IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M 136 of 2018

On appeal from the Full Court of the Federal Court of Australia

BETWEEN:

RUDY FRUGTNIET
Appellant

and

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION
Respondent

RESPONDENT'S SUBMISSIONS

PART I PUBLICATION

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

PART II ISSUES

2. This appeal principally concerns the construction and interaction of:

   a) Part VIIC of the *Crimes Act 1914* (Cth) (the ***Crimes Act***);

   b) s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the ***AAT Act***); and

   c) s 80 of the *National Consumer Credit Protection Act 2009* (Cth) (the ***Credit Act***).

3. Ultimately, the appeal is concerned with whether the Administrative Appeals Tribunal (the **Tribunal**) erred by taking into account the appellant's spent convictions when undertaking a review of ASIC's decision to make a banning order against him. The appellant contends that ASIC was obliged not to take these convictions into account and so, on the proper construction of the legislation

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mentioned above, the Tribunal was similarly obliged not to take them into account and erred when it did so. ASIC contends that the above legislation did not require the Tribunal to disregard the appellant's spent convictions and that the courts below did not err in so concluding.[1]

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. Pursuant to s 78B of the *Judiciary Act 1903* (Cth), ASIC has given notice that this proceeding involves or may involve a matter arising under the Constitution or involving its interpretation.[2]

PART IV FACTS

10 5. There is no dispute about the facts relevant to this appeal. Those facts are generally set out in paragraphs 11 to 16 of the appellant's submissions dated 5 October 2018 (**AS**). In particular, it is not in dispute that, in affirming an earlier decision of ASIC's delegate to make a permanent banning order against the appellant, the Tribunal had regard to, among other things, certain convictions and findings of guilt against the appellant that were, for the purposes of Part VIIC of the *Crimes Act*, spent convictions.[3]

PART V ARGUMENT

The *Crimes Act*

6. Part VIIC of the *Crimes Act* was inserted by the *Crimes Legislation Amendment Act*
20 *1989* (Cth). The then Attorney-General explained in the second reading speech that the question of spent convictions had been the subject of a report by the Australian Law Reform Commission and extensive discussions in the Standing Committee of Attorneys-General, leading to an agreement that all jurisdictions would enact legislation on this topic.[4] This agreement has not yet been carried to fruition throughout Australia.

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1 This appeal is not about whether the Tribunal was entitled to have regard to the conduct underlying the spent convictions. See *Kocic v Commissioner of Police* [2014] NSWCA 368; (2014) 88 NSWLR 159 at 173-174 [59]-[60] (Basten JA) and 177-178 [82] and [85] (Leeming JA).

2 See ASIC's notice of a constitutional matter dated 31 August 2018.

3 For the definition of the term "spent conviction", see ss 85ZL and 85ZM of the *Crimes Act*.

4 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1989, 2545 (Lionel Bowen, Attorney-General).

7. The Attorney-General further explained that the legislation will prohibit disclosure of, or discrimination against a person on the basis of, a conviction for a minor offence where the person has been of good behavior for 10 years after conviction.[5] Rather than create a range of offences to enforce the scheme, the Privacy Commissioner was given conciliation and civil remedy powers similar to those conferred by the *Privacy Act 1988* (Cth), to resolve breaches of the legislation.

8. Part VIIC contains six Divisions. The first includes s 85ZL, which contains definitions. "Commonwealth authority" is broadly defined and includes "a tribunal ... established or appointed for a public purpose by or under a Commonwealth law" and "a federal court". Likewise, "State authority" is defined so as to include "a tribunal ... established or appointed for a public purpose by or under a State law" and "a State court".

9. Section 85ZM(1) provides an expansive meaning of when a person has been convicted. Section 85ZM(2) explains when a person's conviction is "spent". It is not in dispute that the appellant's 1978 English convictions[6] and his 1997 Victorian finding of guilt[7] were spent convictions within the terms of s 85ZM(2) of the *Crimes Act*.

10. Part VIIC applies whether a person was convicted before or after the commencement of the Part: s 85ZP. The Part binds the Crown in right of the Commonwealth, each of the States and of the Australian Capital Territory and Northern Territory: s 85ZQ.

11. Division 2 concerns pardons for persons wrongly convicted. Its only relevance to this appeal is that its structure is similar to that described in detail for Division 3 below.

12. Division 3 is directed to spent convictions. Section 85ZV identifies three circumstances where it is engaged. Section 85ZV(1) is engaged in respect of convictions of Commonwealth offences and Territory offences that are "spent" (as explained by s 85M). Section 85ZV(2) is engaged in respect of convictions of a State offence or a foreign offence that are spent (as explained by s 85M). Section 85ZV(3) is engaged in respect of convictions of a State offence that are not "spent"

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5 Ibid.
6 Described at CAB 11 [9].
7 Described at CAB 12 [11].

in accordance with s 85M (and thus do not fall within s 85ZV(2)) but which are the subject of a State law dealing with the disclosure and taking into account of spent convictions. In essence, s 85ZV(3) is concerned with situations where a State allows an offence under its laws to be treated as spent in circumstances that are more favourable to the offender than s 85ZV(2).

13. When s 85ZV applies to Commonwealth and Territory offences, its effects operate generally and are binding on all persons and polities. When the section applies to State and foreign offences, it operates on all persons and polities in the Territories and also applies to Commonwealth authorities wherever located. This is needed because the State and foreign laws concerning spent convictions would not alone operate to bind Commonwealth authorities or to constrain Commonwealth laws.

14. Each of the provisions in s 85ZV are stated to be "subject to Division 6". Apart from Division 6, the section is otherwise intended to have effect "despite any other Commonwealth law or Territory law". Further, s 85ZV(1) is intended to have effect also despite any State law.

15. The operative effect of each subsection is, essentially, that "the [convicted] person is not required ... to disclose to any [person or Commonwealth authority or State authority] the fact that the person has been charged with, or convicted of, the offence".

16. This operative effect, when it is engaged, negates what would otherwise be a "requirement" to disclose that fact. Such requirements may arise directly under a law that requires a person to answer a question or complete a form honestly. A requirement might also arise in the context of employment by reason of contractual obligations or consequences if a misleading or untrue response is given.

17. The section does not prohibit a request for information as to whether there have been any spent convictions. It does, however, remove any obligation to respond to that request. This works in conjunction with s 85ZW, which is discussed below.

18. To the extent that a State law might require a person to answer a question seeking to ascertain whether the person had spent convictions of Commonwealth or Territory offences, such a law would be inconsistent with s 85ZV(1). Section 109

of the Constitution would operate to ensure that s 85ZV(1) prevails and the State law would need to yield to that extent.[8]

19. Section 85ZW is engaged where s 85ZV operates to make it lawful for a person not to disclose the fact that he or she was charged with, or convicted of, an offence. Thus, the ambit of operation of s 85ZW corresponds precisely with s 85ZV.

20. When s 85ZW is engaged, it has three effects, two of which are relevant to this case and are therefore considered here. *First*, it is lawful for the (convicted) person to claim (in the circumstances covered by s 85ZV) on oath or otherwise that he or she was not charged with or convicted of the offence. This constitutes a positive authority to do what would otherwise be characterised as a lie. There are a range of laws where lying in this regard might itself be an offence or at least have civil consequences. Section 85ZW(a) operates to make this conduct lawful and thus overrides any Commonwealth, State or Territory law to the contrary, save for one qualification. The qualification is that the lawfulness of a claim not to have been convicted is subject to Division 6.

21. The *second* relevant effect of s 85ZW is that specified in s 85ZW(b)(ii). It provides that anyone who knows or could reasonably be expected to know that s 85ZV applies to a given person (hence, anyone who knows that the person has a spent conviction that cannot be required to be disclosed) shall not take account of the fact that the person was charged with or convicted of the offence the subject of that spent conviction. Hence, if a State authority or Commonwealth authority knows that a person has a spent conviction, that authority must not take that fact into account in making its decisions. In many instances, the authority may be acting under a statute that requires or permits that fact to be taken into account. Again, the effect of s 85ZW(b)(ii) is to override any such Commonwealth, State or Territory law that would permit this fact to be taken into account. Of course, this effect is itself expressly made subject to Division 6.

22. Division 4 makes provision for circumstances where Division 3 may or will cease to apply in respect of certain spent convictions. It is not presently material.

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8 See, by way of analogy, *Pearce v South Australian Health Commission* [1996] SASC 5801; (1996) 66 SASR 486 at 490-491 (Bollen, Millhouse and Williams JJ); *McBain v Victoria* [2000] FCA 1009; (2000) 99 FCR 116 at 123 [19]-[20] (Sundberg J); and *EHT18 v Melbourne IVF* [2018] FCA 1421 at [107]-[124] (Griffiths J). These are cases where Commonwealth prohibitions engage s 109 notwithstanding that the particular Commonwealth enactments provided for a specific method for civil remedies to be achieved.

23. Division 5 sets up a regime for the Information Commissioner to receive and investigate complaints about breaches of Divisions 2 and 3 of Part VIIC. The Information Commissioner is empowered to make determinations of the kind specified in s 85ZZD(1).

24. Division 6 is entitled "Exclusions". It has three subdivisions, only the second of which is immediately relevant. Subdivision B and s 85ZZH are both also entitled "Exclusions". Section 85ZZH relevant 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:*
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> *(a) a law enforcement agency, for the purpose of making decisions in relation to prosecution or sentencing or of assessing:*
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> *(i) prospective employees or prospective members of the agency; or*
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> *(ii) persons proposed to be engaged as consultants to, or to perform services for, the agency or a member of the agency;*
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> ...
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> *(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;*
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> *(d) a person who makes a decision under the* Migration Act 1958, *the* Australian Citizenship Act 2007, *or the* Immigration Act 1980 *of the Territory of Norfolk Island, for the purpose of making that decision;*
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> ...

25. The chapeau to s 85ZZH provides that the lawfulness of non-disclosure of spent convictions and the requirement that they not be taken into account do not apply to the bodies identified in the circumstances specified in the succeeding paragraphs.

26. These paragraphs are part of a careful counter-balancing of the otherwise favourable operative provisions. Parliament should be taken to have identified the stated exclusions as circumstances where the interests in honesty of disclosure and the ability for a specified body to weigh the disclosure in the balance outweighs the interest in allowing offenders of minor offences to conduct their affairs as if their spent offences had not been committed.

27. It is apparent that the identified circumstances apply to both Commonwealth and State agencies. For example, "law enforcement agency" is defined to include State agencies as well as Commonwealth agencies. In this way, s 85ZZH demarks when s 109 of the Constitution will apply so that ss 85ZV and 85ZW prevail over State law and when they do not.

28. The plain words of s 85ZZH(c) indicate that the exclusion applies to Commonwealth and State courts and tribunals "for the purpose of making a decision".[9] The language of that exclusion is broad and of general application.[10] The exclusion applies to all courts and tribunals established under laws of Australia and for the general purpose of making decisions. There is otherwise no limitation on the kinds of courts and tribunals to which the exclusion applies. Nor is there any limitation on the kinds of decisions to which it applies.[11] Indeed, it would cover all substantive decision-making powers whether they are exercises of judicial power or administrative power, whether they are first instance decisions or appeals, or reviews on the merits.

29. This paragraph applies to all kinds of Commonwealth and State courts and tribunals and must have ambulatory application as the powers of such courts and tribunals change over time.

30. It would certainly apply both to a court or tribunal doing licensing work (deciding whether someone was fit and proper to hold a liquor licence or gaming licence or the like). The provision should be understood against the background of all State and Commonwealth courts and tribunals that existed in 1989.

31. Moreover, it should be understood to apply with respect to laws or provisions governing those bodies when "making a decision". For example, a State law requiring a decision-maker to have regard to all convictions would be inconsistent with Part VIIC in so far as the State law applied to decision-makers not falling within s 85ZZH, but would not be inconsistent with Part VIIC when a State court or tribunal was exercising the same power. Likewise, a State law empowering a State officer to compel a person to disclose a spent conviction would be inconsistent

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9 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

10 As Middleton J found in *Toohey v Tax Agents' Board of Victoria* [2007] FCA 431; (2007) 171 FCR 291 at 297-298 [30].

11 Cf. CAB 150 [85]-[86] and 155-156 [102]-[103].

with Part VIIC, but such a law that allowed a court or tribunal to compel an answer would not be inconsistent with Part VIIC.

32. The scheme reveals a clear legislative intent by which the Parliament decided that courts and tribunal should be able to compel complete and honest answers (under pain of contempt or like provision) and could take disclosed convictions into account as they saw fit (even if they be spent convictions).

33. Although Part VIIC operates on State laws through the prism of s 109 of the Constitution and on Commonwealth and Territory laws through different mechanisms, there is no reason to believe that the Parliament intended that there would be a different substantive outcome as between, say, Commonwealth tribunals and State tribunals.

34. In relation to the impact of Part VIIC on pre-existing Commonwealth laws, it is clear that there were laws that required persons to answer questions (which could extend to questions about the existence of spent convictions) and there were laws that would have made past convictions (including what became spent convictions) mandatory or permissible considerations for Commonwealth decision-makers.[12] Indeed, the purpose of Part VIIC was to reform those very laws.

35. In circumstances where ss 85ZV and 85ZW applied (and hence not circumstances carved out by s 85ZZH), the effect of Part VIIC was to effect a partial repeal of any pre-existing laws that could be used to require disclosure of past convictions or which would allow spent convictions to be taken into account. Part VIIC did not wholly repeal those existing laws but would have repealed them only to the extent to which they were inconsistent. As observed by Griffith CJ in *Goodwin v Phillips* [1908] HCA 55; (1908) 7 CLR 1 at 7:

> *... That proposition is only an instance of a more general rule, that is, that where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. It is immaterial whether both Acts are penal Acts or both refer to civil rights. The former must be taken to be repealed by implication. Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their*

12 See footnote 14 below.

operation is excluded with respect to cases falling within the provisions of the later Act.

36. The net effect of Part VIIC was then to allow the pre-existing laws to continue to operate as before, other than in circumstances that are governed by the more recent Act, in which case that Act will prevail.

The *AAT Act*

37. An enactment may provide that applications may be made to the Tribunal for review of decisions made in the exercise of powers conferred by that enactment: s 25(1), *AAT Act*.

38. The *AAT Act* confers on the Tribunal a range of procedural powers including: a power to take evidence on oath (s 40(1)); the power requiring a person appearing before the Tribunal to give evidence (s 40(2)); and the power to summons persons to give evidence or produce documents (s 40A). The Tribunal also has power to make an order staying or otherwise affecting the operation or implementation of the decision under review (s 41(2)).

39. In addition to its own procedural powers, the Tribunal may, for the purpose of reviewing a decision, exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision under review: s 43(1), *AAT Act*. This provision confers not only the procedural powers of the original decision-maker but also confers the powers under the relevant enactment to make a substantive decision.[13] Where appropriate, the Tribunal can set aside the decision under review or vary it, in which case the Tribunal will in part be exercising the powers under the Act that conferred power on the original decision-maker. A decision by the Tribunal to vary or set aside an original decision (but not a decision to affirm it) is deemed to be a decision of the original decision-maker (other than for the purposes of applications to the Tribunal for review or of appeals under s 44): s 43(6).

40. The requirements imposed by the *AAT Act* upon a person to give evidence and to give it honestly are sanctioned by criminal offences: ss 61, 62 and 62A.

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13 See AS [4].

41. When Part VIIC was enacted, there were a range of decision-making powers held by Commonwealth authorities that would have been affected by it, which decision-making powers were subject to review on the merits before the Tribunal.[14] In some of these cases, the Commonwealth agency may have had power to compel answers to questions. In others, it may have had power to prescribe forms that needed to be completed honestly in order to apply for a licence or permit. In other cases, it may have had no power to require disclosures at all. In circumstances where there was a law that could be used to require disclosure about past convictions, after the enactment of Part VIIC (and assuming that Division 6 did not apply to that agency), the power to require disclosure would no longer extend to the disclosure of spent convictions. Likewise, if a decision-making power required or permitted the Commonwealth agency to have regard to all past convictions, after the enactment of Part VIIC, the provision conferring that power would be overridden *to the extent that* it required or permitted spent convictions to be taken into account (again, assuming that Division 6 was not applicable).

42. If there had been an application for review to the Tribunal, a question would arise as to whether the Tribunal's powers under the *AAT Act* to require disclosure of past convictions had been overridden by Part VIIC. This would require consideration of whether s 85ZV was enlivened to override the power of the Tribunal to require such a disclosure. The answer is that it would not because s 85ZV is subject to s 85ZZH(c), which provides s 85ZV does not apply in relation to the disclosure of information to a tribunal for the purpose of making a decision.

43. If s 85ZV does not apply, then the provisions of the *AAT Act* empowering the compelling of evidence are not impliedly repealed to any extent. Moreover, if s 85ZV does not apply in relation to tribunals, then s 85ZW(b)(ii) is not even engaged by its own terms (as it applies only when s 85ZV applies). In any event, for the same reasons, s 85ZZH(c) would operate so that s 85ZW does not apply to the Tribunal to require it to disregard spent convictions.

44. In this way, Part VIIC would operate in the Commonwealth context just as it would in the State context, namely some primary decision-makers may be precluded from

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[14] See, for example, the *Corporations Act 1989* (Cth) and, in particular, s 600 (director disqualification), s 1280 (registration of auditors), s 1282 (registration of liquidators) and s 783 (grant of licence to dealer or investment adviser (s 783(4) requires the Commission to have regard to any conviction of the applicant, during the 10 years ending on the day of the application, of serious fraud)). See also, for example, s 12 of the *Migration Act 1958* (Cth) (as then in force).

taking spent convictions into account but courts and tribunals (including those undertaking merits review) are not so constrained. This is not a result of the Tribunal's review function being to exercise different laws but because the Parliament has intentionally adopted a new regime that distinguishes between the material that a tribunal can consider when making a decision and what a primary decision-maker can consider.

The *Credit Act*

45. The *Credit Act* was enacted in 2009. The Act contains (in Chapter 2) a regime for the licensing of persons who engage in "credit activities" (an expression defined in s 6).

46. Section 80 empowers ASIC to make a banning order against a person, relevantly (under s 80(1)(f)), if ASIC has reason to believe that the person is not a fit and proper person to engage in credit activities. Section 80(2) relevantly provides:

> *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:*
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> *(a) if the person is a natural person—the matters set out in paragraphs 37(2)(a) to (f) and subparagraph 37(2)(g)(i) in relation to the person;*
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> ...
>
> *(c) any criminal conviction of the person, within 10 years before the banning order is proposed to be made;*
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> *(d) any other matter ASIC considers relevant;*
>
> *(e) any other matter prescribed by the regulations.*
>
> *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.*

47. For a natural person, such as the appellant, paragraphs (a), (c), (d) and (e) are stated as matters that ASIC must have regard to, but subject to Part VIIC of the *Crimes Act*. For present purposes, nothing turns on paragraphs (a) and (e).

48. Paragraph (c) makes convictions committed within 10 years of a banning order mandatory relevant considerations. There is scope for this requirement to be inconsistent with Part VIIC of the *Crimes Act*. For example, the latter requires some convictions within s 85ZV not to be taken into account (inter alia by ASIC), and this would extend to certain offences committed more than five years ago (when

committed as a minor[15]) and also certain offences committed less than 10 years ago when a State law provides that the conviction need not be disclosed (s 85ZV(3)).

49. Because the duty imposed on ASIC to consider those convictions under s 80(2)(c) is subject to the duty not to do so imposed under Part VIIC, ASIC is under a duty not to consider the subset of convictions that fall within s 85ZW(b)(ii).

50. Section 80(2)(d) requires ASIC to have regard to other matters it considers relevant. Given the protective purpose underpinning the power to make a banning order under s 80 of the *Credit Act*,[16] a person's criminal conviction from more than 10 years earlier is capable of constituting "any other matter ASIC considers relevant".[17] It should be borne in mind that not all such convictions will be spent convictions. For example, a person may have committed serious offences more than 10 years ago that would not be spent because the person was sentenced to more than 30 months' imprisonment (s 85ZM(2)(b)). There is no doubt that such a conviction could be considered by ASIC to be relevant to whether the person was fit and proper and there would be no inconsistency with Part VIIC of the *Crimes Act*.

51. Of course, offences committed more than 10 years ago might be considered by ASIC to be relevant but also be spent convictions. In such cases, as explained in relation to s 80(2)(c), ASIC would be bound not to take spent convictions into account because the duty (or perhaps ability) to consider that matter under s 80(2)(d) is subject to the duty not to consider it under s 85ZW(b)(ii) (in circumstances where Division 6 is not applicable to ASIC decision-making).

52. The note to s 80(2) states that Part VIIC "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" (emphasis added).[18] The reference to "certain circumstances" contemplates the effect of Division 6 of Part VIIC, which identifies the circumstances when spent convictions do not need to be disregarded.

53. The banning power in s 80 of the *Credit Act* is subject to the **whole** of Part VIIC, such that the power is not subject to the constraint imposed by s 85ZW when

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15 See the definition of "spent" in s 85ZM(2) and the definition of "waiting period" in s 85ZL.
16 Cf. CAB 63-65 [43]-[47] (FC) and CAB 151 [88] (FFC).
17 Cf. CAB 58-59 [28]-[30] and 60-63 [35]-[42] (FC) and CAB 151 [88] (FFC).
18 See also s 13 of the *Acts Interpretation Act 1901* (Cth).

s 85ZZH(c) provides that s 85ZW does not apply. Because s 85ZZH of the *Crimes Act* has been designed by Parliament to operate not only by reference to decision-making powers but also by reference to the nature of the decision-making body, it follows that s 85ZW will constrain some decision-makers and not others, even when exercising the same substantive powers. Critically, that occurs when a decision under s 80 of the *Credit Act* is being reviewed by the Tribunal. Hence, while the Tribunal stands in the shoes of ASIC, exercising the same power subject to its terms, the same constraint on that decision-making power imposed by Part VIIC applies differentially to the Tribunal as it does to ASIC. This is the direct and intended result of the ambit of the exclusions in s 85ZZH and from the exclusions distinguishing between different decision-making bodies that (in some instances) exercise the same decision-making powers.

54. An application may be made to the Tribunal for review of an ASIC decision under s 80: see s 327(1), *Credit Act*.

Resolution of the present appeal

55. The appellant argues that s 43 of the *AAT Act* operates to make the Tribunal subject to the same legal constraints that bound ASIC (at AS [4]). It is not controversial that the Tribunal must do again what the primary decision-maker did. The Tribunal can exercise the same substantive powers (if it wishes not to affirm the decision) and can exercise both the primary decision-maker's procedural powers as well as its own procedural powers.

56. In the present case, the Tribunal was required to consider again whether the appellant should be banned and it was required to have regard to the matters specified in s 80(2) of the *Credit Act* and, like ASIC, its duty to have regard to those matters was subject to Part VIIC of the *Crimes Act*. None of that is controversial.

57. However, Part VIIC operates differentially when the decision-making body is the Tribunal as compared to when it is ASIC. The difference in consideration is not a result of applying s 80 of the *Credit Act* differently but is a result of decision-makers being subject to variable constraints by reason of the terms of those constraints.

58. The appellant contends that s 85ZZH(c) of the *Crimes Act* should not be permitted to override s 43 of the *AAT Act*.[19] However, there is no inconsistency between these

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[19] See AS [5] and [36].

two provisions requiring one to override the other. Section 43 requires the Tribunal to consider re-exercising the same power and that is what it did here. The fact that that power, by incorporating Part VIIC of the *Crimes Act*, operates differentially does not give rise to inconsistency with s 43. They operate harmoniously. Section 43 does not state that the Tribunal may never be subject to different constraints to the primary decision-maker, even if the law so provides. The Tribunal will have powers that the primary decision-maker does not have (it always having its own procedural powers) and they may be subject to different constraints than were faced by the primary decision-maker. This does not involve overriding s 43; it is a possibility inherent in the *AAT Act*.

59. There are other instances where laws provide that the Tribunal is subject to different constraints than the primary decision-maker.[20] Part VIIC is one such instance and, in that case, it is not subject to a constraint imposed on the primary decision-maker. The imposition of different constraints on the Tribunal (as compared with the decision-maker) is not inconsistent with s 43 of the *AAT Act*. They can readily be read together.

60. The appellant contends that there is a conflict between s 85ZZH(c) of the *Crimes Act* and s 43 of the *AAT Act*, which can be resolved by the principle that a special provision will prevail over a general provision (at AS [36]). It is then argued that Part VIIC has general application and is not directed to the circumstances of the Tribunal (at AS [39]).

61. This Court should not accept these arguments. The language of s 85ZZH(c) is clearly capable of referring to the Administrative Appeals Tribunal, being "a ... tribunal established under a law of the Commonwealth ..." The Tribunal was the pre-eminent body of that kind in 1989 (and remains so today). The report of the Australian Law Reform Commission on Spent Convictions identified (at p 4) a public interest contrary to that of offenders:

> Administration of justice: *the interest in efficient and fair administration of justice, including decision making, review and sentencing, particularly with a view to ensuring that courts and tribunals are provided with all relevant and necessary information ...*

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20 For example, see: s 52(3) of the *Australian Citizenship Act 2007* (Cth); s 500(6H) and (6J) of the *Migration Act 1958* (Cth); s 60A(4) and (5) of the *Therapeutic Goods Act 1989* (Cth); s 31 of the *Lands Acquisition Act 1989* (Cth); s 269SHA(5) and (6) of the *Customs Act 1901* (Cth).

62. The Commission continued at p 24:

> Exemptions
>
> *39.* Courts and tribunals - evidence of spent convictions. *Under previous recommendations the courts, when sentencing offenders, would be exempt from the obligation to disregard spent convictions. But this is not the only context in which courts make use of information about convictions. The reasons for a general obligation to disregard spent convictions have less force when the decision maker is a court or tribunal. Courts and tribunals apply a well defined and highly structured set of rules in admitting evidence of convictions and determining the weight to be given to the evidence. ...*

63. While it may be accepted that Part VIIC did not follow the drafting proposed by the ALRC, it is difficult to imagine that the Parliament did not consider that s 85ZZH(c) would not apply to the Tribunal. There was a real policy justification for excluding all courts and tribunals from the constraints otherwise imposed by Part VIIC.[21]

64. At AS [40], the appellant contends that s 85ZZH(c) should be understood as having no application in the circumstances of this case. Presumably, the logic of that approach and the fact that the Tribunal is a review body leads to the conclusion that s 85ZZH(c) should be understood as essentially not applying to the Tribunal at all. The appellant refers to its "construction" (AS [41]) but does not proffer any means by which the language of s 85ZZH(c) is to be read as excluding the Tribunal. Are words to be read in and if so what words? Is it the Tribunal alone that is excluded or are State merits review tribunals to be excluded as well? Or are State merits review bodies still included because even if there was a State law equivalent to s 43 of the AAT Act, it would not have the same effect as s 43 on the appellant's argument? Are State courts that undertake merits review to be excluded? Did Parliament intend for State merits review bodies to be able to have regard to spent convictions but not trust its own pre-eminent tribunal to do the same?

65. None of these questions are answered because the appellant does not actually proffer a construction of the legislation that supports that outcome. Rather, the appellant starts with the outcome he wants (that the Tribunal cannot consider spent convictions) and seeks to reason backwards to the position that this is what the Parliament should be taken to have intended. The Court should reject this invitation.

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21 *Kocic v Commissioner of Police* [2014] NSWCA 368; (2014) 88 NSWLR 159 at 175 [66] and 176 [74] (Basten JA) and 188 [135] and 189 [138] (White J).

66. Nothing in the text, structure or context of Part VIIC indicates that its reference to tribunals established under Commonwealth law is meant to exclude the Tribunal.

67. The appellant asserts that his "construction" avoids anomalous results. ASIC contends that the idea that some decision-making bodies can consider spent convictions while others cannot, even when exercising the same powers, is not anomalous. It is a policy choice made by Parliament in clear language.

68. Moreover, the result advanced by the appellant would create anomalies rather than remove them. Let it be assumed that s 85ZZH(c) was to be understood as if words were implied into it (which must be what the appellant is wanting) as follows:[22]

> *a court or tribunal established under a Commonwealth law, a State law or a Territory law, for the purpose of making a decision (but not for the purpose of making a decision on review), including a decision in relation to sentencing;*

69. Such a construction would immediately raise the question whether an appellate court hearing a sentencing appeal would be allowed to have regard to the spent convictions that the sentencing judge had regard to.[23]

70. Even if "review" could be limited to "administrative review", it would mean that a delegate of the Minister for Home Affairs could have regard to spent convictions when making visa grant and cancellation decisions because of the operation of s 85ZZH(d) but the Tribunal on review would be obliged to disregard the same spent convictions (because on this hypothesis s 85ZZH(c) would not apply to the Tribunal undertaking a review of the delegate's decision). Such an outcome would encourage review applications in every case where spent convictions were considered by the delegate. This would be anomalous and absurd, and flows solely from the appellant's approach to how these provisions operate.

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22 *Minogue v Victoria* [2018] HCA 27 at [43] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ); *Taylor v Owners – Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531 at 547-549 [35]-[40] (French CJ, Crennan and Bell JJ).

23 One example is the County Court of Victoria established under the *County Court Act 1958* (Vic). Pursuant to Part 6.1 of the *Criminal Procedure Act 2009* (Vic), the County Court conducts appeals by way of rehearing from convictions and sentences imposed by the Magistrates' Court of Victoria in criminal proceedings. In conducting those appeals, the County Court "may exercise any power which the Magistrates' Court exercised or could have exercised". See s 256(2) of the *Criminal Procedure Act 2009* (Vic). A narrower construction would prevent the County Court, in an appeal on sentence, from having regard to a spent conviction in respect of a Commonwealth offence. See ss 85ZV(1) and 85ZW(b) of the Crimes Act. It is unlikely that such a consequence would have been intended.

71. Contrary to AS [43], s 43(6) does not lead to any anomaly. If having reviewed all the material (including spent convictions), the Tribunal determines to substitute ASIC's decision, then that substituted decision is taken to be ASIC's decision (save for purposes of review or appeal). There is no anomaly here. It is how all Tribunal decisions work.

72. If the Parliament had wished to avoid an outcome under which the Tribunal could consider spent convictions which ASIC could not consider, it could readily have done so by referring in s 80 of the *Credit Act* more specifically to "spent convictions" and not more generally to the whole of Part VIIC of the *Crimes Act*. For example, s 80(2) does not state, but could have been drafted to provide, that ASIC must not have regard to any "spent convictions" within the meaning of s 85ZM of the *Crimes Act*. Had it said this, the constraint would have applied also to the Tribunal on review and s 85ZZH(c) would have had no application at all.

73. As the Full Federal Court observed in this matter, other Commonwealth statutory provisions have employed drafting techniques to ensure that the operation of Part VIIC is specifically qualified in some way.[24] For instance:

a) s 290(2) of the *Migration Act 1958* (Cth) provides that, in considering whether a person is not fit and proper or a person of integrity, the Migration Agents Registration Authority must take into account any conviction of the person of a relevant criminal offence "except a conviction that is spent under Part VIIC of the *Crimes Act 1914*";

b) s 513(1) of the *Fair Work Act 2009* (Cth) provides that, in deciding whether a person is a fit and proper person, the Fair Work Commission must take into account any conviction of the person of a relevant criminal offence; and s 513(2) states that:

> *Despite 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.;*

c) s 120(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) provides that a person is a disqualified person if, "at any time", the person was convicted of a criminal offence in respect of dishonest conduct; and

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24 CAB 154 [95]-[98].

s 120(4) expressly excludes the application of the Commonwealth spent conviction legislation, stating 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.*

74. Further, the legislation under consideration in this case is different to the legislation considered by the New South Wales Court of Appeal in *Kocic v Commissioner of Police* [2014] NSWCA 368; (2014) 88 NSWLR 159. Among other things, the interaction between s 80(2) of the *Credit Act* and Part VIIC of the *Crimes Act* is described in express and different terms. Moreover, Part VIIC applies to both Commonwealth and State laws and both Commonwealth and State courts and tribunals established under statute. Overall, *Kocic* is of limited assistance in the proper construction of the Commonwealth legislation under consideration here.

75. To the extent that *Kocic* might provide any assistance, the reasoning of Basten JA (with whom Leeming JA agreed) should not, with respect, be approved. That reasoning requires that an exclusion provision analogous to s 85ZZH(c) of the *Crimes Act* be read so as to apply to "tribunals generally, but not to the tribunal exercising merit review of an administrative decision-maker who is bound by the *Criminal Records Act*".[25] Such a reading of the provision implies many additional words into a statute without adequate reason for doing so.[26] As White J, in dissent, rightly observed, such a reading is also not consistent with the unambiguous and plain words of the provision.[27]

Conclusion

76. Pursuant to s 43(1) of the *AAT Act*, the Tribunal may exercise the power conferred by s 80(1) of the *Credit Act* on ASIC to make a banning order. That is the same power as the power exercised by ASIC.

77. In exercising that power, the Tribunal "stands in the shoes" of ASIC. To that end, and in accordance with s 80(2) of the *Credit Act*, the Tribunal (like ASIC) must,

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25 *Kocic v Commissioner of Police* [2014] NSWCA 368; (2014) 88 NSWLR 159 at 177 [76] (Basten JA).

26 See footnote 22 above.

27 *Kocic v Commissioner of Police* [2014] NSWCA 368; (2014) 88 NSWLR 159 at 187 [128] (White J).

"subject to Part VIIC of the *Crimes Act 1914*", have regard to certain matters, including any other matter it considers relevant.

78. If the Tribunal considers a spent conviction relevant, it must (like ASIC) have regard to that matter subject to the "constraint" imposed by the provisions of Part VIIC of the *Crimes Act*.

79. Although, by reason of s 85ZZH(c) of the *Crimes Act*, that constraint on what must be taken into account happens to operate differently for the Tribunal than ASIC, the Tribunal does not exercise any different power to that conferred by s 80 of the *Credit Act* on ASIC.

10 80. The Full Federal Court was correct to find that, in the circumstances of this matter, the Tribunal was entitled to have regard to the appellant's spent convictions. The appeal should be dismissed with costs.

PART VI TIME ESTIMATE FOR THE RESPONDENT'S ORAL ARGUMENT

81. The estimated duration of the presentation of the respondent's oral argument is one hour.

Dated: 2 November 2018

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