IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M134 of 2018

BETWEEN:

VICTORIAN BUILDING AUTHORITY
Appellant

and

NICKOLAOS ANDRIOTIS
Respondent

10

RESPONDENT'S SUBMISSIONS

Part I:

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

Part II: issues

2. The respondent accepts the characterisation of the issues for determination that appears in Part II of the appellant's submissions, save for observing that the reference[1] to "the discretion" to refuse registration conferred by sections 20(2) and 21(3) assumes the point in issue.

20

Part III: section 78B notice

3. The appellant (**VBA**) has served notices under section 78B of the *Judiciary Act 1903* (Cth) (**Notices**).

4. The respondent contends that on their proper construction there is no inconsistency between section 17(2) of the *Mutual Recognition Act 1992* (Cth) (***MRA***) and section 170(1)(c) of the *Building Act 1993* (Vic) (***Building Act***).

5. The respondent does not accept that the implicit proposition said by the VBA to underlie the Full Court's decision[2] is a correct characterisation of that decision. In particular, the Full Court's decision is not premised on section 170(1)(c) of the *Building Act* being

1 Appellant's submissions, [4], page 2, line 6
2 Notices, [15]

Filed on behalf of the respondent by:
Boris Pogoriller Solicitor
Office 3B, 2 Central Avenue
Moorabbin Vic 3189
PO Box 613 Mentone Vic 3194

Date of filing: 2 November 2018
Telephone: 0403 585 849
Fax: n/a
Email: boris@pogoriller.com.au
Ref: BP:Andriotis

inconsistent with sections 17(2) and 20 of the *MRA*.

6. As set out in Part V of these submissions, the respondent's case is that the regime established by the *MRA* operates in parallel with local registration regimes in the various States. An application for registration via the *MRA* is one means by which applicants who are registered for an occupation in the first State can be registered for the same occupation in the second State, while the relevant local registration regime (in this case Part 11 of the *Building Act*), continues to regulate the registration of local applicants.

7. The respondent contends that on its proper construction the *MRA* operates neither as supplementary nor cumulative[3] to the regime in Part 11 of the *Building Act*. Instead it
10 provides an alternative, but parallel, avenue to registration as a builder under the *Building Act* for those already registered for an equivalent occupation in another State.

8. The respondent accepts that laws of Victoria that regulate the manner of carrying on the occupation in that State will continue to apply to a person registered under the *Building Act* via the *MRA*. But the respondent contends, as below, that section 170(1)(c) of the *Building Act* is a law based on the possession of some qualification relating to applicant's fitness to carry on the occupation.[4] Accordingly it can have no operation in relation to interstate applications for registration via the *MRA*, although it continues to operate in relation to local applicants for registration under the *Building Act* itself.

9. It follows that there is no inconsistency between section 17(2) of the *MRA* and section
20 170(1)(c) of the *Building Act*. That an interstate applicant for registration under the Victorian Act via the *MRA* must establish different matters from a local applicant under the *Building Act* itself does not give rise to any inconsistency; the two statutes are different but parallel paths to the same destination.

Part IV: material facts and chronology

10. The respondent does not contest any of the material facts set out in the appellant's narrative of facts or chronology.

Part V: Argument

A. Ground 1: The power to grant registration

[3] Notices, [16]
[4] *MRA*, subsection 17(2)(b)

11. The first issue of statutory construction identified by the VBA raises the effect of an applicant seeking registration for an equivalent occupation in a second State, having lodged a valid notice pursuant to section 19 of the *MRA*. The contest on the first issue is whether the word "may" in section 20(2) of the *MRA* means that the registration authority in the second State:

    (a) as the VBA contends, is permitted to register an applicant who satisfies the ground for registration in section 20(1) of the *MRA*, but at its discretion need not; or

    (b) as the Full Court held, is required to register the applicant, unless it is entitled to postpone registration because one or more of the statutory preconditions in section
10 22(1) of the *MRA* applies, or refuse registration because one or more of the statutory preconditions in section 23(1) of the *MRA* has been satisfied.

12. The Full Court held that the "word 'may' in section 20(2) [of the *MRA*] is used in its permissive sense to identify when the local registration authority is empowered to grant registration,"[5] and that once section 20(1) of the *MRA* is satisfied, and the power to grant registration is thereby enlivened, section 20(2) of the *MRA* "does not provide a capacity for a local registration authority to refuse the grant of registration on any ground, or alternatively any ground consistent with the purpose of Part 3" of the *MRA*.[6] The respondent contends that this is correct.

13. ***First***, while the Full Court neither referred, nor was it referred, to section 33(2A) of the
20 *Acts Interpretation Act 1901* (***AIA***), reference to that provision would not have affected the Full Court's construction of section 20(2) of the *MRA* because the application of the *AIA* to a provision of an Act is subject to a contrary intention.[7] Section 20(2) of the *MRA*, when considered in the context of Part 3 of that Act, manifests such a contrary intention.

14. An application for registration in a second State starts with lodgement of a written notice under section 19 of the *MRA* (**Section 19 Notice**), verified by statutory declaration. By that declaration the person already registered for an equivalent occupation in the first State applying for registration relevantly verifies the absence of disciplinary matters, and consents to the registering authority in the second State making inquiries.[8]

---

5 *Andriotis v Victorian Building Authority* [2018] FCAFC 24 (***Andriotis***) at [106] (Bromberg and Rangiah JJ) [**AB 104**]. See also at [68] (Flick J) [**AB 94**]

6 *Andriotis* [2018] FCAFC 24 at [108] (Bromberg and Rangiah JJ) [**AB 105**] regarding the applicant's activities in the relevant occupation *or otherwise*. Flick J determined similarly at [68] [**AB 95**]

7 *AIA*, section 2(2)

8 *MRA*, subsections 19(2)(d) to (h).

15. Having lodged a Section 19 Notice, section 20(1) of the *MRA* provides that the applicant is "entitled to be registered in the equivalent occupation" in the second State as if registration in the first State were a "sufficient ground of entitlement to registration."[9]

16. The source of the power of the registering authority in the Second State to register the applicant in the equivalent occupation is section 20(2). Considered in the context of the other powers afforded the local registration authority upon receipt of a Section 19 Notice, the scheme established by Part 3 of the *MRA* manifests an intention contrary to the presumption that the use of the word "may" in section 20(2) of the *MRA* provides a discretion to the registration authority to exercise the section 20(2) power.

10 17. That scheme provides three courses of action to a local registration authority when it receives an application:

(a) it can register the applicant in the equivalent occupation,[10] and must do so within one month following the lodging of the Section 19 Notice;[11]

(b) it can postpone registration,[12] so long as one of the preconditions to postponement in section 22(1) of the *MRA* is satisfied; or

(c) it can refuse registration,[13] so long as one of the preconditions to refusal in section 23(1) of the *MRA* is satisfied.

18. Where, as here, there is no dispute as to equivalence of occupation for which the applicant seeks registration, the power to refuse registration under section 23(1) of the
20 *MRA* is confined to failure to comply with the requirements of section 19. That is because section 23(1) itself, in reflecting the requirements of section 19, "does not purport to go beyond the conferral of a discretionary power to give effect to the scheme set forth in the *MRA* and, in particular, s19 of that Act".[14]

19. In light of the three possible responses to a Section 19 Notice – registration, postponement or refusal – the respondent submits that the word "may" is used in section 20(2) of the *MRA* as part of an enabling phrase; it is apt to cover both a situation in which the local authority must register an applicant (when the section 19 requirements

---

9 Ibid, section 20(1).
10 Ibid, section 20(2)
11 Ibid, section 21(1)
12 Ibid, section 21(3)
13 Ibid, section 23(1)
14 *Andriotis* [2018] FCAFC 24 at [68] (Flick J) **[AB 94]**

are satisfied), as well as situations in which it need not (when occupations are not equivalent or the requirements of section 19(2) are not satisfied, and the powers in sections 22(1) or 23(1) are therefore enlivened).

20. The power in each instance is conditioned on the local registration authority being satisfied of particular objective facts. The scope of the permission or power to register, postpone registration or refuse registration is thereby defined, and conditions precedent to the exercise of each such power are specified.[15] Those conditions are mutually exclusive: if the preconditions to the exercise of a particular power are established (registration), then it is necessarily the case that the preconditions for an alternative
10 power (refusal of registration) are not.

21. The determination by the local registration authority of which power arises therefore requires consideration of the content of the Section 19 Notice; the powers to postpone or refuse registration arise only if one or more of the matters in sections 22(1) or 23(1) respectively are satisfied. That can only occur when one or more of the requirements for registration under section 19 are not. Contrary to the submission advanced by the VBA,[16] that construction supports the proposition that the matters in section 23(1) are an exhaustive description of the circumstances in which the local registration authority can refuse to register an applicant; to hold otherwise would deprive the scheme of the *MRA* of much of its utility.[17]

20 22. The use of the word "may" in each of sections 20(2), 22(1) and 23(1) of the *MRA* is consistent with that construction. If "may" in section 20(2) is to be read as providing a discretion, preservation of the three possible responses available on receipt of a Section 19 Notice would require substantial changes in the correct reading of sections 20 and 21 of the *MRA*. Thus:

(a) section 20(1) would need to be read as though the phrase "*sufficient ground*" were replaced by "*necessary but not sufficient ground*";

(b) section 21 would need to be read:

(i) to include at the commencement of section 21(1) a conditioning phrase "*If registration is to be granted under section 20(1)*", and to replace the word

---

15 *Finance Facilities Pty Ltd v Commissioner of Taxation* (1971) 127 CLR 106 at 134 (Windeyer J); *Leach v R* (2007) 230 CLR 1 at [38] (Gummow, Hayne, Heydon and Crennan JJ)

16 Appellant's submissions, [20(3)]

17 *Andriotis*, [2018] FCAFC 24 at [108] (Bromberg and Rangiah JJ) **[AB 108]**

"Registration" as it appears at the commencement of that subsection with the word "it"; and

(ii) so that section 21(4) would be ignored, since it provides for a self-executing mechanism for registration, which on the VBA's case, cannot exist.

23. That the construction of section 20(2) for which the VBA contends changes the construction of sections 20 and 21 so substantially is a strong indication that it is not the intended construction.

24. ***Secondly***, the respondent's construction of section 20(2) of the *MRA* is consistent with the underlying premise of that Act generally, and the mutual recognition principle in
10 particular. As Bromberg and Rangiah JJ observed in the Full Court:

> an underlying premise for mutual recognition was that each of the States has regulatory standards which ought to be regarded as satisfactory by all or, in other words, the regulatory oversight of one State could be trusted to provide sufficient regulatory protection to a second State in relation to the registration in the second State of a person regarded as suitable by the first.[18]

25. That premise is reflected in the requirements of sections 19(2) and 20(1) of the *MRA*. In particular, it is only when an applicant verifies by declaration that he or she is not subject to any of the matters set out in sub-sections 19(2)(d) to (f) of the *MRA*, each of which relates to the applicant's fitness to carry on the occupation in either State, that an
20 applicant is entitled to registration in the second State. Only when an applicant has made the necessary declaration (and the local registration authority in the second State has satisfied itself that those matters the subject of the declaration are true) does section 20(1) operate, in effect to replace the registration requirements of the relevant legislation in the second State. That is, once the requirements of sections 19(1) and (2) are satisfied, the applicant is entitled to registration in the second State as if the law in that state that deals with registration in the particular occupation "expressly provided that registration in the first State is a sufficient ground for entitlement to registration."[19]

26. As Bromberg and Rangiah JJ observed at [99] of their judgment,[20] the *MRA* regime was not forced on the States. In authorising it, they have accepted that the requirements of

---

18 *Andriotis* [2018] FCAFC 24 at [120] (Bromberg and Rangiah JJ) [**AB 108**]

19 *MRA*, section 20(1)

20 *Androtis* [2018] FCAFC 24 at [99] (Bromberg and Rangiah JJ) [**AB 102**]

section 19 sufficiently protect the second State, which has the capacity to refuse registration if those requirements are not met.

27. The mutual recognition principle rests on the basis that the registration requirements of the first State are a sufficient determinant of whether an applicant has the qualities necessary for registration in a particular occupation.[21] The construction of sections 19 and 20(1) and (2) advanced by the respondent is consistent with that basis. That is the reason that the declarations required of the applicant for registration in the second State are limited to those that concern the question of whether, having satisfied the admission requirements of the first State, the applicant has conducted him or herself in such a way as to be subject to a disciplinary process or remedy.

28. In the immediate case, the premise and purpose of the mutual recognition principle is achieved by, in effect, replacing the registration requirements of subsections 170(1) and (2) of the *Building Act* with the requirements of section 19 of the *MRA*. That latter provision operates to ensure both that the applicant for registration:

   (a) has satisfied the requirements for registration in the first State, which are assumed to provide a satisfactory regulatory standard for registration in the second State; and

   (b) having been registered in the first State, has not conducted him or herself in a manner that has attracted, or has the potential to attract, some disciplinary sanction.[22]

29. In the event that an applicant has so conducted him or herself, he or she will be unable to make the declarations required by section 19(2) of the *MRA*. Because this cannot be done, the entitlement to registration under section 20(1) cannot be enlivened.[23] Were an applicant to make the declarations in such circumstances, the declarations would be materially false or misleading. The falsity of such declarations would be revealed by the inquiries undertaken by the registration authority of the second State, pursuant to the consent required by section 19(2)(h) of the *MRA*. The power in section 22(1) of the *MRA* to postpone registration, and if inquiries confirmed that falsity, 23(1) to refuse registration, would be enlivened.

---

21 *Andriotis* [2018] FCAFC 24 at [121] (Bromberg and Rangiah JJ) **[AB 108]**

22 *MRA*, subsections 19(2)(d) – (f)

23 *Re Pretroulias* [2005] 1 Qd R 643 at [19] (de Jersey CJ)

30. Thus, the Section 19 Notice is the gateway to registration in the second State. While filing a valid notice does not effect registration, section 20(1) entitles the applicant to be registered. Section 20(2) provides the registration authority with the *power* to register the applicant, giving the latter provision work to do,[24] while importing from section 20(1) the necessary language of compulsion.

31. ***Thirdly***, the VBA contends that the requirement in subsection 19(2)(h) that an applicant for registration consent to the registration authority in the second State making inquiries of the authorities of any other State speaks against the construction adopted by the Full Court.[25] Consideration of the scheme as a whole shows to the contrary.

10 32. As submitted by the VBA, the inquiries to which the applicant is required to consent are inquiries "regarding the person's activities in the relevant occupation." The breadth and purpose of those inquiries, however, is conditioned by the immediately following phrase in subsection 19(2)(h): "or otherwise regarding matters relevant to the notice." The inquiries to which section 19(2)(h) of the *MRA* requires the applicant to consent are inquiries regarding matters that may determine whether or not any of the bases upon which the registration authority might postpone or refuse an application for registration are enlivened. Contrary to the submission advanced by the VBA, consent to those inquiries does not open for consideration matters irrelevant to the veracity of the Section 19 Notice, or to the facts attested to in that notice.

20 33. That construction is consistent with the structure of Division 2 of Part 3 of the *MRA* advanced by the respondent, and the underlying premise of the *MRA* that the registration requirements of the first State are a sufficient determinant of the applicant's fitness for registration in the second State. The purpose of the inquiries contemplated by section 19(2)(h) of the *MRA* is to determine whether the applicant has in fact satisfied each of the requirements for registration in the second State. If those inquiries reveal that the applicant has not, the power to register the applicant in the second State will not be enlivened either because:

(a) the occupation for which the applicant has applied for registration is not an equivalent occupation;[26] or

---

[24] cf Appellant's submissions, [20(1)] and [35]
[25] Appellant's submissions, [33(3)]
[26] *MRA*, section 17(1), section 19(1), section 23(1)(c)

(b) the declarations made by the applicant in his or her Section 19 Notice are false or misleading.[27]

34. The VBA submits that inquiries contemplated by section 19(2)(h) might reveal conduct that is likely to result in a disciplinary procedure, but in relation to which disciplinary proceedings have not commenced.[28] The VBA contends that in those circumstance, on the construction adopted by the Full Court:

(a) despite having engaged in that conduct, an applicant could "give a section 19 notice" (because he or she could state that they were not subject of disciplinary proceedings or any preliminary investigations or action that might lead to disciplinary proceedings); and

10

(b) accordingly, the statutory preconditions for postponement or refusal in sections 22(1) or 23(1) could not be satisfied, and the registration authority could not postpone or refuse registration.

35. It is of course true that an applicant could lodge a document entitled "Section 19 Notice" and make such a statement. The question is whether such a notice would be a *valid* Section 19 Notice. The respondent submits that such a statement by an applicant in accordance with section 19(2)(d) would be materially misleading within the meaning of subsections 22(1)(a) or 23(1)(b) of the *MRA*. That was the factual situation in *Re Petroulias* [2005] 1 Qd R 643, and the proposition presently advanced by the VBA was expressly analysed by Davies JA.[29] His Honour held that while such a statement may be literally true, if the applicant "knew of matters affecting him which, if they were known by the registration authority of the first State, would have been the subject of disciplinary proceedings against him in that State or of preliminary investigations or action that might lead to such disciplinary proceedings", then a statement in the terms in subsection 19(2)(d) would be materially misleading.[30] The respondent contends that that construction of the section 19 requirements is correct.

20

36. In order for the entitlement to registration to crystallise, each of the factual matters underlying the declarations in section 19(2) must in fact be the case. In the event that one or more is not, then the entitlement to registration in the second State does not crystallise,

---

27 *MRA,* subsection 23(1)(a)

28 Appellant's submissions, [45]

29 See also *Re Petroulias* [2005] 1 Qd R 643 at [55]-[56]. See also at [19] (de Jersey CJ)

30 Ibid, [55]

whether or not the applicant purports to make the form of declaration required by section 19(5).[31]

37. That conclusion applies equally to the other requirements of section 19, so the entitlement to registration will also not crystallise unless:

(a) the notice lodged by the applicant is for an equivalent occupation (section 19(1)); or

(b) the application is accompanied by a document that is either the original or a copy of the instrument evidencing the applicant's existing registration, or sufficient information to identify those things (section 19(3)).

10 38. That construction requires that for an applicant's entitlement to registration to crystallise, not only must he or she lodge a Section 19 Notice that complies with the requirements of section 19, but also the facts that are the subject of the statements and declarations in that notice must be true. Contrary to the proposition advanced by the VBA,[32] this second requirement allows the local registration authority in the second State to "look behind" a Section 19 Notice. Neither the entitlement on the part of the applicant to registration in the second State, nor the power of the local registration authority in the second State to register the applicant, is enlivened until it is satisfied that the factual matters underlying the entitlement to registration are true.

39. Were inquiries to reveal that one of the matters required by section 19 of the *MRA* was

20 not established, the entitlement to registration would not crystallise. That is because giving utility to the convenience of the interstate scheme provided by the *MRA* requires that a valid Section 19 Notice must not be misleading. That is the natural reading of the scheme. To hold otherwise – that a residual discretion not to register must be retained to ensure that a literally true but misleading notice is a valid notice – is the long way round to ensure that the scheme is both workable and fit for purpose.

40. ***Fourthly***, on their facts neither *Re Petroulias* or *Re Tkacz; Ex parte Tkacz* (2006) 206 FLR 171 is authority for the construction advanced by the VBA.[33] Neither case was an example of the exercise by the registration authority of a second State of an unstructured discretion under the *MRA*.

---

31 *Re Petroulias* [2005] 1 Qd R 643 at [19] (de Jersey CJ)

32 Appellant's submissions, [48] and [49]

33 Appellant's submissions, [42]

41. *Re Petroulias* concerned a local authority[34] applying the *MRA* as advanced by the present respondent. Because Mr Petroulias was unable to make the declarations required by section 19(2) of the *MRA* truthfully, the "notice was consequently not apt to crystallise the entitlement to registration in [the second State] provided for by section 20".[35] Hence, no occasion arose for the exercise of any discretion to refuse registration: Mr Petroulias did not cross the section 19 threshold.[36]

42. On the respondent's construction of the *MRA*, an alternative, and equally valid approach to the circumstances of *Re Petroulias* and those in *Scott v Law Society of Tasmania*,[37] would be for the local registration authority, having become aware that the applicant was subject to a preliminary investigation:

   (a) within one month from the lodging of the Section 19 Notice, to postpone the applicant's registration pursuant to the power in section 22(1); and

   (b) having postponed that registration, to make further inquiries of the relevant registration authority in the other State; and

   (c) if satisfied, on the basis of those inquiries, that a statement in the Section 19 Notice was in fact materially false or misleading, to exercise the power in section 23(1) to refuse to register the applicant.

43. Either approach gives utility to the *MRA*, protects against the concerns raised by the VBA, and is consistent with the respondent's construction.

44. *Re Tkacz; Ex parte Tkacz* arose out of different circumstances. That case concerned a legal practitioner who had been admitted to practice in New South Wales following full disclosure of a criminal conviction. The task of construction being undertaken by the Full Court of the Supreme Court of Western Australia was to determine whether the *MRA*, whether by express words or necessary intention, "removes or curtails [the] residual power" of the Court in its inherent jurisdiction to refuse to admit an applicant

---

34 By operation of Rule 76K of the *Supreme Court (Legal Practitioners) Admission Rules 2004* (Qld), the Queensland Court of Appeal had delegated to the Registrar of the Queensland Supreme Court the power to register a solicitor in Queensland, which was the relevant act of registration the subject of Mr Petroulias' application under the *MRA*.

35 *Re Petroulias* [2005] 1 Qd R 643 at [19] (de Jersey CJ), at [48] (McMurdo P).

36 The facts of *Scott v Law Society of Tasmania* [2009] TASSC 12, were relevantly identical, and the *ratio decidendi* the same.

37 [2009] TASSC 12

who has otherwise satisfied the requirements of admission.[38] The Full Court in that case held that the *MRA* did not affect the Court's inherent jurisdiction to regulate admission to legal practice in that State, and decided the case on that basis.[39]

45. That the Court in *Re Tkacz* decided that the *MRA* did not displace that inherent power is not determinative of whether any other registration authority in any other occupation retains a residual discretion arising from the *MRA* itself. Indeed, the *MRA* in terms recognises that legal practitioners are subject to two different parallel systems of registration controlled by different registering authorities.[40] The primary system, which is centuries old, is the admission of practitioners to practice by entry on the roll of practitioners of the relevant State Supreme Court. That act of registration is the exercise of the court's inherent jurisdiction to control its practitioners. In each State there is also a statutory regulating body, which issues some form of yearly licence to engage in legal practice.

46. The former is once off; a practitioner remains on the roll unless removal is ordered by the Court. The latter is subject to the practitioner satisfying the regulating body each year that the relevant preconditions of registration have been satisfied, including payment of a fee and declarations as to conduct, continuing legal education, insurance and such like. While admission to practice is a precondition to an application for a practising certificate, the body which issues practising certificates, being a creature of statute, cannot order that a practitioner's name be included on the roll of admitted practitioners maintained by the court.

47. The concern in *Re Tkacz* was whether the *MRA* had interfered with the inherent jurisdiction. On a careful reading, it does not support the VBA's position in the present case. Indeed, that the construction advanced by the respondent might result in the Supreme Courts of the States retaining a residual discretion to refuse registration, when other registration authorities that are purely creatures of the statute do not, is unremarkable.

48. While *Re Petroulias* was determined on an application of Part 3 of the *MRA* entirely consistent with the respondent's position, two subsidiary questions arose:

---

38 *Re Tkacz* (2006) 206 FLR 171 at [60] – [61]; *Andriotis* [2018] FCAFC 24 at [98] (Bromberg and Rangiah JJ) **[AB 102]**

39 *Re Tkacz* (2006) 206 FLR 171 at [44] – [45], [62] – [69].

40 *MRA*, section 18(3)

(a) *first,* whether the Court of Appeal, having by Rules of Court delegated its power to admit practitioners to a registrar, could rely on the inherent jurisdiction to revoke Mr Petroulias' registration, when the Registrar's decision to admit Mr Petroulias was in error (because Mr Petroulias had not satisfied the requirements of section 19 of the *MRA*). The Court held that on the proper construction of the *MRA,* it did retain that inherent jurisdiction, and that the operation of the *MRA* was not inconsistent with its existence and exercise;[41]

(b) *secondly*, whether the terms of the relevant form for the admission of solicitors in Queensland under the *MRA* that required the applicant to state that he or she "knew of no other matter which might bear witness on" his or her fitness to be registered in Queensland was inconsistent with mutual recognition principle.

49. In relation to the latter question, de Jersey CJ held that that requirement "merely facilitate[d] the gathering of information as contemplated by s.19(2)(h)" of the *MRA*.[42] His Honour's comments regarding the capacity of the local authority to make independent inquiries, and of the local authority not being denied "all discretion" were made expressly in the context of the admission of solicitors via the *MRA*.

50. The careful analysis of the special parallel regimes applying to legal practitioners undertaken and applied in *Re Tkacz, Re Petroulias* and *Scott*, shows that those three cases are not inconsistent with the Full Federal Court's construction of the mutual recognition principle in the present case. The *ratio decidendi* of each of the decisions in *Re Tkacz* and *Re Petroulias* recognises and is supported by the principle that the inherent power of superior courts to determine admission to legal practice of their practitioners survives the mutual recognition principle.[43] That conclusion does not affect whether a statutory registration authority without anything corresponding to an inherent jurisdiction (such as the VBA) enjoys a residual discretion to refuse to register an applicant whose application otherwise complies with the requirements of the *MRA*.

B. Ground 2: section 17(2) and the mutual recognition principle

51. The respondent accepts that a law requiring that a person be a fit and proper person may be both a qualification for, and a description of the manner in which, an occupation is to be carried on. The second ground of appeal therefore reduces to whether a requirement

41 *Re Petroulias* [2005] 1 Qd R 643 at [23] – [30], [35] (de Jersey CJ)
42 Ibid at [27]
43 *Andriotis* [2018] FCAFC 24 at [98] (Bromberg and Rangiah JJ) [**AB 102**].

that an applicant for registration be a fit and proper person is a law based on the possession of a qualification relating to fitness to carry on the occupation within the meaning of subsections 17(2)(b) and 20(4)(b) of the *MRA*.

52. The Full Federal Court determined that a "character requirement" is a law based on possession of a qualification, and is therefore excluded from the exception in the chapeau to section 17(2),[44] which maintains the operation of the laws of the second State regulating the manner of carrying on an occupation, and section 20(4), which establishes the "qualified primacy" of the laws of the second State that affect continuance of registration.[45]

10 53. In reaching that determination, the Full Court referred to the definition of occupation that appears in section 4 of the *MRA* that "specifies 'character' as an example of what is meant by 'qualification'".[46] The Full Court held that the definition of qualification should be given consistent meaning throughout the *MRA* militates in favour of a construction of the proviso in section 17(2)(b) to include laws that require an applicant to be a fit and proper person.

54. The VBA contends that because:

(a) the definition of occupation in section 4(1) of the *MRA* points to experience as an example of what amounts to attainment or possession of some qualification; and

(b) subsections 17(2)(b) and 20(4)(b) of the *MRA* identify qualification and experience
20 as separately being subject to the proviso in those sections,

"qualification" as it appears in the subsection 17(2)(b) in particular should be given a narrower meaning than appears in the definition of occupation, and ought be construed so narrowly as to exclude character requirements from its meaning.[47]

55. While it might be accepted that "qualification" as it appears in section 17(2) might be given a narrower meaning than that which appears in the definition of "occupation", the respondent submits that that does not require "qualification" to be construed so narrowly as to exclude considerations of an applicant's character. On the contrary, that the word

---

44 *Andriotis* [2018] FCAFC 24 at [51] (Flick J) **[AB 90]**, [92] (Bromberg and Rangiah JJ) **[AB 101]**

45 *Andriotis* [2018] FCAFC 24 at [113] (Bromberg and Rangiah J) **[AB 106]**

46 *Andriotis* [2018] FCAFC 24, at [15] and [51] (Flick J) **[AB 76 and 90 – 91]**, and [92] (Bromberg and Rangiah JJ) **[AB 101]**

47 Appellant's submissions, [67]

"qualification" in section 17(2) should be construed to include a character requirement is evident from three considerations.

56. First, as observed by Flick J in the Full Court, the natural and ordinary meaning of the word "qualification" includes considerations of personal integrity.[48] It is not self-evident from a reading of the phrase "qualification or experience" as it appears in subsection 17(2)(b) why the word "qualification" should be read down to exclude such considerations.[49] More broadly, as Bromberg and Ranghiah JJ held, the requirement to hold a particular qualification is apt to require consideration of any condition of suitability for registration to carry on a particular occupation.[50] Indeed, as their Honours
10 pointed out, the registration requirements in the *Building Act* at the time the respondent sought registration included a requirement that a person be of good character as a condition of suitability for registration under that legislation.[51]

57. Secondly, that natural and ordinary meaning of the word "qualification" is supported by the consideration of the context in which it appears in section 17(2)(b) and section 20(4)(b) of the *MRA*. The word appears as part of a proviso to, in the case of:

(a) subsection 17(2)(b), an exception to the operation of the mutual recognition principle; and

(b) subsection 20(4)(b), the qualified primacy of laws of the Second State concerning the continuation of registration.

20 58. In each instance, it operates to exclude those laws that are:

> *based on the* ***attainment or possession*** *of some qualification or experience* ***relating to the fitness to carry on the occupation*** (emphasis added).

59. Two things follow from that formulation:

(a) first, the concept of qualification is broad enough to encompass both something attained by the applicant (ie. something that the applicant did not have, but that was

---

48 *Andriotis* [2018] FCAFC 24 at [51] (Flick J) **[AB 90 – 91]**

49 *Andriotis* [2018] FCAFC 24 at [51] (Flick J) **[AB 90 – 91]**

50 *Andriotis* [2018] FCAFC 24 at [92] (Bromberg and Rangiah JJ) **[AB 101]**

51 By amendments effected by the *Building Legislation Amendment (Consumer Protection) Act 2016* (Vic), the requirements for registration under the *Building Act* were amended by replacing the requirement that an applicant be "of good character" with a requirement that the applicant "is a fit and proper person to practise as a building practitioner, having regard to all relevant matters, including the character of the applicant

gained by the application of some effort), and a characteristic inherent to the applicant; and

(b) secondly, the thing that the applicant for registration must have attained or that he or she must inherently possess must relate to the fitness to carry on the occupation.

60. In the latter regard, the provisions should be read distributively, so that they relevantly refer to a qualification relating to the fitness to carry on the occupation, *or* some experience relating to the fitness to carry on the occupation.

61. Read in that context, a definition of the word "qualification" that is limited to the attainment of some technical qualification is inapt.[52] The VBA contends that this word as it appears in subsections 17(2)(b) and 20(4)(b) of the *MRA* is to be given a narrower construction than the same word that appears in the definition of "occupation" in section 4(1), because a construction of the word "qualification", excluding considerations of an applicant's character, would lead to absurd or unintended consequences.[53] It says that because the phrase "qualification relating to the fitness to carry on the occupation" must be read consistently in subsections 17(2)(b) and 20(4)(b), a person's registration in the second State could never be revoked on the basis that he or she had ceased to be of good character.[54]

62. That submission ought not be accepted. It fails to take account of the distinction between registration itself, and post-registration carrying on of the occupation.

63. The *MRA* establishes the circumstances in which an applicant will be entitled to be registered in a second State,[55] including what an applicant must do to enliven that entitlement,[56] and circumstances in which the local registration authority in the second State can refuse that registration.[57]

64. In so doing, the *MRA* presupposes that the regulatory standards of the first State are suitable for, if not equivalent to, those in the second State and restricts the "capacity of

---

52 *Andriotis* [2018] FCAFC 24 at [51] (Flick J) **[AB 91]**, [92] (Bromberg and Rangiah JJ) **[AB 101]**
53 Appellant's submissions, [68]
54 Ibid
55 *MRA*, section 20(1).
56 *MRA*, sections 19(1) and (2)
57 *MRA*, section 23(1).

the second State to impose its own set of requirements".[58] Were it otherwise, the sought-after efficiencies that underlie the mutual recognition principle would be lost.[59]

65. Thus compliance with section 19 of the *MRA* in effect replaces the registration requirements of the second State, but also provides the machinery to ensure sufficient compliance with the second State's registration requirements. Having satisfied those registration requirements, and become registered, the registrant's carrying on of the occupation, and his or her continued registration,[60] in the second State are then subject to the "qualified primacy" of the laws of the second State.[61]

66. As the Full Court held, the effect of section 20(4) of the *MRA* is to preserve the operation of those laws of the second State that regulate the manner in which a person registered pursuant to the Act carries on the occupation in the second State.[62]

10

67. In the present case, a building practitioner who has become registered (whether via the *MRA* or otherwise), is subject to the VBA's disciplinary regime provided for by sections 178 and 179 of the *Building Act*. As Flick J observed, the conclusion that an applicant for registration, having satisfied the requirements of section 19(1) of the *MRA*, has an entitlement to registration says nothing about his or her susceptibility to disciplinary action pursuant to sections 178 and 179 of the *Building Act*.[63]

68. In particular, section 179(1) of the *Building Act* provides an extensive list of 15 grounds for which disciplinary action may be taken against a registered building practitioner. All of those grounds concern post-registration events, either post-registration conduct of a registered building practitioner, or subsequent concerns as to previous information.[64] They include:

20

(a) the VBA's belief "on reasonable grounds that the practitioner is no longer a fit and proper person to practise as a building practitioner": *Building Act*, subsection 179(1)(g);[65] and

58 *Andriotis* [2018] FCAFC 24, at [120] (Bromberg and Rangiah JJ) **[AB 108]**
59 *Andriotis* [2018] FCAFC 24, at [46] (Flick) **[AB 89]**, and [108] **[AB 105]** (Bromberg and Rangiah JJ).
60 *MRA*, section 20(4).
61 *Andriotis* [2018] FCAFC 24, at [113] (Bromberg and Rangiah JJ) **[AB 106]**
62 *Andriotis* [2018] FCAFC 24, at [51] (Flick J) **[AB 91]**, [113] (Bromberg and Rangiah JJ) **[AB 106]**.
63 *Andriotis* [2018] FCAFC 24, at [51] (Flick J) **[AB 91]**
64 *Building Act*, subsection 179(1)(h).
65 The current section 179 was inserted into the *Building Act* by the *Building Legislation Amendment (Consumer Protection) Act 2016*. The version of the *Building Act* that was before the Full Court was as it appeared at 2 June 2015, ie. the date on which the respondent applied to the VBA for registration. For the purposes of this application, it is appropriate to refer to the current version of the *Building Act*

(b) that the practitioner, relevantly, has obtained the practitioner's registration under Part 11 of the *Building Act* "on the basis of information or a document that was false or misleading": *Building Act,* subsection 179(1)(h).

69. The ground in subsection 179(1)(g) is not a law based on the possession of some qualification. It is a law that is based on the conduct of the practitioner. The power of the authority pursuant to subsection 179(1)(g) of the *Building Act* is only enlivened if it believes on reasonable grounds that the practitioner is *no longer* a fit and proper person. Thus, the subsection has a temporal aspect since it presupposes that the practitioner:

(a) was a fit and proper person at the time of registration, either because:

10

(i) in the case of local applicants, the VBA was satisfied at the time of registration that the practitioner was a fit and proper person;[66] or

(ii) in the case of an application under the *MRA*, the practitioner satisfied the requirements of section 19(1) of the *MRA*, and the notice filed by the applicant was valid; and

(b) whichever route to registration had been adopted, after he or she was registered under the *Building Act*, conducted him or herself in a way that provided reasonable grounds for the VBA to believe that he or she was no longer a fit and proper person.

70. On that construction, the effect of the *MRA* is that the VBA:

20

(a) is bound to whatever assessment of a practitioner's character was undertaken by the registration authority of the first State to permit registration in the first State (sections 19(1), 20(1));

(b) cannot impose on a practitioner, once registered in the second State, a requirement concerning the manner in which he or she carries on his or her work that would require the possession of some qualification (section 20(4)); and

(c) retains all its powers to take disciplinary action, including powers to do so should the practitioner conduct him or herself so as to give rise to a reasonable belief that

---

as that is the version of the Act to which the respondent's conduct as a building practitioner would be subject if he were to be registered. Accordingly that would be the version under which any putative disciplinary action would be taken.

66 *Building Act*, s 170(1)(c), as amended by the *Building Legislation Amendment (Consumer Protection) Act 2016.*

the practitioner had ceased to be a fit and proper person (*Building Act*, subsection 179(1)(g)).

71. The respondent contends further that this construction of the *MRA* is supported by consideration of section 33(1) of the same Act, which provides that if a person's registration is cancelled or subject to a condition on disciplinary grounds in the first or second State, then his or her registration in the other state is affected in the same way.[67] The effect of that provision extends to registration effected other than by the terms of the *MRA*.[68] Section 33 of the *MRA* is symmetrical in its application; the conduct founding disciplinary action can occur in either State.

10 72. The VBA contends that it is questionable whether subsection 179(1)(h) of the *Building Act* would apply to a practitioner who had been registered "pursuant to the power in the *MRA*", because subsection 179(1)(h) is limited to the practitioner's registration under Part 11 of the *Building Act.* The respondent contends that concern is misplaced. The effect of section 20(1) of the *MRA* is that the applicant who satisfies the requirements of section 19 of the *MRA* becomes entitled to registration as if the relevant legislation in the second State provided for registration on that ground. In the immediate circumstances, building practitioners who apply for registration under the *MRA* are therefore registered under Part 11 of the *Building Act*, not under the *MRA*. The *MRA* applies to multiple registration authorities in multiple States. In each instance, it is the
20 local registration authority which effects and subsequently supervises registration.

73. Further, section 178 of the *Building Act* provides the sanctions for disciplinary breaches. Some of them permit interference with registration. But the respondent contends that no fair reading of sections 178 or 179 of the *Building Act* in their entirety would support the conclusion that the provisions are "based on" a qualification.

74. That being the case, subsection 179(1)(h) in particular would be a ground on which the VBA could commence disciplinary action against a practitioner who had been registered:

(a) in the second State via the *MRA*; but

---

67 *MRA*, section 33(1).
68 *MRA*, section 33(3).

(b) in the first State either fraudulently, or on the basis of information that was false or misleading.[69]

75. The VBA describes that process of registration followed by disciplinary action as artificial and overly technical, and contends that it is not apparent how such a course would achieve the sought after efficiencies.[70] That position is overstated. It can be assumed that, as a proportion of overall applications for registration under the *Building Act*, or indeed any other relevant regulatory registration regime in any state, applicants under the *MRA* who would be immediately subject to disciplinary action because of some shortcoming in their application for registration in the first State would represent a
10 small proportion of overall applications: if the States had information to the contrary, they would not have accepted the scheme provided by the *MRA*. The respondent's construction advances the efficiencies created by the process under the *MRA*; the VBA's construction largely removes them.

Part VI: Notice of contention

76. The respondent has not filed a notice of contention

Part VII: Estimate

77. The respondent estimates that he will require 1.5 hours for oral argument.

Dated: 2 November 2018

20

KP Hanscombe QC

(03) 9225 8268

kphanscombe@vicbar.com.au

TJD Chalke

(03) 9225 8401

tim.chalke@vicbar.com.au

[69] *Andriotis* [2018] FCAFC 24 at [51] (Flick J) **[AB 91]**
[70] Appellant's submissions, [50]