *Firearms Act 1996* (NSW) provided in substance that a firearms licence must not be issued to a person unless the Commissioner of Police was satisfied that the person was a fit and proper person and could be trusted to have possession of firearms without danger to public safety or the peace. Section 12(c)(ii) of the *Criminal Records Act 1991* (NSW) provided in substance that a reference to a person's character or fitness was not to be interpreted as permitting or requiring account to be taken of spent convictions. Section 16(1) of the *Criminal Records Act* provided in effect that s 12 did not apply to proceedings before a "court" (including the giving of evidence) or the making of a decision by a "court". Section 4(1) of the *Criminal Records Act* defined "court" as including a tribunal. Section 75 of the *Firearms*

Act permitted a review by the Administrative Decisions Tribunal²⁴ of a refusal by the Commissioner to issue a licence. Section 63 of the *Administrative Decisions Tribunal Act 1997* (NSW) provided that, in determining an application for review of a reviewable decision, the Tribunal was to decide what the correct and preferable decision was having regard to the material then before it and could exercise all of the functions that were conferred or imposed by any relevant legislation on the administrator who made the decision. So far as is pertinent for present purposes, the question in *Kocic* was whether, on review of a decision of the Commissioner of Police not to issue a firearms licence, s 16(1) of the *Criminal Records Act* permitted the Administrative Decisions Tribunal to have regard to the applicant's spent convictions notwithstanding that the Commissioner had been prevented from doing so by s 12(c)(ii) of the *Criminal Records Act*.

29 Basten JA, with whom Leeming JA agreed²⁵ with additional observations, held²⁶ that it did not. As Basten JA observed²⁷, it presented as "counterintuitive" that an applicant for merits review of an administrative decision should be placed in a more disadvantageous position in relation to spent convictions than when before the original decision-maker. In his Honour's view, such an anomaly was to be avoided by treating the Administrative Decisions Tribunal's functions on review as limited to the functions of the original decision-maker – and therefore to be exercised according to the same legal principles – and by conceiving of s 12(c)(ii) of the *Criminal Records Act* as setting the legal parameters for the Commissioner's powers – and therefore the powers of the Administrative Decisions Tribunal on review of the Commissioner's decision²⁸. On that basis, his Honour concluded that s 16(1) of the *Criminal Records Act* was not to be understood as changing "the ground rules, as it were by a side wind, without any clear intention that it should have such an operation", but rather as having no application to a tribunal undertaking merits review of an administrative decision²⁹.

24 Now the Civil and Administrative Tribunal.

25 *Kocic* (2014) 88 NSWLR 159 at 177 [82].

26 *Kocic* (2014) 88 NSWLR 159 at 177 [76].

27 *Kocic* (2014) 88 NSWLR 159 at 176 [73].

28 *Kocic* (2014) 88 NSWLR 159 at 176-177 [75].

29 *Kocic* (2014) 88 NSWLR 159 at 177 [76].

30 White J, in dissent, reasoned to the contrary³⁰ that the notion that an administrative review tribunal's functions are limited to the functions of the original decision-maker requires qualification. His Honour was of the view that, although the function of an administrative review tribunal undertaking merits review of an administrative decision is frequently spoken of as the tribunal stepping into the shoes of the original decision-maker, it is more accurate to say that the function of the administrative review tribunal is to make the correct decision on the material before it³¹. His Honour observed that the question before the Administrative Decisions Tribunal was not whether the Commissioner made the correct decision on the material before him but that s 16(1) of the *Criminal Records Act* permitted the Administrative Decisions Tribunal to have recourse to a wider range of materials than was before the Commissioner³². White J reasoned³³ that s 16(1) of the *Criminal Records Act* did not purport to vary the relevant considerations or "legal parameters" to be taken into account but merely the materials that could be taken into account in deciding whether the applicant was a fit and proper person according to those considerations. His Honour also rejected³⁴ the idea that s 16(1) of the *Criminal Records Act* as so construed would place an applicant for administrative review in an invidious position. In his Honour's view³⁵, since spent convictions could be taken into account only if an applicant sought review of the Commissioner's refusal to issue a licence, the risk of revelation of a non-disclosed history could not worsen the applicant's position by reason of the Administrative Decisions Tribunal taking into account the history of those spent convictions because the applicant was already in the position of the Commissioner having decided to refuse the licence.

31 The reasoning of Basten and Leeming JJA is to be preferred. Under s 11(3) of the *Firearms Act*, the Commissioner's function was not simply to decide whether an applicant was a fit and proper person but to decide whether the applicant was a fit and proper person having regard to a restricted range of identified considerations which, by reason of s 12(c)(ii) of the *Criminal Records Act*, expressly excluded spent convictions. Contrary to White J's analysis, the

30 Kocic (2014) 88 NSWLR 159 at 188 [132].

31 Kocic (2014) 88 NSWLR 159 at 187 [128].

32 Kocic (2014) 88 NSWLR 159 at 187 [128].

33 Kocic (2014) 88 NSWLR 159 at 188 [134], 189 [140].

34 Kocic (2014) 88 NSWLR 159 at 189 [136].

35 Kocic (2014) 88 NSWLR 159 at 189 [136].

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function of deciding whether a person is a fit and proper person according to a restricted range of considerations is a different function from deciding whether that person is a fit and proper person having regard to a less restricted and thus more expansive range of considerations. If s 16(1) of the *Criminal Records Act* had applied to the Administrative Decisions Tribunal in the conduct of its merits review of the Commissioner's decision, it would have meant that the Administrative Decisions Tribunal was required to decide whether the applicant was a fit and proper person having regard to a less restricted and, therefore, different range of considerations from those to which the Commissioner was permitted to have regard. That would have meant that the Administrative Decisions Tribunal would have been required to discharge a different function from the Commissioner. Evidence of spent convictions could not be regarded as events occurring between the time of the Commissioner's decision and the time of review, to which the Commissioner could have had regard if they had existed at the time of the Commissioner's decision. The fact that they were spent convictions dictated that they occurred long before the Commissioner's decision was made. They were excluded considerations. And, as Basten JA concluded³⁶, the notion of an administrative review tribunal undertaking merits review of an administrative decision by reference to different considerations from those which the original decision-maker is required to take into account or prohibited from taking into account, and so exercising a different function from the administrative decision-maker, is such a substantial departure from established conceptions of administrative decision merits review that it would require a clearly expressed legislative intent to achieve that result. It followed, as his Honour held, that given that there was no such clearly expressed contrary legislative intent, s 16(1) of the *Criminal Records Act* was not to be interpreted as applicable to the Administrative Decisions Tribunal in conducting its merits review of the Commissioner's decision.

32 The majority's reasoning in *Kocic* fortifies the conclusion earlier expressed in these reasons that upon its proper construction s 80(2) of the NCCP Act does not make s 85ZZH(c) of the *Crimes Act* applicable to the AAT in the review of a decision of ASIC under s 80(1) of the NCCP Act. To adopt and adapt Basten JA's words, it is not to be supposed that Parliament intended to make such a profound change to the nature of merits review by a legislative side-wind. The better view is that s 80(2) does not have that effect.

36 *Kocic* (2014) 88 NSWLR 159 at 177 [76].

Kiefel *CJ*
Keane *J*
Nettle *J*

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Conclusion

33 In the result, the appeal should be allowed and orders made in the terms proposed by Bell, Gageler, Gordon and Edelman JJ.

34 BELL, GAGELER, GORDON AND EDELMAN JJ. The question in this appeal is whether a conviction that is spent within the meaning of Pt VIIC of the *Crimes Act 1914* (Cth), and which for that reason cannot be taken into consideration by the Australian Securities and Investments Commission ("ASIC") in deciding to make a banning order against a person on the basis that the person is not a fit and proper person to engage in credit activities under the *National Consumer Credit Protection Act 2009* (Cth) ("the Credit Protection Act"), can be taken into consideration by the Administrative Appeals Tribunal ("the AAT") on a review of the decision of ASIC under the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act"). The answer is that it cannot.

Legislative context

35 Inserted in 1989³⁷, Pt VIIC of the *Crimes Act* is designed "to give people a chance to live down a minor criminal conviction"³⁸. It applies to convictions of offences against Commonwealth, State and Territory laws as well as to convictions of offences against foreign laws³⁹.

36 For the purpose of Pt VIIC, a person is taken to have been convicted of an offence not only if the person has been convicted of the offence, but also if the person has been charged with and found guilty of the offence but discharged without conviction or if the person has not been found guilty of the offence but a court has taken it into account in passing sentence on the person for another offence⁴⁰. The conviction is taken to be spent if the person has been granted a pardon for a reason other than that the person was wrongly convicted of the offence⁴¹. The conviction is also taken to be spent if the person was not sentenced to imprisonment for the offence or if the person was sentenced to imprisonment for the offence for no more than 30 months, provided that in each of those cases a waiting period for the offence has ended⁴². In the ordinary case

37 Section 10 of the *Crimes Legislation Amendment Act 1989* (Cth).

38 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 11 May 1989 at 2545.

39 See s 85ZV of the *Crimes Act*.

40 Section 85ZM(1) of the *Crimes Act*.

41 Section 85ZM(2)(a) of the *Crimes Act*.

42 Section 85ZM(2)(b) of the *Crimes Act*.

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of a person who was tried and convicted as an adult, the waiting period is the period of ten years beginning on the day on which the person was convicted of the offence⁴³.

37 Division 3 of Pt VIIC has the relevant effect that, subject to Div 6 of Pt VIIC and despite any other Commonwealth law, a person whose conviction is spent is not required to disclose the fact that the person has been charged with or convicted of the offence to any Commonwealth authority⁴⁴, and a Commonwealth authority which knows or could reasonably be expected to know that the person is not required to make that disclosure is prohibited from taking account of the fact that the person was charged with or convicted of the offence⁴⁵. A Commonwealth authority, for the purpose of Pt VIIC, includes "a body (whether incorporated or not), or a tribunal, established or appointed for a public purpose by or under a Commonwealth law"⁴⁶, and on that basis includes both ASIC and the AAT.

38 Within Div 6 of Pt VIIC, s 85ZZH(c) provides:

"Division 3 does not apply in relation to the disclosure of information to or by, or the taking into account of information by a person or body referred to in one of the following paragraphs for the purpose specified in relation to the person or body:

...

(c) 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".

39 Chapter 2 of the Credit Protection Act sets out a scheme for the licensing of persons to engage in credit activities. Within Ch 2, Div 2 of Pt 2-4 provides for the making of banning orders prohibiting persons from engaging in credit activities. Section 80(1) provides that ASIC may make a banning order against a person in specified circumstances. Those circumstances include if ASIC has

43 Section 85ZL of the *Crimes Act* (definition of "waiting period").

44 Section 85ZV(1) and (2) of the *Crimes Act*.

45 Section 85ZW(b)(ii) of the *Crimes Act*.

46 Section 85ZL of the *Crimes Act* (definition of "Commonwealth authority").

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reason to believe that the person is likely to contravene any credit legislation or be involved in a contravention of a provision of any credit legislation by another person (para (e)). They also include if ASIC has reason to believe that the person is not a fit and proper person to engage in credit activities (para (f)). Section 80(2) goes on relevantly to provide:

"For the purposes of paragraphs (1)(e) and (f), ASIC must (subject to Part VIIC of the *Crimes Act 1914*) have regard to the following:

...

- (c) any criminal conviction of the person, within 10 years before the banning order is proposed to be made;
- (d) any other matter ASIC considers relevant;

...

Note: Part VIIC of the *Crimes Act 1914* includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them."

40 Section 327(1) of the Credit Protection Act makes general provision for an application to be made to the AAT for review of a decision made by ASIC under the Credit Protection Act. That general provision encompasses an application for review of a decision made by ASIC under s 80.

41 By force of s 25(4) of the AAT Act, the AAT has power to review any decision in respect of which an application is made to it under any Commonwealth Act. Section 43(1) of the AAT Act provides that "[f]or 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". The decision of the AAT can be one affirming the decision under review, varying the decision under review, or setting aside the decision under review and either making a decision in substitution for it or remitting the matter for reconsideration in accordance with any directions or recommendations of the AAT. Section 43(6) has the effect that the decision under review as varied by the AAT, or a decision made by the AAT in substitution for the decision under review, is for all purposes (other than the purposes of applications to the AAT for review or of appeals to the Federal Court of Australia in accordance with s 44 of the AAT Act) deemed to be a decision of the primary decision-maker.

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Factual context and litigious history

42 In 2014, a delegate of ASIC made a banning order against Mr Frugtniet under s 80 of the Credit Protection Act. The delegate made the order having found in terms of s 80(1)(f) that ASIC had reason to believe that Mr Frugtniet was not a fit and proper person to engage in credit activities.

43 Mr Frugtniet applied to the AAT for a review of the delegate's decision. Finding on the material before it that it had reason to believe that Mr Frugtniet was not a fit and proper person to engage in credit activities, the AAT in 2015 made a decision to affirm the decision of the delegate. In reaching that decision, the AAT took into consideration matters of history, two of which involved spent convictions within the meaning of Pt VIIC of the *Crimes Act*. One was that Mr Frugtniet had in 1978 been convicted in the United Kingdom on numerous counts of handling stolen goods, forgery, obtaining property by deception and theft, in respect of which he had been sentenced to a term of imprisonment and served two years. The other was that Mr Frugtniet had in 1997 been found guilty in the Broadmeadows Magistrates' Court of obtaining property by deception in relation to the issue of airline tickets, in respect of which he had been fined without a conviction being recorded.

44 Mr Frugtniet appealed from the decision of the AAT to the Federal Court in accordance with s 44 of the AAT Act on grounds, amongst others, that the AAT had erred in law in taking the spent convictions into consideration. Mr Frugtniet's appeal to the Federal Court was dismissed at first instance by Bromberg J⁴⁷, whose judgment was upheld on Mr Frugtniet's subsequent appeal under s 24 of the *Federal Court of Australia Act 1976* (Cth) by a Full Court comprised of Reeves, Farrell and Gleeson JJ⁴⁸.

45 Both Bromberg J and the Full Court framed the relevant question of law in terms of whether s 85ZZH(c) of the *Crimes Act* operated to preclude the AAT from taking spent convictions into consideration in reviewing the decision of ASIC, and both answered that question in the negative⁴⁹. Fortified by dissenting

47 *Frugtniet v Australian Securities and Investments Commission* (2016) 70 AAR 153.

48 *Frugtniet v Australian Securities and Investments Commission* (2017) 255 FCR 96.

49 *Frugtniet v Australian Securities and Investments Commission* (2016) 70 AAR 153 at 171-172 [73]-[76]; *Frugtniet v Australian Securities and Investments Commission* (2017) 255 FCR 96 at 115 [89].

reasons for judgment in the New South Wales Court of Appeal⁵⁰ in relation to the operation of an equivalent provision in New South Wales legislation⁵¹, the Full Court concluded 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 VIIC⁵².

46 On Mr Frugtniet's appeal by special leave to this Court from the judgment of the Full Court, ASIC seeks support for the Full Court's conclusion in the parenthetical language in the chapeau to s 80(2) of the Credit Protection Act. ASIC argues that, by subordinating the considerations to be taken into account for the purposes of s 80(1)(e) and (f) of the Credit Protection Act to Pt VIIC of the *Crimes Act*, the parenthetical language acknowledges that the effect of s 85ZZH(c) is that Pt VIIC of the *Crimes Act* has a differential operation between ASIC as the primary decision-maker and the AAT conducting a review. ASIC and the AAT are both permitted by s 80(2)(d) of the Credit Protection Act to take into account any matter they consider relevant, so the argument goes, but only ASIC is constrained by Pt VIIC of the *Crimes Act* to leave out of account a conviction that is spent within the meaning of that Part.

The jurisdiction of the AAT

47 Neither the Full Court's construction of s 85ZZH(c) of the *Crimes Act* nor ASIC's construction of the parenthetical language in the chapeau to s 80(2) of the Credit Protection Act can be sustained.

48 Section 80 of the Credit Protection Act is directed solely to the power of ASIC to make a banning order. The parenthetical language in the chapeau to s 80(2) must be read in that context. That language, together with the note to s 80(2), acknowledges that the decision-making power of ASIC is constrained by Pt VIIC of the *Crimes Act*. The parenthetical language says nothing of the decision-making power of the AAT.

49 Section 85ZZH(c) of the *Crimes Act* says nothing more of present relevance than that Div 3 of Pt VIIC of the *Crimes Act* has no application to a

50 *Kocic v Commissioner of Police, NSW Police Force* (2014) 88 NSWLR 159 at 187-190 [128]-[142].

51 Section 16 of the *Criminal Records Act 1991* (NSW).

52 *Frugtniet v Australian Securities and Investments Commission* (2017) 255 FCR 96 at 120-122 [110]-[118].

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tribunal established by statute taking information into account for the purpose of making a decision. The operation of s 85ZZH(c) does not go beyond non-application of Div 3 of Pt VIIC. Section 85ZZH(c) does nothing to alter the statutory jurisdiction of the tribunal. In particular, it does not make a spent conviction relevant to be taken into account in the exercise of that jurisdiction.

50 Understood in this sense, the apparent conflict between s 85ZZH(c) and the AAT's review jurisdiction falls away. The jurisdiction of the AAT, on a review under s 327 of the Credit Protection Act of a decision made by ASIC under s 80 of the Credit Protection Act, is unaffected by s 85ZZH(c) of the *Crimes Act*.

51 That is because, except where altered by some other statute, which has not occurred here, the jurisdiction conferred on the AAT by ss 25 and 43 of the AAT Act, where application is made to it under an enactment, 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 which it considers should, be made in the exercise of the power or powers conferred on the primary decision-maker for the purpose of making the decision under review⁵³. The AAT exercises the same power or powers as the primary decision-maker, subject to the same constraints. The primary decision, and the statutory question it answers, marks the boundaries of the AAT's review. The AAT must address the same question the primary decision-maker was required to address, and the question raised by statute for decision by the primary decision-maker determines the considerations that must or must not be taken into account by the AAT in reviewing that decision⁵⁴. A consideration which the primary decision-maker must take into account in the exercise of statutory power to make the decision under review must be taken into account by the AAT. Conversely, a consideration which the primary decision-maker must not take into account must not be taken into account by the AAT.

52 To accept the argument put forward by ASIC would distort exercise of the powers conferred on the AAT by s 43(1) of the AAT Act for the purpose of reviewing a decision of ASIC under s 80 of the Credit Protection Act: where spent convictions were a relevant factor in the AAT's determination, the AAT could not sensibly remit the matter to ASIC for reconsideration in accordance

53 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 299 [40], 315 [100], 324-325 [134]; [2008] HCA 31.

54 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 327 [142].

with any directions or recommendations of the AAT because ASIC would then be required to ignore the spent convictions; and any decision by the AAT varying or in substitution of ASIC's decision would be deemed by s 43(6) to be a decision of ASIC, even if that varied or substituted decision took into account spent convictions which ASIC was required to ignore.

53 The AAT and the primary decision-maker exist within an administrative continuum⁵⁵. The AAT has no jurisdiction to make a decision on the material before it taking into account a consideration which could not have been taken into account by the primary decision-maker in making the decision under review and which could not be taken into account by the primary decision-maker were the AAT to remit the matter to the primary decision-maker for reconsideration.

54 The decision-making power of ASIC under s 80 of the Credit Protection Act is constrained by Pt VIIC of the *Crimes Act* to preclude ASIC taking spent convictions into account. The decision-making power of the AAT is subject to the same constraint in the exercise of the jurisdiction conferred on it by s 327 of the Credit Protection Act and ss 25 and 43 of the AAT Act.

Orders

55 The appeal must be allowed. Orders 2 and 3 of the orders made by the Full Court of the Federal Court on 12 October 2017 must be set aside. In place of those orders, it is to be ordered that the appeal to that Court be allowed and that order 1 made by Bromberg J on 22 August 2016 and the order made by Bromberg J on 15 September 2016 be set aside. In place of the orders made by Bromberg J, it is to be ordered that the decision made by the AAT on 6 March 2015 be set aside and the matter remitted to the AAT for reconsideration in accordance with law. ASIC must pay the costs of Mr Frugniet in this Court.

55 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 300-301 [45], quoting *Jebb v Repatriation Commission* (1988) 80 ALR 329 at 333-334.