IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M134 of 2018

BETWEEN:

VICTORIAN BUILDING AUTHORITY
Appellant

and

NICKOLAOS ANDRIOTIS
Respondent

APPELLANT'S REPLY

Marlo Baragwanath, Victorian Government Solicitor
Victorian Government Solicitor's Office
Level 25, 121 Exhibition Street
Melbourne VIC 3000

Telephone: 03 8684 0416
Fax: 03 8684 0449
Email: alison.o'brien@vgso.vic.gov.au
Contact: Alison O'Brien / Alice Wharldall (1854891)

PART I: CERTIFICATION

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

PART II: ARGUMENT

A. GROUND 1: THE DISCRETION TO REFUSE TO REGISTER AN APPLICANT

2. It is now apparent that both parties agree that a local registration authority may refuse to register an applicant who has lodged a s 19 notice that contains statements and information that are literally true. That is because Mr Andriotis now accepts that, if an applicant has conducted him- or herself in a manner that "has the potential to attract" disciplinary sanction, the local registration authority may refuse to register the applicant (RS [28]-[29]).[1] The difference between the parties is the source of that power:

   (a) The VBA contends that the source of the power to refuse to register an applicant in these circumstances is the discretion conferred by s 20(2).

   (b) Mr Andriotis contends that the source of the power is s 23(1), which permits refusal where statements or information in the s 19 notice are materially misleading. Mr Andriotis says that, in this regard, the local registration authority in the second State can "look behind" the s 19 notice (RS [38]). He accepts that, if a person's conduct has the potential to attract disciplinary sanction, then the s 19 notice will be materially misleading in relation to the matter specified in s 19(2)(d) — even though it is literally true that the person has not been subject to disciplinary proceedings or any preliminary investigation or action (RS [34]-[35], [39]).

3. Mr Andriotis' submissions accept that the registration provisions in the *Mutual Recognition Act 1992* (Cth) must be construed so that the scheme is both "workable and fit for purpose" (RS [39]) and implicitly acknowledge that a strict and literal interpretation would lead to unworkable results.

4. There are a number of ambiguities and uncertainties in Mr Andriotis' submissions.

   (a) The submissions at times appear to conflate a misleading s 19 notice with a false s 19 notice (eg RS [18], [20], [25], [29], [35]-[39]). It also seems that Mr Andriotis considers a misleading, but literally true, s 19 notice to be "invalid" (RS [35], [39]).

   (b) More importantly, it is not clear how Mr Andriotis' approach to construction would operate in practice. If a person had not been the subject of disciplinary action, but

[1] Although not made express in Mr Andriotis' submissions, the VBA understands that Mr Andriotis' reference to conduct that "has the potential to attract some disciplinary sanction" is directed solely to potential disciplinary sanction in the first State, not the second State.

had engaged in conduct that had the **potential** to attract disciplinary sanction, are they then precluded from lodging a valid notice? Or could they disclose that conduct, so that their literally true s 19 notice is not misleading, and thus ensure that the s 23(1) refusal power is not enlivened? If the latter, then what is the authority in the second State to do with that information? On this construction, it would seem that it cannot evaluate and act on that information: it must register the applicant.

5. Even putting those ambiguities to one side, to interpret ss 19 and 23 in the way suggested by Mr Andriotis involves some departure from the literal terms of s 19.

   (a) Parliament did not provide for an applicant, whether in a s 19 notice or elsewhere, to disclose conduct that could, but has not, given rise to a disciplinary proceeding or other investigative action.

   (b) A failure to disclose conduct which may, but has not yet, become the subject of official action does not logically bear on the accuracy of a s 19(2)(d) statement.

   (c) It will not always be clear to an applicant that particular conduct might lead to disciplinary action or an investigation and thus that they cannot lodge a valid s 19 notice. Nor would it necessarily be clear to an applicant, having regard to the requirements in s 19(2), that they could disclose such conduct.

6. In addition, if the *Mutual Recognition Act* does permit the local registration authority to look behind the s 19 notice in this way, the question arises as to how far this power goes. Mr Andriotis submits that an authority could look behind a s 19(2)(d) statement which is literally true. It would be consistent with this approach that the authority could also look behind a s 19(2)(a) statement that the person is registered for the occupation in the first State. That is, although such a statement may be literally true, if the authority may look behind it, the authority could conclude that the statement is misleading if the person had obtained that registration based on incorrect or misleading information. That is what occurred in this case. Relevantly, the AAT found that information provided to the NSW authority for the original registration, "which Mr Andriotis said was true and correct in a statutory declaration on his application form, on closer examination, has proved to be demonstrably incorrect". In particular, Mr Andriotis said in his NSW application that he was not relying on a process of recognition of prior learning assessment to establish his qualifications, but his oral evidence established the opposite.[2]

---

2 *Andriotis and Building Practitioners Board* [2017] AATA 378 at [127], [129] [**AB 41-42**].

7. As between the VBA's and Mr Andriotis' constructional approaches, the VBA contends that its approach is to be preferred. A construction which acknowledges that, because the local registration authority "may grant registration" under s 20(2), it has a discretionary power to refuse registration is a more straightforward reading of the statutory language. It avoids the ambiguities and uncertainties in Mr Andriotis' construction identified above. It is also consistent with the mutual recognition principle that a local registration authority has a discretion to refuse to register an applicant if he or she has engaged in conduct that would have led to refusal of registration or to disciplinary action by the local registration authority in the first State had the conduct been known.

10 8. Nor, contrary to RS [22], does the VBA's construction require "substantial changes" to the language of ss 20 and 21. In particular,[3] the asserted change to s 21(1) would not be required given ss 21(3) and 21(4); and the assertion that s 21(4) would be "ignored" misunderstands the VBA's submissions. Section 21 is a provision dealing with the time by which the local registration authority must make one of the three decisions open to it, and will operate according to its terms consistently with the VBA's construction.

9. Alternatively, even if Mr Andriotis' construction is accepted, the AAT nonetheless had a power to refuse to register Mr Andriotis. The AAT found that Mr Andriotis was not of good character, that he had provided incorrect information to the NSW authority and that he was party to a scheme intended to deceive the regulators.[4] Those findings were not
20 subject to appeal. Mr Andriotis has therefore conducted himself in a manner that has the potential to attract disciplinary action in New South Wales.[5] Thus, on Mr Andriotis' own construction of s 23(1), the AAT had the power to refuse to register him on the basis that his s 19 notice was materially misleading. It is well established that, if a source of power to do an act exists, the fact that the repository was mistaken as to the source does not affect the validity of the act.[6] Thus the Full Court's conclusion that the AAT had no power to refuse registration[7] was in error and the appeal should be allowed.[8]

---

3 The construction of s 20(1) has been dealt with in the VBA's principal submissions at [35]-[36].

4 *Andriotis* [2017] AATA 378 at [137], [142] [**AB 44, 45**].

5 See *Home Building Act 1989* (NSW), ss 43(1) and 56(a)-(c), (j).

6 *Brown v West* (1990) 169 CLR 195 at 203 (the Court); *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at 362 [124] (Heydon J) and the authorities cited in fn 93.

7 *Andriotis v Victorian Building Authority* [2018] FCAFC 24 at [68] (Flick J) [**AB 94-95**], [109] (Bromberg and Rangiah JJ) [**AB 105**].

8 The VBA notes that it filed a notice of contention based on s 23(1)(a) of the *Mutual Recognition Act*. The notice was not determined by the Full Court on the basis that it was a matter for the AAT on the remittal: *Andriotis* [2018] FCAFC 24 at [79] (Flick J) [**AB 94-95**], [139] (Bromberg and Rangiah JJ) [**AB 113**].

The cases

10. Contrary to Mr Andriotis' submissions, the reasoning in both *Re Tkacz; Ex parte Tkacz* and *Re Petroulias* supports the VBA's construction (cf RS [40]).

11. *Re Tkacz* principally concerned the application of the exception to the mutual recognition principle in s 17(2) to the *Legal Practice Act 2003* (WA). However, in the course of its decision the Supreme Court held that the use of the word "may" in s 20(2) was consistent with the Court retaining a residual discretion to refuse to register a lawyer admitted interstate who had been convicted of a criminal offence.[9] The Court also observed that the conditions in s 23(1) for refusal of registration were not expressed to be exhaustive,[10] having earlier noted that those conditions were not met because the statements and information in Mr Tkacz's s 19 notice were not materially false or misleading.[11]

12. Similarly, although in *Re Petroulias* the applicant for registration was unable to complete the s 19 notice because he was the subject of an investigation in Victoria (the first State), the reasoning of de Jersey CJ is consistent with the existence of a residual discretion. His Honour held that the local registration authority "is not by the legislation denied all discretion" and "is equipped with a capacity for independent inquiry ... which may inform the exercise of that discretion".[12] The Chief Justice accepted the argument that an applicant "does not have an absolute entitlement" to be registered in the second State.[13]

13. Both decisions establish that s 20(1) does not confer an absolute right to be registered on a person who has lodged a s 19 notice. Further, these decisions did not hold that there is a special approach to be taken to the registration of lawyers under the *Mutual Recognition Act* based on the inherent jurisdiction of the Court to determine admission of its practitioners (cf RS [50]).[14]

B. GROUND 2: THE EXCEPTION TO THE MUTUAL RECOGNITION PRINCIPLE IN S 17(2)

14. Mr Andriotis seeks to distinguish between a character requirement imposed for the purpose of initial registration for an occupation and one imposed in respect of continuing

---

9 *Re Tkacz* (2006) 206 FLR 171 at 187 [65] (Martin CJ, Murray and Templeman JJ).
10 *Re Tkacz* (2006) 206 FLR 171 at 187 [67].
11 *Re Tkacz* (2006) 206 FLR 171 at 181 [39].
12 *Re Petroulias* [2005] 1 Qd R 643 at 652 [30].
13 *Re Petroulias* [2005] 1 Qd R 643 at 651 [25].
14 The Court in *Re Tkacz* construed the provisions as being consistent with the inherent jurisdiction: (2006) 206 FLR 171 at 182-183 [45], 187 [66], 187-188 [68]-[69]. The judgments in *Re Petroulias* did not refer to the inherent jurisdiction in construing the registration provisions: [2005] 1 Qd R 643 at 652 [30]-[31] (de Jersey CJ), 656-657 [54]-[58] (Davies JA). Their Honours referred to the inherent jurisdiction in relation to the continuance of registration, but not in relation to the initial registration: at 654 [40], 657-658 [63].

registration (RS [62]). That distinction is based on the proposition that, when relied on in relation to continuing registration, the "fit and proper person" provision in s 179(1)(g) of the *Building Act 1993* (Vic) is based on **conduct**, not the person's qualification — but when relied on in relation to initial registration, the analogous requirement in s 170(1)(c) is based on a **qualification**, not on conduct (RS [68]-[70]).

15. The argument is untenable. The distinction cannot be maintained as a matter of logic or construction. The phrase "based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation" ought to be given the same meaning in ss 17(2) and 20(4).[15]

16. The term "qualification" must take its meaning from its context.[16] Here, that context includes the reference, in s 17(2), to law based on "the attainment or possession of some **qualification or experience**". As Gibbs J observed in *R v Refshauge*, albeit in a different statutory context, "[i]f the word 'qualifications' were used in its wider sense, the express reference to 'experience' in the subsection would be unnecessary … That in itself indicates that 'qualifications' is used in the narrower, but natural, sense of academic qualifications".[17] Thus it is inapt simply to fall back to what is said to be the "natural and ordinary meaning" of the word "qualification" (RS [56]-[57]).

17. Finally, and arguably inconsistently with his submissions on ground 1, Mr Andriotis appears to contend that the *Mutual Recognition Act* requires a local registration authority to register a person who obtained registration in the first State by fraud or on the basis of false or misleading information, but that the authority can, upon registering the person, immediately take action to discipline the person or cancel their registration under the relevant local statute (RS [74]-[75]).[18] This is an artificial and inefficient approach to the construction of the *Mutual Recognition Act*.

Dated: 16 November 2018

KRISTEN WALKER QC
Solicitor-General for Victoria
Telephone: (03) 9225 7225
Facsimile: (03) 9670 0273
k.walker@vicbar.com.au

CLAIRE HARRIS QC
Telephone: (03) 9225 6393
Facsimile: (03) 9225 8395
claire.harris@vicbar.com.au

SIMONA GORY
Telephone: (03) 8600 1724
Facsimile: (03) 9225 8395
simona.gory@vicbar.com.au

---

15 *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 (Mason J, with Barwick CJ and Jacobs J agreeing); *Craig, Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452 (Hodges J).

16 *R v Refshauge* (1976) 11 ALR 471 at 475 (Gibbs J, with Mason, Jacobs and Murphy JJ agreeing).

17 (1976) 11 ALR 471 at 475.

18 See also *Andriotis* [2018] FCAFC 24 at [51] (Flick J) [**AB 91**].