Federal Court of Australia

Frugtniet v Australian Securities and Investments Commission [2023] FCAFC 14

|  |  |
| --- | --- |
| Appeal from: | *Frugtniet and Australian Securities and Investments Commission* [2022] AATA 295 |
|  |  |
| File number: | VID 139 of 2022 |
|  |  |
| Judgment of: | **MARKOVIC, MCELWAINE AND MCEVOY JJ** |
|  |  |
| Date of judgment: | 17 February 2023 |
|  |  |
| Catchwords: | **ADMINISTRATIVE LAW** – appeal from a decision of the second respondent (**Tribunal**) to uphold a decision of a delegate of the first respondent (**ASIC**) to make a banning order under the *National Consumer Credit Protection Act* *2009* (Cth) (**NCCP Act**) – where the banning order prohibited the applicant from engaging in credit activities – whether the Tribunal erred by applying the NCCP Act in force at the time of the Tribunal’s decision in circumstances where the banning order was imposed under a previous version of the NCCP Act – where transitional provisions provided that a banning order in force prior to the amendment of the NCCP Act continues in force and *may be dealt with* as if it had been made under the amended subsection – statutory construction of *may be dealt with* – whether the Tribunal’s decision is affected by apprehended bias because the Tribunal had knowledge of prejudicial but inadmissible facts relating to the applicant’s spent convictions – whether the applicant was denied procedural fairness – whether the Tribunal impermissibly made findings by having regard to findings made in other proceedings or made findings that were not reasonably open to it or based on probative evidence – appeal dismissed |
|  |  |
| Legislation: | *Acts Interpretation Act 1901* (Cth) s 7(2)  *Administrative Appeals Tribunal Act 1975* (Cth) ss 33(1)(c), 37, 44(1)  *Crimes Act 1914* (Cth) s 85ZW  *Evidence Act 1995* (Cth) s 91  *Financial Sector Reform (Hayne Royal Commission Response-Stronger Regulators (2019 Measures)) Act 2020* (Cth)  *National Consumer Credit Protection Act 2009* (Cth) ss 37, 37A, 37B, 80, 81  *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth) s 2(1) of Sch 14 |
|  |  |
| Cases cited: | *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88  *Attorney-General for the State of Queensland v Australian Industrial Relations Commission* (2002) 213 CLR 485  *Barbaro v Minister for Immigration and Ethnic Affairs* (1982) 44 ALR 690; (1982) 65 FLR 127  *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76  *Frugtniet v Australian Securities and Investments* (2019) 266 CLR 250  *Frugtniet v Australian Securities and Investments Commission* [2016] FCA 995; 152 ALD 31  *Frugtniet v Migration Agents Registration Authority* [2016] AATA 299  *Frugtniet v Migration Agents Registration Authority* [2017] FCA 537*;* 156 ALD 79  *MBJY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 284 FCR 152  *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482; 26 ALR 247  *Rawson Finances Pty Ltd v Commissioner of Taxation*  (2013) 133 ALD 39  *Re Frugtniet and Secretary, Department of Family and Community Services* (2004) 84 ALD 774  *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286  *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | Victoria |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 144 |
|  |  |
| Date of hearing: | 29 November 2022 |
|  |  |
| Counsel for the Appellant: | The Appellant appeared in person |
|  |  |
| Counsel for the First Respondent: | Mr R Knowles KC with Ms F Bentley |
|  |  |
| Solicitor for the First Respondent: | Australian Securities and Investments Commission |
|  |  |
| Counsel for the Second Respondent: | The Second Respondent did not appear |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | VID 139 of 2022 |
|  | | |
| BETWEEN: | MR RUDY FRUGTNIET  Appellant | |
| AND: | AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

|  |  |
| --- | --- |
| order made by: | MARKOVIC, MCELWAINE AND MCEVOY JJ |
| DATE OF ORDER: | 17 February 2023 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

# THE COURT:

1. On 26 June 2014 a delegate of the first respondent, the Australian Securities and Investments Commission (**ASIC**), made a banning order under s 80(1) and s 81 of the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**) permanently prohibiting the appellant, Rudy Frugtniet, from engaging in credit activities (**Banning Order**).
2. On 25 July 2014 Mr Frugtniet applied to the second respondent, the Administrative Appeals **Tribunal**, for review of ASIC’s decision.
3. On 6 March 2015 the Tribunal affirmed ASIC’s decision. That decision of the Tribunal was ultimately set aside by the **High Court** of Australia and the matter remitted to the Tribunal for reconsideration according to law: see *Frugtniet v Australian Securities and Investments* (2019) 266 CLR 250 (***Frugtniet HCA***).
4. On 22 February 2022 the Tribunal, on the remitter, decided to vary the decision under review so as to permanently prohibit Mr Frugtniet from engaging in any credit activities; controlling, whether alone or in concert with one or more other entities, another person who engages in credit activities; and performing any function involved in engaging in credit activities.
5. Mr Frugtniet appeals, pursuant to s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**), from the Tribunal’s decision. In doing so he relies on a further amended notice of appeal from the Tribunal filed on 2 November 2022.

# STATUTORY FRAMEWORK

1. Before proceeding further it is instructive to set out the relevant provisions of the NCCP Act. That Act was amended by the *Financial Sector Reform (Hayne Royal Commission Response-Stronger Regulators (2019 Measures)) Act 2020* (Cth)(**Amending Act**) after the date the Banning Order was made and before the Tribunal heard and determined the application for review following its remittal by the High Court. The relevant provisions of the NCCP Act as amended are set out below.
2. Definitions are included in s 5 of the NCCP Act. Relevantly the term “banning order” is defined to mean “an order made under subsection 80(1)”.
3. Division 3 of Pt 2-2 of the NCCP Act concerns how a person can get a credit licence. Section 37 provides for when a licence may be granted to applicants, other than authorised deposit-taking institutions (**ADI**), and includes:

(1) ASIC must grant a person (other than an ADI) a licence if (and must not grant the person a licence unless):

(a) the person has applied for the licence in accordance with section 36; and

(b) ASIC has no reason to believe that the person is likely to contravene the obligations that will apply under section 47 if the licence is granted; and

(c) the requirement in section 37A (fit and proper person test) is satisfied in relation to the applicant and the licence applied for; and

(e) the person meets any other requirements prescribed by the regulations.

Note: ASIC must not grant a licence to a person contrary to a banning order or disqualification order, or if a prescribed State or Territory order is in force against the person or certain representatives of the person (see section 40).

1. Section 37A of the NCCP Act sets out the “fit and proper person” test for the purposes of, relevantly, s 37(1)(c) and s 37B sets out the matters to which ASIC must have regard in determining the “fit and proper person” test. Those sections provide:

***37A Fit and proper person test***

(1) For the purposes of paragraph 37(1)(c), subsection 46A(2) and paragraph 55(1)(c), the requirement in this section is satisfied in relation to a person (the ***first person***) and a licence, or a proposed licence, if ASIC is satisfied that there is no reason to believe any of the following:

(a) that the first person is not a fit and proper person to engage in the credit activities authorised by the licence;

(b) if the first person is a body corporate—that an officer (within the meaning of the *Corporations Act 2001*) of the first person is not a fit and proper person to perform one or more functions as an officer of a person that engages in the credit activities authorised by the licence;

(c) if the first person is a partnership or the multiple trustees of a trust:

(i) that any of the partners or trustees are not fit and proper persons to engage in the credit activities authorised by the licence; or

(ii) that any of the senior managers of the partnership or the trust are not fit and proper persons to perform one or more functions as an officer (within the meaning of the *Corporations Act 2001*) of a person that engages in the credit activities authorised by the licence;

(d) that any person who controls the first person is not a fit and proper person to control a person that engages in the credit activities authorised by the licence;

(e) if a controller mentioned in paragraph (d) is a body corporate—that an officer (within the meaning of the *Corporations Act 2001*) of the controller is not a fit and proper person to perform one or more functions as an officer of an entity (as defined by section 64A of that Act) that controls a person that engages in the credit activities authorised by the licence;

(f) if a controller mentioned in paragraph (d) is a partnership or the multiple trustees of a trust:

(i) that any of the partners or trustees are not fit and proper persons to control a person that engages in the credit activities authorised by the licence; or

(ii) that any of the senior managers of the partnership or the trust are not fit and proper persons to perform one or more functions as an officer (within the meaning of the *Corporations Act 2001*) of an entity (as defined by section 64A of that Act) that controls a person that engages in the credit activities authorised by the licence.

(2) In considering whether a person is fit and proper for a purpose mentioned in subsection (1), ASIC must have regard to the matters in section 37B.

***37B Fit and proper person test—matters to which ASIC must have regard***

(1) ASIC must have regard to the matters set out in subsection (2) (subject to Part VIIC of the *Crimes Act 1914*) for the purposes of applying any of the following provisions to a person:

(a) a paragraph of subsection 37A(1);

(b) paragraph 80(1)(f).

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.

(2) The matters are as follows:

(a) whether any of the following of the person has ever been suspended or cancelled:

(i) a licence, or a registration under the Transitional Act;

(ii) an Australian financial services licence;

(b) whether any of the following has ever been made against the person:

(i) a banning order, or a disqualification order under Part 2‑4;

(ii) a banning order, or a disqualification order, under Division 8 of Part 7.6 of the *Corporations Act 2001*;

(c) if the person is an individual—whether the person has ever been disqualified under the *Corporations Act 2001*, or any other law of the Commonwealth or of a State or Territory, from managing corporations;

(d) whether the person has ever been banned from engaging in a credit activity under a law of a State or Territory;

(e) whether the person has ever been linked to a refusal or failure to give effect to a determination made by AFCA (as defined in section 910C of the *Corporations Act 2001*);

(f) if the person is not the multiple trustees of a trust—whether the person has ever been insolvent;

(g) if the person is the multiple trustees of a trust—whether a trustee of the trust has ever been insolvent;

(h) whether, in the last 10 years, the person has been convicted of an offence;

(i) any relevant information given to ASIC by a State or Territory, or an authority of a State or Territory, in relation to the person;

(j) any other matter prescribed by the regulations;

(k) any other matter ASIC considers relevant.

1. Part 2.4 of the NCCP Act concerns the banning or disqualification of persons from engaging in credit activities. It includes s 80 which relevantly provides:

*Making a banning order*

(1) ASIC may, in writing, make one or more orders (***banning orders***) against a person:

… ; or

(f) if ASIC has reason to believe that the person is not a fit and proper person to:

(i) engage in one or more credit activities; or

(ii) perform one or more functions as an officer (within the meaning of the *Corporations Act 2001*) of another person who engages in credit activities; or

(iii) control another person who engages in credit activities; or

...

*When a person is not a fit and proper person*

(2) For the purposes of paragraph (1)(f), ASIC must have regard to the matters in section 37B.

1. Section 81 of the NCCP Act sets out what a banning order prohibits and relevantly provides:

(1) A banning order made against a person may specify that the person is prohibited from doing one or more of the following:

(a) engaging in any credit activities;

(b) engaging in specified credit activities in specified circumstances or capacities;

(c) controlling, whether alone or in concert with one or more other entities (as defined by section 64A of the *Corporations Act 2001*), another person who engages in credit activities;

(d) performing any function involved in the engaging in of credit activities (including as an officer (within the meaning of the *Corporations Act 2001*), manager, employee, contractor or in some other capacity);

(e) performing specified functions involved in the engaging in of credit activities.

(2) The banning order may specify that a particular prohibition specified in the order applies against the person:

(a) if the sole ground for the banning order is because paragraph 80(1)(fc) applies—for a specified period of up to 5 years; or

(b) otherwise—either permanently or for a specified period.

Note: This subsection applies separately to each prohibition specified in the order.

1. Section 82(1) of the NCCP Act provides that a person who is subject to a banning order must not engage in conduct that is contrary to it. That subsection is a civil penalty provision, breach of which carries with it a penalty of 5,000 units. Section 82(2) provides that a person commits an offence if he or she is subject to a requirement under subs (1) and the person engages in conduct and the conduct contravenes the requirement. The penalty for breach of s 82(2) of the NCCP Act is five years imprisonment.

# THE TRIBUNAL’S DECISION

1. The Tribunal identified three primary issues for determination:
2. whether at least one of the statutory preconditions for exercising the discretion to impose a banning order on Mr Frugtniet was met;
3. if the answer to the first issue is yes, whether a banning order should be imposed on Mr Frugtniet; and
4. if so, the appropriate term and/or conditions to be imposed on any banning order.
5. The Tribunal also identified a number of legal issues which it was required to consider and which in its opinion impacted the resolution of the matter. They were:
6. whether the application for review should be dealt with under the NCCP Act as it existed at the time ASIC made the Banning Order or in the form it existed at the time of the Tribunal’s decision following its amendment by the Amending Act;
7. the extent to which the Tribunal could rely on findings of other courts and tribunals to make factual findings for the purposes of its decision; and
8. whether the expression “any other matter” in s 37(2)(i) (s 37B(2)(k) of the NCCP Act as amended by the Amending Act) is to be read down by reference to its statutory context such that certain matters cannot be taken into account in determining the application for a banning order.
9. As a preliminary matter, the Tribunal addressed the first of those legal issues. In that regard the Tribunal was satisfied that it was appropriate to apply the NCCP Act as amended. The Tribunal was of the opinion that Parliament had authorised it, by reason of the applicable transitional provisions in relation to existing banning orders, to treat an existing banning order as if it had been made under the NCCP Act as amended: Tribunal’s **reasons** at [18]-[19]. In reaching this conclusion the Tribunal relied on the reasoning in *Schroeder v Australian Securities and Investments Commission* [2020] AATA 2453 in which the Tribunal considered the approach to cognate transitional provisions in relation to banning orders under the *Corporations Act 2001* (Cth).
10. After setting out the relevant provisions of the NCCP Act as amended, the Tribunal noted that the applicable statutory framework required it to undertake a two step decision making process: reasons at [27]-[29].
11. First, it was required to satisfy itself that:
12. it had reason to believe that Mr Frugtniet was not a fit and proper person to:
    1. engage in credit activities; or
    2. perform one or more functions as an officer of another person who engages in credit activities; or
    3. control another person who engages in credit activities; or
13. it had reason to believe that Mr Frugtniet is likely to contravene any credit legislation or to be involved in a contravention of a provision of any credit legislation by another person.

The Tribunal noted that its primary focus was on the first limb.

1. Secondly, if the Tribunal was satisfied that it had reason to believe one of the matters set out in the preceding paragraph, it was required to determine the terms of the banning order, if any, that should be imposed. In that regard the Tribunal noted that it must consider the extent of any order in terms of what it should specify the person cannot do in relation to providing credit activities, whether the ban should be permanent or for a specified period and whether the order should allow the person to do specified acts which would otherwise be prohibited, subject to specified conditions or in specified circumstances.
2. The Tribunal then considered the first of the two matters it had identified, namely whether it had “reason to believe” that Mr Frugtniet was not a fit and proper person. It noted that in other statutory contexts that formulation requires that the relevant decision maker actually holds the relevant belief and that there are reasonable grounds or cause for the belief such that the test is both subjective and objective. The Tribunal found that the expression carries with it the same meaning in the context of the NCCP Act: reasons at [31]-[32]. The Tribunal went on to observe that as ASIC is only required to have “reason to believe” that a person “is not a fit and proper person” the legislature has given ASIC “more leeway” to proceed with a banning order in circumstances where the available material allows it to form that view even though it may not have the complete picture: reasons at [33].
3. At [34] of its reasons the Tribunal relevantly said:

This distinction has some importance in this matter as it affects the extent to which we have relied on findings of other decision makers. For the purposes of determining whether we have a reason to believe, we have been content to rely on the findings of other bodies. However, for the purposes of deciding what banning orders to impose we have relied upon positive findings of fact which we make based on material before us.

1. The Tribunal noted that ASIC had drawn its attention to numerous adverse findings made by other decision makers which were said to reflect adversely on Mr Frugtniet’s character. While recognising that some of the findings were in decisions that were set aside on appeal, the Tribunal was satisfied that the findings, individually and collectively, in those decisions that were undisturbed provided it with reason to believe that Mr Frugtniet is not a fit and proper person to engage in credit activities, perform functions as an officer of a person who engages in credit activities or control another person who engages in credit activities. However, the Tribunal went on to say that more explicit factual findings were necessary to underpin the exercise of the discretionary powers which that belief triggered. In considering whether a banning order should be made the Tribunal noted that it would rely on its own factual findings, rather than findings made by other decision makers: reasons at [35]-[39].
2. In explaining why it had reached the necessary level of satisfaction on the threshold question, namely whether it had “reason to believe”, the Tribunal first referred to the concept of “fit and proper person”. It observed that the NCCP Act required it to have regard to the factors in s 37B(2) when making that assessment and that the only relevant category for the purposes of the present matter was s 37B(2)(k) which required consideration of “any other matters ASIC considers relevant” to the assessment: reasons at [40]. After surveying the authorities the Tribunal concluded that the assessment it was required to undertake was broad, that the question to be resolved was whether Mr Frugtniet is a fit and proper person to engage in credit activities and that, in the context of considering the statutory test, honesty, knowledge and ability are the attributes of concern: reasons at [44]-[45].
3. The Tribunal was satisfied that it had reason to believe that Mr Frugtniet is not a fit and proper person to engage in credit activities. It reached that conclusion having regard to the findings of other decision makers, which it referred to in its reasons. Relevantly, it observed that, even if it disregarded the adverse findings contained in decisions that were set aside on appeal or where Mr Frugtniet did not have an opportunity to challenge the findings, because he was not a party to the proceeding, it was comfortable that the balance of the adverse findings provided a sufficient basis for it to be so satisfied: reasons at [49].
4. Once satisfied that the discretion to make a banning order had been enlivened, the Tribunal considered whether it should make a banning order and if so the length and terms of such an order. As we have already observed, in doing so it proceeded to make its own findings of fact based on the material before it rather than relying on the findings of other decision makers. In particular, the Tribunal focussed on three events from Mr Frugtniet’s past which it described at [52] of its reasons as follows:

(j) Misrepresentations he made to a barrister and a magistrate about his professional status and the subsequent giving of false evidence to VCAT in response to the LIV’s application for an order that he be declared a disqualified person indefinitely for the purposes of the *Legal Profession Act 2004*;

(k) Involvement in the falsification of a client’s pre-immigration skills assessment;

(l) A dishonest disclosure to MARA on his 1999 re-registration form.

1. The Tribunal considered the facts relating to each of those matters and found either that Mr Frugtniet had made false statements deliberately or had been involved in a deception. The Tribunal was satisfied based on those matters that Mr Frugtniet had engaged in dishonesty or unethical conduct. At [80] of its reasons it set out its conclusion:

Based on our finding that:

(a) Mr Frugtniet gave false evidence to VCAT when it considered the LIV application to seek orders under the Legal Profession Act;

(b) Mr Frugtniet gave false evidence to this Tribunal about his level of involvement in the provision of false information to the TRA by Mr Bastola (and also gave false evidence to the Tribunal in *Frugtniet v MARA* when the matter was heard by DP Forgie); and

(c) Mr Frugtniet gave false information to MARA in relation to his application for reregistration;

we are satisfied Mr Frugtniet has for many years been and remains a dishonest person. As honesty is essential for a person to be regarded as a fit and proper person to perform credit activities, we are satisfied not only that there is reason to believe he is not a fit and proper person, but on the evidence before us, we are positively satisfied he is not a fit and proper person to engage in credit activities.

1. The Tribunal found that, given that Mr Frugtniet “has over many years proven himself to be a dishonest person who is willing to lie even in circumstances where he has sworn to tell the truth, he is not a fit and proper person to be involved in credit activities in any capacity” and, given the long track record of dishonesty, his disqualification must be permanent. The Tribunal also concluded, given the “long track-record of dishonest behaviour”, that it was not appropriate to leave open any opportunities for Mr Frugtniet to participate in credit activities: reasons at [81]-[83].
2. At [84]-[85] the Tribunal said:

84. In these circumstances and in light of our conclusion that the Amending Act applies, the appropriate decision is to vary the decision under review to the following:

Rudy Frugniet (sic) is prohibited from:

(a) Engaging in any credit activities;

(b) Controlling whether alone or in concert with one or more other entities (as defined in section 64A of the *Corporations Act 2001*) another person who engages in credit activities;

(c) Performing any function involved in engaging in credit activities (including as an officer (within the meaning of the *Corporations Act 2001*) manager, employee, contractor, or in some other capacity).

85. If we are wrong and the Amending Act does not apply, we would have affirmed the decision under review.

# APPEAL

1. As set out at [5] above, Mr Frugtniet relies on a further amended notice of appeal in which he identifies four questions of law and raises three grounds of appeal. His grounds of appeal are (as written):

1. The Tribunal erred in law in its construction and application of the NCCP Act as amended by the *Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Act 2020* (**Amending Act**). Section 7(2) of the *Acts Interpretation Act 1901* (Cth) (**AIA**) provides that the Amending Act cannot impact the Applicant’s rights, privileges or the like or the operation of the NCCP Act, at the relevant (historical) time. The Amending Act expanded the breadth of section 80 of the NCCP Act. The law ought to have been applied as it stood as at the time of the original decision.

The Applicant contends that in the absence of express provision that the NCCP Act (as amended from time to time) applies retrospectively, the Tribunal must apply the NCCP Act as it stood at the time of ASIC making its original decision, or in the alternative, at the time of any de novo review.

Given ASIC’s status as a model litigant, and the gravity of the Banning Order, it ought be held to a standard which does not allow for such transgressions on an individual’s rights to natural justice, particularly when the individual is before the Tribunal as a self-represented litigant.

2. The Tribunal erred in law in that it was prohibited by the *NCCP Act 2009, Crimes Act 1900* (Cth), to consider any reference to spent conviction, nevertheless considered oral submissions by the respondent relating to the impugned material contained in the s37 T documents, gave directions that submissions be filed contrary to prohibited, prejudicial and inadmissible information being admitted which was not relevant to ASIC, was therefore not relevant to the Tribunal’s consideration in its review. The prohibition further circumscribed a Commonwealth Authority (ASIC) from canvassing such matters orally and in writing to another Commonwealth Authority namely the (AAT). A reasonable bystander would have a reasonable apprehension of bias in circumstances where the Tribunal admitted prohibited evidence (including unredacted material) and/or related submissions, and where the Tribunal’s decision was infected by multiple references to spent convictions and related judgments.

3. The Tribunal erred in making findings not available on a fair reading of the evidence, and/or by relying on an imbalanced collection of the available evidence, and/or by effectively treating prior findings in other proceedings as evidence, contrary to the *Evidence Act 1995* (Cth). Specifically:

a. regarding evidence allegedly given by the Applicant to the AAT and VCAT relating to events at the Magistrates’ Court of Victoria at Werribee, purportedly establishing the Applicant gave inconsistent (and thereby dishonest) evidence to those two Tribunals (**at [52]-[68], [80(a)]**): the Tribunal’s finding was not reasonably open, and was not based probative admissible evidence;

b. regarding evidence allegedly given by the Applicant to the Trade Recognition Australia (**TRA**) and the matters relating to Mr Bastola which the Tribunal deemed amounted to dishonesty **(at [69]-[75], [80(b)]):** the Tribunal’s finding was not reasonably open, and was not based on probative admissible evidence;

c. regarding second hand hearsay evidence relied on to make adverse findings against the Applicant in respect of a 19 December 2005 letter from the Migration Agents Registration Authority (**MARA**) to the Applicant about his 1999 application to MARA, in the absence of direct first hand evidence, or the original application **(at [76]-[79], [80(c)]):** the Tribunal’s finding that the Applicant gave a deliberately false answer to MARA was based on extrapolated assumptions in the absence of direct evidence (including but not limited to the 1999 application itself) and was not reasonably open, or based on probative admissible evidence;

d. regarding evidence of or reference to the 1995 VCAT proceeding relating to Tarson Pty Ltd and the Applicant’s wife **(at [46(a)]):** the Tribunal’s decision to admit and rely on related evidence was based in error and denied the Applicant procedural fairness, given that the Applicant was not a party to the proceeding, he had no standing to participate in or influence the outcome, and no sanction or order was made against him; and

e. regarding evidence or reference to the 2004 decision of *Re Frugtniet and Secretary, Department of Family and Community Services* (2004) 84 ALD 774: the Tribunal’s decision to refer to and rely on those findings was based in error, and denied the Applicant procedural fairness, given that decision was set aside by the AAT, and could thereby have no meaningful weight in the Tribunal’s determination.

The Applicant contends the Tribunal erred as set out above, and in failing to find that the decisions of the Tribunal were affected by a denial of procedural fairness in the form of apprehended bias arising from its decisions of 4 November 2019 **(at [1]-[38]), 1 September 2021, (at [1]-[28]) and 22 March 2022, (at [13]).** The cumulative impact of the evidence was (a) was irrelevant; (b) ought not to have been provided; and/or (c) was given a disproportionate amount of weight which led the Tribunal into error.

(Emphasis in original.)

1. We address each ground below.

## Ground 1

1. By ground 1 Mr Frugtniet contends that the Tribunal misconstrued and misapplied the NCCP Act in that it relied on the NCCP Act as amended and in force at the time of its decision rather than relying on the NCCP Act in the form in force at the time ASIC made the Banning Order.

### Mr Frugtniet’s submissions

1. Mr Frugtniet submitted that the proper interpretation of the transitional provisions as evidenced by the **Explanatory Memorandum** to the *Financial Sector Reform (Hayne Royal Commission Response –Stronger Regulators (2019 Measures)) Bill 2019* (Cth) is to ensure that a banning order made prior to the commencement of Pt 2 of Sch 4 to the Amending Act continued to apply and can be modified or revoked by ASIC at a later time in accordance with the amended provisions. He contended that the Tribunal’s position that the transitional provisions evidence an intention that the Tribunal proceed based on the NCCP Act as amended is unsupported by the text of those provisions and the purpose as set out in the Explanatory Memorandum.
2. Mr Frugtniet contended that, in the absence of an express provision that the NCCP Act as amended applies retrospectively, the Tribunal must apply that Act as it stood at the time that ASIC made the Banning Order, or alternatively, at the time of any de novo review. He also submitted that, given the gravity of the Banning Order and ASIC’s role as a model litigant, the Tribunal ought to be held to a standard that does not allow for transgressions on an individual’s rights to natural justice, particularly where, as in his case, the individual is not legally represented.
3. Mr Frugtniet submitted that for these reasons there was no basis to depart from the generally accepted position that the Tribunal must perform its role as original decision maker in accordance with the law as it applied to the decision maker at the time of the Banning Order. He submitted that the proper role and function of the Tribunal is to consider whether the original decision is the correct or preferable decision and that in doing so it is subject to the same general constraints as the original decision maker and should ordinarily approach its task as though it were performing the relevant function of the original decision maker in accordance with the law as it applied to the decision maker at the time of its original decision. In the absence of clear legislative intent to the contrary the legal framework applicable to the Tribunal is the same as that which applied to the original decision maker.
4. Mr Frugtniet submitted that the Tribunal’s interpretation of the transitional provisions is inconsistent with the legislative intent, as evidenced by the Explanatory Memorandum. He said that the Tribunal erred in finding that Parliament authorised it to treat the Banning Order as if it had been made under the NCCP Act as amended and in finding that the transitional provisions authorised it to deal with the Banning Order as if it had been made under the NCCP Act as amended. Mr Frugtniet set out three reasons why that was so:
5. having regard to [5.144] of the Explanatory Memorandum, the use of the term “and may be dealt with” in s 2(1) of Sch 14 of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth) (**NCCP Transitional Provisions Act**) is to permit action to be taken under s 82 of the NCCP Act as amended (i.e. enforcement action) in relation to a banning order made before the commencement of that Act as amended as if the banning order had been made at or after commencement of the amendments. That section does not authorise the Tribunal, standing in the shoes of the original decision maker, to deal with the Banning Order as if it had been made under the NCCP Act as amended;
6. the purpose of Sch 14 of the NCCP Transitional Provisions Act is to facilitate the workability of the provisions introduced into the NCCP Act by the Amending Act. The purported purpose imposed by the Tribunal is inconsistent with that intention; and
7. the amendments permit ASIC to vary or cancel any banning order in force immediately before the commencement of the NCCP Act as amended in any circumstance that ASIC considers to be appropriate which allows ASIC to add additional prohibitions to an existing banning order, rather than having to revoke and make a new order in each case. If the Tribunal is permitted to “deal with” a banning order as if it had been made under the NCCP Act as amended, it would render nugatory this separate and distinct power given to ASIC by the Amending Act.

### Consideration

1. This ground of appeal raises the question of whether the Tribunal was required to apply the NCCP Act as amended in undertaking its review or the NCCP Act in the form it existed at the time ASIC made the Banning Order.
2. The relevant provisions of the NCCP Act as amended by the Amending Act are set out at [7]-[12] above. Among other things, and critically for the purposes of the review by the Tribunal, s 80 and s 81 of the NCCP Act were amended such that the potential reach of a banning order imposed under s 81 was expanded. Prior to the amendments s 81 had a more limited scope. It relevantly provided:

(1) A ***banning order*** is a written order that prohibits a person from engaging in any credit activities or specified credit activities in specified circumstances or capacities.

1. Section 39 of Sch 4 to the Amending Act amended the NCCP Transitional Provisions Act by inserting a new Sch 14 into that Act. Schedule 14 sets out transitional provisions in relation to the amendments made by the Amending Act to the NCCP Act and relevantly includes:

**1 Application—conduct etc. relevant to new banning and disqualification orders**

When making either of the following orders at or after the commencement of Part 2 of Schedule 4 to the *Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020*:

(a) a banning order;

(b) a disqualification order described in paragraph 86(2)(a) of the National Credit Act;

regard may be had to acts, omissions, states of affairs or matters before, at or after that commencement.

**2 Transitional—existing banning and disqualification orders**

(1) An order made under subsection 80(1) of the National Credit Act, that is in force immediately before the commencement of Part 2 of Schedule 4 to the *Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020*, continues in force (and may be dealt with) as if it had been made under that subsection as amended by that Part.

1. Whether the Tribunal erred in the way contended for by Mr Frugtniet depends on the meaning of s 2(1) of Sch 14 to the NCCP Transitional Provisions Act. Mr Frugtniet contends for a narrow construction, limiting its application to the ability for ASIC to deal with banning orders made before the commencement of the NCCP Act so amended, as if they were made under that Act as amended.
2. The starting point to construe a provision in a statute is the text but in undertaking that task regard must also be had to context and purpose: see ***SZTAL*** *v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ). The plurality in *SZTAL* observed (at [14]) that:

This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

1. Section 2(1) of Sch 14 of the NCCP Transitional Provisions Act commencing with the text, provides: first, that a banning order made under s 80(1) prior to the amendment of the NCCP Act continues in force after the amendments to that Act come into effect as if the banning order was made under s 80(1) as amended; and secondly, that a banning order made under s 80(1) of the NCCP Act prior to its amendment “may be dealt with” as if it had been made under s 80(1) as amended. It is the meaning of the second aspect that is in issue.
2. The term “deal with” is defined in the *Concise Oxford English Dictionary* as “to take measures concerning” and in the *Oxford English Dictionary* (online edition) as “to act in regard to, administer, handle, dispose in any way of (a thing), to handle effectively; to grapple with; to take successful action in regard to”. It is defined in the *Macquarie Dictionary* as:

a. to do business with.

b. to occupy oneself or itself with: *deal with the first question; botany deals with the study of plants.*

c. to take action with respect to; handle: *to have many problems to deal with.*

d. to take effective action with respect to; handle successfully: *she managed to deal with the difficult situation.*

e. to take disciplinary or punitive action with respect to: *the role of law courts is to deal with law-breakers; the principal will deal with you later.*

1. In *Attorney-General for the State of Queensland v Australian Industrial Relations Commission* (2002) 213 CLR 485 the High Court considered the meaning of “dealing with” in the context of s 111AAA(1) of the *Industrial Relations Act 1988* (Cth) which relevantly provided:

If the Commission is satisfied that a State award or State employment agreement governs the wages and conditions of employment of particular employees whose wages and conditions of employment are the subject of an industrial dispute, the Commission must cease dealing with the industrial dispute in relation to those employees, unless the Commission is satisfied that ceasing would not be in the public interest.

At [55] Gaudron, McHugh, Gummow and Hayne JJ observed that the term “dealing with” is “an expression of considerable scope”.

1. It is apparent that the ordinary meaning of the term “may be dealt with” is both general and broad. It is, like the term “dealing with”, a term “of considerable scope”. There is no reason to confine its meaning. In permitting a banning order made under s 80(1) of the NCCP Act, prior to its amendment, to “be dealt with” as if it was made under s 80(1) of the NCCP Act as amended, a person or entity is permitted to take action in relation to, administer or handle the banning order as if it were made under the section as amended. That expansive meaning must encompass all of the ways in which a banning order “may be dealt with” under the NCCP Act.
2. Relevantly, s 327 of the NCCP Act enables an application to be made to the Tribunal for review of decisions made by ASIC under the NCCP Act, other than for certain specified exceptions. Thus one of the ways in which a banning order made pursuant to s 80(1) of the NCCP Act in force prior to its amendment may be dealt with is by the Tribunal on an application for review of ASIC’s decision imposing the banning order. Where an application for review of a decision is made the Tribunal may, for the purpose of reviewing the decision, exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision: see s 43(1) of the AAT Act.
3. Section 81(1) of the NCCP Act as amended empowers a decision maker to make a banning order which may specify that the person is prohibited from doing one or more of the things set out therein (see [11] above). Standing in the shoes of the original decision maker, the Tribunal was empowered to make a banning order as contemplated by s 81(1) of the NCCP Act as amended.
4. A matter of context to which ASIC drew our attention and which provides support for a broad construction of s 2(1) of Sch 14 to the NCCP Transitional Provisions Act is the approach adopted by the legislature to the application of s 83 of the NCCP Act which relevantly provides:

(1) ASIC may vary or cancel a banning order if ASIC is satisfied that it is appropriate to do so because of a change in any of the circumstances based on which ASIC made the order.

1. Notwithstanding that s 83 was not amended by the Amending Act, its application has been varied by the NCCP Transitional Provisions Act. In particular s 2(3) of Sch 14 to that Act provides that:

Section 83 of the National Credit Act applies to an order covered by subitem (1) as if the words “because of a change in any of the circumstances based on which ASIC made the order” were omitted from subsection 83(1) of that Act.

1. In other words, the legislature intends that where a banning order was made under s 80(1) of the NCCP Act prior to its amendment ASIC may vary or cancel the banning order if it is satisfied that it is appropriate to do so without the additional requirement that there be a change in circumstances. In implementing this approach ASIC is empowered to vary any existing banning order in accordance with the NCCP Act as amended such that, following amendment of the NCCP Act, the legislature intends that existing banning orders are to be varied by ASIC if it considers it is appropriate to do so in accordance with the new regime. There is no reason why that intent would not equally apply to banning orders that are the subject of review by the Tribunal. Indeed it would be an odd result for a review by the Tribunal of a banning order made prior to amendment of the NCCP Act to be subject to a different regime to that imposed on ASIC.
2. This legislative intention is also evident from the Explanatory Memorandum. At [5.142] it notes that not requiring the application of the provisions in the NCCP Act that mandate a change in circumstances permits ASIC to “update or revoke an existing banning order, where it is appropriate to do so, to bring it in line with the updated rules for making banning orders” and that this will permit ASIC to “add additional prohibitions under an existing order, rather than having to revoke the order and make a new order in each case”. In making this observation we bear in mind that statements of legislative intent in explanatory memoranda cannot overcome the need to consider carefully the text of the statute in issue to ascertain meaning: see *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [31]-[33].
3. Mr Frugtniet relied on the Explanatory Memorandum to support his submission that the Tribunal erred in concluding that it was to proceed as if the Banning Order was made under s 80(1) of the NCCP Act as amended. Among other things, Mr Frugtniet relied on [5.139] under the heading “Application and transitional provisions” which states that:

The amendments in Part 1 and Part 2 of Schedule 4 to the Bill apply in respect of banning orders and disqualification orders that are made at or after the relevant Part commences. In making such an order, regard may be had to any acts, omissions, states of affairs or matters before, at or after that commencement.

1. But this clause does no more than explain that, relevantly, the amendments in Part 2 of Sch 4 to the Bill apply to banning orders made at or after commencement of the relevant part. That statement is not contrary to the conclusion we have reached about the construction of s 2(1) of Sch 14 to the NCCP Transitional Provisions Act.
2. Of more relevance are [5.143] and [5.144] of the Explanatory Memorandum which provide:

5.143 The amendments specify that a banning order or disqualification order that was made under the previous provisions continues in force, and may be dealt with, as though it had been made under the amended provisions.

5.144 These savings rules ensure that such orders continue to apply and can be modified or revoked at a later time in accordance with the amended provisions.

1. Paragraph 5.143 replicates the text of s 2(1) of Sch 14 to the Transitional Provisions Act and the explanation in [5.144] supports the construction to which we have arrived.
2. Mr Frugtniet also called in aid s 7(2) of the ***Acts Interpretation Act*** *1901* (Cth) and submitted that there was a self-evident right acquired or accrued to him under the NCCP Act prior to its amendment, namely that any banning order would be confined to engaging in credit activities and could not extend, as it can now, to controlling a person who engages in credit activities. Section 7(2) of the Acts Interpretation Act relevantly provides:

(1) If an Act, or an instrument under an Act, repeals or amends an Act (the ***affected Act***) or a part of an Act, then the repeal or amendment does not:

…

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act or part; or

…

Any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the affected Act or part had not been repealed or amended.

1. There are two answers to Mr Frugtniet’s submission. First, the “right” which Mr Frugtniet identifies is not a right that had accrued to him prior to the amendment of the NCCP Act. It was no more than a potential procedural advantage as to the nature of the banning order that could be made. At the time the power conferred on the decision maker was narrower than it is now: see *Chang v Laidley Shire Council* (2007) 234 CLR 1 at [114]-[117] per Hayne, Heydon and Crennan JJ. Secondly, the application of the Acts Interpretation Act or a provision of it to an Act is subject to a contrary intention: see s 2(2). In this case there is a contrary intention manifest in the NCCP Transitional Provisions Act.
2. Having regard to the principles of statutory construction as set out and applied above, there was no error in the Tribunal’s finding that it was authorised to deal with the Banning Order as if it had been made under s 80(1) of the NCCP Act as amended. It follows that there was similarly no error in the Tribunal finding that, in dealing with the Banning Order as if it had been made under s 80(1) as amended, it was authorised to apply s 81(1) of the NCCP Act as amended. Ground 1 is not made out.
3. Before leaving this ground we note that ASIC drew our attention to the decision in ***Shi*** *v Migration Agents Registration Authority* (2008) 235 CLR 286 where the High Court considered the question of whether the Tribunal must apply the law as it applied at the time of the original decision or as it applies at the time of review, where there has been a change in the law. In that case, in contrast to the position that the Tribunal found itself in here, there were, it seems, no transitional provisions in relation to the application of the relevant legislative amendments. It is the application of the NCCP Transitional Provisions Act in this case that compelled the Tribunal to apply the NCCP Act as amended, rather than the more general principles discussed in *Shi* (at [60] per Kirby J with whom Crennan J agreed at [118], at [102]-[104] per Hayne and Heydon JJ and at [134] per Kiefel J (as her Honour then was) taking a contrary view) and in *Frugtniet HCA* (at [15]).

## Ground 2

1. By ground 2 Mr Frugtniet contends that the Tribunal took spent convictions into account and, as a result, its decision is affected by apprehended bias.

### Mr Frugtniet’s submissions

1. Mr Frugtniet submitted that the timing of the assessment of whether there is a reasonable apprehension of bias is important and that the obligation to act fairly attaches to what occurs before the exercise of power. He noted that the s37 documents before the Tribunal contained material that referred to spent convictions, ASIC canvassed the content of matters contained therein at directions hearings in order to have the Tribunal determine what could be made admissible and, as a consequence, the Tribunal ordered the removal of some of that material.
2. Mr Frugtniet said that he informed the Tribunal that it was not authorised to consider such material and the Tribunal made directions for the matter to be addressed by way of submissions. He submitted that ASIC’s submissions contained prejudicial, inadmissible material that referenced spent convictions. He took the view that the Tribunal was already possessed of the impugned material and that he resolved to submit on the first day of the hearing that the objective bystander would have concluded that there was an apprehension of bias. Mr Frugtniet said that ASIC accepted that it placed the prohibited material before the Tribunal but that it said that the Tribunal could put it out of its mind. He submitted that ASIC failed to recognise that the issue is that the material was not relevant to determining the questions in the proceeding.
3. Mr Frugtniet submitted that apprehended bias, if found, is an aspect of a lack of procedural fairness and that the rules to assess apprehended bias form part of the body of principles, rooted in fairness, and directed to the necessity for executive power to be exercised fairly and to appear to be exercised fairly, in support of the maintenance of confidence in the administrative process, and judicial review of it. He submitted that the relevant inquiry is directed not to the correctness of the outcome, but to the apparent fairness of the process. Mr Frugtniet referred to *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 (at [19]) and submitted that, as the Court noted, the principles that govern what a decision maker must do in the course of making a decision, or exercising a power, are not focussed on the outcome of the exercise of power. It is wrong, so Mr Frugtniet submitted, to look at the reasons of a decision maker because then the Court is assessing fairness by reference to outcome, which should not be done.
4. Mr Frugtniet submitted that, in any event, the Tribunal recycled matters in forming the opinion, in its substantive decision, that impacted his credibility and by resorting to a finding of dishonesty, inconsistent statements and false evidence, by admitting evidence of judgments that had been set aside. He contended that it was evident that the impugned material was circumscribed under the *Australian Securities and Investments Commission Act 2001* (Cth) and therefore should not have been the subject of any consideration by the Tribunal.

### Consideration

1. In considering this ground it is convenient first to set out the test and applicable principles for apprehended bias in the context of an administrative decision maker, such as the Tribunal. Those principles did not appear to be in dispute.
2. In *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at [56]-[59] Nettle and Gordon JJ summarised the applicable principles in the following way:

56 The test for apprehended bias is whether “a fair-minded lay observer might reasonably apprehend that the [decision-maker] might not bring an impartial mind to the resolution of the question the [decision-maker] is required to decide”. A finding of apprehended bias is not to be reached lightly. The determination of whether an apprehension of bias is “reasonable” is not assisted by philosophical conceptions of the varieties of seriousness or materiality.

57 The test has two steps. First, one must identify what it is that might lead a decision-maker to decide a case other than on its legal and factual merits. What is said to affect a decision-maker’s impartiality? Partiality can take many forms, including disqualification by direct or indirect interest in the proceedings, pecuniary or otherwise; disqualification by conduct; disqualification by association; and disqualification by extraneous information. As Deane J said in *Webb v The Queen*, in relation to disqualification by extraneous information, “knowledge of some prejudicial but inadmissible fact or circumstance [may give] rise to [an] apprehension of bias”. Second, a logical connection must be articulated between the identified thing and the feared deviation from deciding the case on its merits. How will the claimed interest, influence or extraneous information have the suggested effect?

58 In applying the test, “it is necessary to consider … the legal, statutory and factual contexts in which the decision is made”. It is also necessary to consider “what is involved in making the decision and the identity of the decision-maker”. This draws attention to the fact that the test must recognise “differences between court proceedings and other kinds of decision-making”. The fair-minded lay observer knows the nature of the decision, the circumstances which led to the decision and the context in which it was made. The fair-minded lay observer has “a broad knowledge of the material objective facts … as distinct from a detailed knowledge of the law or knowledge of the character or ability of the [decision-maker]”.

59 Where, however, as here, the statutory context is complex, the fair-minded lay observer at least must have knowledge of the key elements of that scheme. In this case, those key elements, summarised below, are not themselves overly complex. It is necessary to consider the statutory regime.

(Footnotes omitted.)

See too: [17]-[21] per Kiefel CJ and Gageler J and [132]-[136] per Edelman J.

1. More recently in ***MBJY*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 284 FCR 152 a Full Court of this Court (Allsop CJ, O’Callaghan and Colvin JJ) considered whether the Tribunal’s decision in that case was affected by apprehended bias. There a delegate of the **Minister** for Immigration, Citizenship, Migrant Services andMulticultural Affairs had refused to revoke a decision to cancel the appellant’s visa under s 501(3A) of the *Migration Act 1958* (Cth) because the appellant did not pass the character test. The appellant applied to the Tribunal for review of the delegate’s decision. At the hearing, together with material going to three convictions recorded against the appellant (of sexually offending), the Tribunal received, and the Minister relied on, material relating to an alleged more serious fourth offence of which the appellant had been acquitted. While the Minister relied on the material, he did not invite the Tribunal to make any findings inconsistent with the acquittal.
2. The sole ground of appeal before the Full Court was whether the primary judge erred in concluding that the Tribunal could permissibly take the material relating to the fourth offence into account and that the Tribunal’s decision was not vitiated by jurisdictional error due to apprehended bias. At [3] Allsop CJ observed:

The real question going to the substance of the appeal is whether, once it was clear how the Minister was to put the case: that the Tribunal should not go behind the acquittal, the Tribunal could continue with the hearing and whether it was required to cease to hear the matter and refer it to a different member with the offending material excised (assuming, however, that in such renewed hearing the Minister would maintain the same position in respect of the acquittal) because a fair-minded lay observer might think that unless this were done the subconscious effect of such indelible material could never be expunged from the mind. For the reasons given by O’Callaghan and Colvin JJ this cannot be correct. The Tribunal under its constitutive legislation is an independent quasi-judicial body of skill and stature. A fair-minded lay observer would be taken to appreciate such matters. The stature and independence of the Tribunal is a feature of importance in the review of, and public confidence in, Commonwealth decision-making: cf *Minister for Immigration and Border Protection v Makas*a (2021) 95 ALJR 117 at [50] and *Minister for Home Affairs v Brown* (2020) 275 FCR 188 at [32] and [33].

1. At [32]-[52] O’Callaghan and Colvin JJ (with whom Allsop CJ agreed) summarised the principles relating to apprehended bias. It is not necessary to set out that detailed analysis save to note that at [32]-[37] their Honours summarised the general principles and at [38]-[52] their Honours considered the different views expressed about the relevance of statements made in reasons for decision in cases where the question whether there is apprehended bias is considered after a decision has been made. In reconciling those decisions at [50]-[52] O’Callaghan and Colvin JJ concluded:

50 It appears that the current state of the law is that, at least where the complaint is of apprehended bias in relation to the decision to be made (rather than a complaint in relation to the process that was followed) the contents of a decision may be brought to account as part of the context in determining whether from the perspective of a fair-minded lay observer there was a reason why the decision may not be independent and impartial. However, in bringing the contents of the decision to account there must be due regard to the potential for some matters to operate subconsciously on the decision-maker even where there is an express disavowal of any regard to those matters. There must also be due regard to the fact that the inquiry concerns whether there is a reasonable apprehension of bias, not an inquiry as to whether there was actual bias and the apprehension may arise by reason of the way the irrelevant and prejudicial material may affect the process irrespective of the terms in which the final decision is expressed and despite incantations or protestations or assurances by the decision-maker to the contrary.

51 What is clear is that one way in which there may be a departure from the requirement for impartial decision-making is where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to an apprehension of bias on the basis that it might give rise to an apprehension that the decision-maker will be influenced by that inadmissible fact: *Webb v The Queen* (1994) 181 CLR 41 at 74; and *CNY17* at [57], [70], [92], [134]. Whether such material gives rise to apprehended bias will depend upon whether, having regard to the particular context, the material is of a kind that it may affect the decision-maker, including in a subconscious way.

52 Obviously enough, it is not sufficient to demonstrate that there was prejudicial but inadmissible material before the decision-maker. What must be shown is that, having regard to the context, and adopting the hypothetical informed lay observer perspective such a person might conclude that the material might lead to the decision-maker being influenced by that material.

1. Next it is necessary to have regard to the context in which the matter came before the Tribunal and two interlocutory applications made by Mr Frugtniet in the course of his application for review.
2. As set out at [3] above, Mr Frugtniet’s application for review of ASIC’s decision imposing the Banning Order was remitted to the Tribunal for reconsideration by the High Court. The question for consideration by the High Court was whether on review of ASIC’s decision imposing a banning order, the Tribunal was entitled to take spent convictions into account. The High Court determined that it was not. This was because of the operation of s 80(2) of the NCCP Act and s 85ZW of the ***Crimes Act*** *1914* (Cth). At the relevant time and prior to its amendment by the Amending Act, s 80(2) of the NCCP Act relevantly provided that:

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:

(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;

…

1. Section 85ZW of the Crimes Act provides that:

Subject to Division 6, but despite any other Commonwealth law, or any State law or Territory law, where, under section 85ZV, it is lawful for a person not to disclose, in particular circumstances, or for a particular purpose, the fact that he or she was charged with, or convicted of, an offence:

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

(b) anyone else who knows, or could reasonably be expected to know, that section 85ZV applies to the person in relation to the offence shall not:

(i) without the person’s consent, disclose the fact that the person was charged with, or convicted of, the offence to any other person, or to a Commonwealth authority or State authority, where it is lawful for the first-mentioned person not to disclose it to that other person or that authority; or

(ii) in those circumstances, or for that purpose, take account of the fact that the person was charged with, or convicted of, the offence.

1. Section 85ZV of the Crimes Act relevantly provides that, subject to Div 6, and despite any other Commonwealth, State or Territory law, if a person’s conviction of a Commonwealth offence is spent, the person is not required in any State or Territory to disclose to any person, for any purpose, the fact that the person has been charged with, or convicted of, the offence. Section 85ZZH(c) of the Crimes Act provides that Div 3 of Pt VIIC does not apply in relation to the disclosure of information to or by, or the taking into account of information by, a court or tribunal established under a Commonwealth law, a State law or a Territory law, for the purpose of making a decision, including a decision in relation to sentencing.
2. At [11] of *Frugtniet HCA*, by way of factual background, Kiefel CJ, Keane and Nettle JJ set out those of Mr Frugtniet’s convictions which were “spent convictions” for the purposes of the Crimes Act. At [43] Bell, Gageler, Gordon and Edelman JJ set out the same history.
3. At [12] Kiefel CJ, Keane and Nettle JJ noted that, in determining whether Mr Frugtniet was a fit and proper person to engage in credit activities, ASIC was precluded from having regard to spent convictions by reason of s 80(2) of the NCCP Act but that on the application for review of ASIC’s decision, the Tribunal approached the review on the basis that it was entitled to, and did, take the spent convictions into account. At [14] Kiefel CJ, Keane and Nettle JJ addressed the nature of review by the Tribunal. At [16]-[17] their Honours observed:

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

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

1. Their Honours found that there was no clear contrary legislative intent and that s 85ZZH(c) of the Crimes Act did not apply to ASIC, and thus the Tribunal. Accordingly, the Tribunal was not entitled to take the spent convictions into account.
2. The same conclusion was reached by Bell, Gageler, Gordon and Edelman JJ: see [47]-[50]. At [51] their Honours explained:

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

(Footnotes omitted.)

1. We turn then to the interlocutory applications made by Mr Frugtniet in the course of the Tribunal’s review following the remittal. The first concerned the question of whether the Tribunal could have regard to material which had been included in the documents lodged by ASIC with the Tribunal as required by s 37 of the AAT Act, referred to as **T-Documents** (**Spent Convictions Application**). The T-Documents included references to spent convictions. Mr Frugtniet contended that those documents should not be disclosed by reason of s 85ZV and s 85ZW of the Crimes Act.
2. On 4 November 2019 the Tribunal determined that it was “not entitled to have regard to documents that describe events precipitated by [Mr Frugtniet’s] convictions which he is now permitted to actively deny. The Tribunal cannot have regard to the documents if, following a redaction process, non-disclosable matters may still be inferred from those documents”: *The Applicant v The Regulator* [2019] AATA 4683. In its reasons, the Tribunal acknowledged that it was informed by the High Court’s reasons in *Frugtniet HCA*: at [20].
3. The second interlocutory application made by Mr Frugtniet was an application made on the first day of the final hearing before the Tribunal. In that application Mr Frugtniet sought that the Tribunal as constituted recuse itself on the grounds of apprehended bias (**Tribunal Recusal Application**). According to reasons published by the Tribunal in relation to that application, Mr Frugtniet contended that the Tribunal had “knowledge of some prejudicial but inadmissible fact or circumstance” said to be found in parts of a submission filed by ASIC in relation to the Spent Convictions Application. The Tribunal noted at [4] of its reasons on the Tribunal Recusal Application that it:

… necessarily had regard to the submissions of both parties which referred to the existence of spent convictions – although as explained in the written reasons we gave in connection with that application, we did not review any of the disputed documents ourselves and relied upon the parties’ descriptions of the material therein.

1. At [9] of its reasons the Tribunal said:

As a consequence of the court’s decision and the subsequent remittal, the Tribunal is unavoidably aware of the applicant’s previous spent convictions but we are also aware we must not have regard to the convictions or take them into account in any way in coming to our decision on review. Interestingly, the applicant does not make his application on the basis of knowledge derived from the court’s decision; indeed he seemed to disavow it.

1. The Tribunal described the information on which Mr Frugtniet based his claim by summarising ASIC’s submissions on the Spent Convictions Application and noted that Mr Frugtniet contended that those submissions disclosed information that the Tribunal was not permitted to take into account such that it was in possession of prejudicial and inadmissible information. At [23] of its reasons on the Tribunal Recusal Application the Tribunal accepted that it was in possession of “information which is prejudicial to [Mr Frugtniet]” but noted that a question arose as to whether the “the Tribunal as presently constituted passes the reasonable fair-minded observer test”. At [27] the Tribunal concluded that:

In these circumstances we are satisfied that provided we duly note (which we now do) that none of the inadmissible prejudicial material included in the submissions will be considered or accorded any weight (a matter we determined in our minds when the decision *The Applicant and the Regulator* was made), then in the present circumstances the reasonable fair minded observer would not reasonably apprehend that the Tribunal might not bring an impartial mind to the resolution of the question the Tribunal is required to decide as a consequence of the disclosures in the submissions.

1. Accordingly the Tribunal refused the application that it recuse itself.
2. Ground 2 of the appeal bears some resemblance to the Tribunal Recusal Application. Once again Mr Frugtniet contends that the Tribunal was affected by apprehended bias in circumstances where it had considered material which came before it and on which it relied in determining the Spent Convictions Application.
3. As is apparent from the authorities set out above, the question that arises is whether the fair minded lay observer, properly informed of the nature of the decision and the context in which it was made, might reasonably apprehend that the Tribunal might not have brought an independent and impartial mind to the making of its decision on the review. The test is to be applied from the perspective of a fair-minded lay observer who, though not a lawyer, is taken to know both the nature of the decision and the nature of the process that the decision maker is required to undertake: see *MJBY* at [33]. In that regard the observations of Allsop CJ in *MJBY* about the nature of the Tribunal are apt (see [66] above). It is “an independent quasi-judicial body of skill and stature” and its independence is an important feature in the review of Commonwealth decision making.
4. Having regard to that context, in our opinion the answer to the question posed is no. That is, the fair minded lay observer, properly informed of the nature of the decision and the context in which it was made, would not reasonably apprehend that the Tribunal might not have brought an independent and impartial mind to the making of its decision. We have reached that conclusion for the following reasons.
5. First, there is nothing in the Tribunal’s reasons on the review to suggest that it had regard to the spent convictions or the material relied on in relation to the Spent Convictions Application. Further at [13] of its reasons the Tribunal set out the procedural history of the proceeding, acknowledged that in *Frugtniet HCA*, the High Court had found that the previously constituted Tribunal should not have considered certain material that was before it and noted that “[i]n the course of the remitted proceedings, [it had] been careful to give both parties an opportunity to object to this Tribunal taking particular material into account”. The Tribunal said that consistent with its interlocutory rulings and the reasoning in *Frugtniet HCA* it had only had regard to Mr Frugtniet’s oral evidence and the material tendered by the parties, set out in annexure one to the reasons, or material specifically referred in the parties’ submissions. It was not suggested by Mr Frugtniet that the material itemised in annexure one to the Tribunal’s reasons included material that was excluded by the Tribunal’s ruling on the Spent Convictions Application.
6. Secondly, given the history of the proceeding before the Tribunal, including its consideration of and ruling on the Spent Convictions Application, it is apparent that the Tribunal was aware that there was a certain class of material to which it could not have regard and indeed took steps to ensure that such material was not before it. So much is apparent from the Tribunal’s ruling on the Spent Convictions Application and the careful way in which it itemised the material to which it did have regard in determining the substantive application for review.
7. Thirdly, given the history of the matter and its remittal by the High Court the Tribunal quite properly acquainted itself with the decision in *Frugtniet HCA*. In doing so it unavoidably became aware of certain factual matters, namely the nature of the spent convictions. But given the way in which the application for review came before the reconstituted Tribunal it could hardly be criticised for doing so. Any tribunal, no matter how constituted, would be required to review that decision and in doing so necessarily become aware of those same facts. That is part of the necessary context in which the test for apprehended bias is to be considered and applied in this case.
8. Finally, in its reasons on the Tribunal Recusal Application the Tribunal carefully considered its position including the information that it was apprised of and how it came to be apprised of it. It was aware of the relevant principles and the test to be applied in considering the important question of apprehension of bias and, after applying the facts to the test determined that the test was not met. No criticism was made of that decision. Mr Frugtniet did not seek leave to appeal from it at the time and does not challenge the Tribunal’s reasoning in this Court.
9. For those reasons ground 2 is not made out.

## Ground 3

1. By ground 3 Mr Frugtniet contends that a number of factual findings made by the Tribunal are affected by error because, in making those findings, either it impermissibly had regard to findings made in other proceedings or it denied him procedural fairness because it made findings that were not reasonably open to it or which were based on material to which it should not have had regard.

### Mr Frugtniet’s submissions

1. Mr Frugtniet submitted that a question of law arose as to whether the Tribunal erred in the interpretation and construction it placed on other judgments in a manner inconsistent with s 91 of the ***Evidence Act*** *1995* (Cth) in circumstances where ASIC did not adduce fresh evidence to prove the facts and matters disputed in those other matters.
2. Mr Frugtniet submitted that it was clear from the Tribunal’s decision, insofar as it relates to whether he engaged in conduct which pointed to a banning order being appropriate, that the Tribunal relied upon each of the following factual findings:
3. that he misled a barrister and a Magistrate about the basis on which he was appearing in court on a particular occasion and that he subsequently gave false evidence in relation to that conduct in a proceeding brought by the Law Institute of Victoria (**LIV**) seeking to have him declared a disqualified person for the purposes of the *Legal Profession Act 2004* (Vic) (**LIV Application Finding**); and
4. that he participated in a scheme to mislead Trades Recognition Australia (**TRA**) about the work experience of a client of his migration practice for the purposes of assisting that client to obtain a visa; and gave dishonest answers to the Migration Agents Registration Authority (**MARA**) in his 1999 application for re-registration (based on assumptions extrapolated from a 2005 letter from MARA to Mr Frugtniet) (**TRA Application Finding**).
5. Mr Frugtniet submitted that:
6. the LIV Application Finding relied, at least in part, on the decision of *Law Institute of Victoria Limited v Frugtniet (Legal Practice)* [2011] VCAT 596 at [55], [59] and [61] albeit the Tribunal noted, at [65], that these “comparatively recent” findings as to dishonesty are based on admissions made by him in the proceeding before it and “depend only on VCAT accurately recording the evidence given to it”; and
7. the TRA Application Finding relied, at least in part, on the decision of *Frugtniet v Migration Agents Registration Authority* [2016] AATA 229 at [71] which was then put to him before the Tribunal (at [75]).
8. Mr Frugtniet accepts that the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate. After referring to the decision in ***Pochi*** *v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482; 26 ALR 247 in relation to s 33(1)(c) of the AAT Act, Mr Frugtniet submitted that the Tribunal should not set the rules of evidence to one side and resort to methods of inquiry which necessarily advantage one party and disadvantage the opposing party. He contended that it is incumbent on the Tribunal at a minimum to judicially consider the effect of s 91 of the Evidence Act.
9. Mr Frugtniet submitted that the Tribunal erred in finding that the impugned conduct could be considered or relied on to make its determination for the following reasons.
10. First, Mr Frugtniet contended that the Tribunal erred in making findings not available on a fair reading of the evidence, and/or by relying on an “imbalanced collection of the available evidence”, and/or by effectively treating prior findings in other proceedings as evidence, contrary to the Evidence Act. In particular he referred to:
11. evidence he allegedly gave to the Tribunal and the Victorian Civil and Administrative Tribunal (**VCAT**) relating to events at the **Magistrates’ Court** of Victoria at Werribee, purportedly establishing that he gave inconsistent (and thereby dishonest) evidence to those tribunals. He contended that the Tribunal’s finding was not reasonably open, and was not based on probative admissible evidence;
12. evidence he allegedly gave to the TRA and the matters relating to Mr Bastola (a former client) which the Tribunal deemed amounted to dishonesty. He contended that the Tribunal’s finding was not reasonably open, and was not based on probative admissible evidence;
13. the letter dated 19 December 2005 from MARA about his 1999 application to MARA which he said was second hand hearsay evidence. He contended that in the absence of direct first hand evidence, or the original application, the Tribunal’s finding that he gave a deliberately false answer to MARA was based on extrapolated assumptions and was not reasonably open or based on probative admissible evidence;
14. evidence of or reference to the 1995 VCAT proceeding relating to Tarson Pty Ltd and his wife and contended that the Tribunal’s decision to admit and rely on related evidence was an error and denied him procedural fairness as he was not a party to the proceeding, had no standing to participate in or influence the outcome, and no sanction or order was made against him; and
15. evidence or reference to the decision in *Re Frugtniet and Secretary, Department of Family and Community Services* (2004) 84 ALD 774 was also an error and was a denial of procedural fairness, given that the decision was set aside by the Tribunal and could thus have no meaningful weight in the Tribunal’s determination.
16. Secondly, Mr Frugtniet submitted that this Court cannot be satisfied that he was afforded natural justice, given the above factors and the facts and matters relied on in relation to ground 2 which demonstrate that the Tribunal considered and relied on prejudicial matters not properly before it.
17. Mr Frugtniet submitted that this Court ought to consider the discrete alleged events and facts which he relied on from past decisions one at a time and to consider their cumulative and net effect. He said that if some but not all of the discrete elements are found to be inadmissible, unreliable, or otherwise unable safely to be the foundation of the Tribunal’s decision, the final ruling is rendered disproportionate or otherwise unsound.

### Consideration

1. As Mr Frugtniet pointed out, the starting point to consider this ground of appeal is s 33(1)(c) of the AAT Act which provides:

(1) In a proceeding before the Tribunal:

…

(c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

1. In *Pochi* (at 491-2), in considering how facts are to be proved and what will amount to sufficient proof in the absence of rules of evidence binding the Tribunal, Brennan J observed, among other things, that the Tribunal may have regard to logically probative evidence which is relevant to the issues before it.
2. The manner in which the Tribunal considers it to be appropriate to inform itself of relevant matters will vary from case to case. However, it will necessarily be informed by the circumstances of the particular case and the objective of the Tribunal set out in s 2A of the AAT Act. In particular, the Tribunal is required, in carrying out its function, to pursue the objective of providing a mechanism of review that is accessible, fair, just, economical, informal, quick and promotes public trust and confidence in its decision making.
3. Mr Frugtniet’s contention that findings of the Tribunal are affected by error because it impermissibly had regard to findings made in other proceedings is essentially the same argument as he raised in *Frugtniet v Migration Agents Registration Authority* [2017] FCA 537;156 ALD 79. In that case Mr Frugtniet argued that the Tribunal’s reference to, or reliance on, findings made by other decision makers, including other tribunals and courts, was contrary to s 91 of Evidence Act. In rejecting that argument, after noting that the Evidence Act applies to all proceedings in a “federal court” as defined, at [213]-[214] Kenny J said:

[213] The Tribunal does not fall within this definition since it is not required to apply the laws of evidence. Section 33(1)(c) of the *AAT Act* expressly provides that “the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate”. Section 91 of the *Evidence Act* does not therefore apply to the Tribunal: see also *Danagher v Child Support Registrar* (2014) 228 FCR 213; [2014] FCA 1408 at [37]–[38] (Gilmour J*); Ralph v Repatriation Commission* (2015) 145 ALD 357; [2015] FCA 165 at [64] (Murphy J); and *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555; 322 ALR 581; 141 ALD 540; [2014] FCAFC 93 at [91] (Flick and Perry JJ).

[214] As the MARA submitted, the Tribunal may use the findings of another tribunal or of a court as the basis for its own findings, according such findings the weight that it considers appropriate in all the circumstances of the case: see, e.g., the reasons for decision of the Tribunal in *Re Thorpe* at [72].

1. In ***Rawson Finances*** *Pty Ltd v Commissioner of Taxation* (2013) 133 ALD 39 Jessup J said at [62]:

Before turning to those issues, it is necessary to say something about the legal framework within which the Tribunal’s fact-finding function was set. The Tribunal is not a court, and is not bound by the rules of evidence: AAT Act, s 33(1)(c). It must, however, proceed by reference to “rationally probative evidence” rather than on mere “suspicion or speculation”: *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 685. If it does so, its finding on a question of fact will not be assailable in a proceeding under s 44 of the AAT Act unless that finding was not reasonably open on the evidence. Where the finding has been made by inference, no error of law will have been made so long as there was some basis for the inference: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 326. The nature and limits of the Tribunal’s function in these and allied respects were described in detail by Greenwood J (Weinberg J agreeing) in *Wecker v Secretary, Department of Education, Science and Training* (2008) 168 FCR 272 at 294-299.

1. The Tribunal is entitled to make use of the findings of other tribunals or courts. In doing so, it has a discretion as to the weight it should give such findings.
2. We turn our attention to the use made by the Tribunal of the other decisions about which Mr Frugtniet complains.
3. As is evident from a review of the Tribunal’s reasons, it relied on the findings of other decision makers in coming to a view on the threshold question of whether it had reason to believe that Mr Frugtniet was not a fit and proper person to engage in credit activities, perform one or more functions as an officer of another person who engages in credit activities or control another person who engages in credit activities. The Tribunal noted that the bar to meet the threshold for that inquiry was lower than that for the second inquiry, whether a banning order should in fact be made and, if so, its extent and duration.
4. At [46] of its reasons the Tribunal set out the nine matters which it considered and which concerned eight decisions. Relevantly:
5. it is evident from a review of the Tribunal’s summary of those decisions (at reasons [46]) that Mr Frugtniet was a party to seven of the eight decisions referred to and considered by the Tribunal;
6. the majority of those decisions were included in the T-Documents required to be lodged with the Tribunal pursuant to s 37 of the AAT Act such that Mr Frugtniet was on notice of them;
7. at the hearing before the Tribunal, ASIC referred to those decisions. For example in opening submissions on day one counsel appearing for ASIC said:

A majority of the material before the [Tribunal], in the T documents, are the decisions of various other courts and tribunals in which various findings of fact are made about the applicant and his conduct. And I intend to briefly take the [Tribunal] through those documents and identify the findings on which ASIC relies to say that there is reason to believe that the applicant is not a fit and proper person.

1. counsel for ASIC then took the Tribunal to, and over objection from Mr Frugtniet tendered as exhibits, the decisions referred to at [46(a)], [46(b)], [46(c)], [46(d)], [46(f)], [46(g)], [46(h)] and [46(i)] of the reasons. Those decisions had been included in the T-Documents in advance of the hearing and Mr Frugtniet clearly had notice of ASIC’s intention to rely on them.
2. As we have already observed the Tribunal only relied on the decisions of other decision makers in relation to the first question it had to resolve, whether it had “reason to believe” as required by s 80(1)(f) of the NCCP Act sufficient to enliven its discretion to consider whether a banning order should be made and its terms.
3. In considering the latter question, namely, whether a banning order should be imposed, the Tribunal did not rely on other decisions but made its own findings of fact. Insofar as it did so, Mr Frugtniet contends that in three instances the Tribunal made findings that were not reasonably open to it based on probative evidence and that in two instances it made impermissible reference to decisions.
4. As to the contention that the Tribunal made findings that were not reasonably open to it on the evidence, it is relevant to recall that an appeal from the Tribunal to this Court can be brought in relation to a question of law: see s 44(1), AAT Act and *Rawson Finances* at [62].
5. Relevantly, in *Rawson Finances* at [84] Jagot J (with whom Nicholas J agreed) said:

The distinction between evidence or material which could support a factual finding and evidence or material which should or should not have supported such a finding is fundamental to the exercise of jurisdiction which is limited to questions of law. When courts refer to there being “no probative” evidence to support a finding or a finding not being “reasonably open” or “open” on the evidence (as in *Australian Broadcasting Tribunal v Bond* at 359-360) or it being necessary that a finding be based on “some probative material or logical grounds” and that a finding not be “completely arbitrary” … the courts are not inviting consideration of whether a finding should or should not have been made. **They are considering the anterior question whether the evidence reasonably admitted the making of the finding; that is, whether the evidence could support the finding. Hence, if there is no probative evidence of a fact and no logical grounds to support the fact, the finding of that fact will involve error of law. But where there is some probative evidence of a fact and some logical ground to support the fact, the finding of that fact will not involve error of law. The formula “some probative material or logical grounds” does not convert questions of fact into questions of law.**

(Emphasis added.)

1. We turn to consider the particular findings which Mr Frugtniet contends were not supported by probative evidence.
2. The first of these is the Tribunal’s finding at [52] and [55]-[68] of its reasons about the representations made by Mr Frugtniet to the Magistrates’ Court. In summary the Tribunal found that:
3. on 25 May 2010 Mr Frugtniet attended the Magistrates’ Court to assist members of a swimming group in which he was involved. Although Mr Frugtniet had a law degree he was not admitted to practice. Upon meeting at court, the barrister for the opposing side inquired whether Mr Frugtniet was a sole practitioner. He responded “yes”;
4. later that morning Mr Frugtniet appeared before a Magistrate who asked for which firm he worked. Mr Frugtniet responded “sole practitioner, your Honour”;
5. before the Tribunal Mr Frugtniet’s evidence (as recorded at reasons [57]) included:

…,what is alleged against me that I misrepresented a barrister and I misrepresented a Magistrate. **Unfortunately and regrettably that’s what I did.** I did so, I can only say, not with any intention, because you see I was a sole practitioner in immigration and I was a sole practitioner in tax, and I should have understood also, and I know it’s encroaching upon more than an overview, but you see, Deputy President, at least I should be – it was one of those days where I was rushed, because normally what I would have done if that was the case, the first thing I would have done was I would have sought leave, and there’s no suggestion that leave would not have been granted…

… My whole intention was to seek leave and it was as simple as, you know, “I seek leave to appear, you know, insofar as I’m not admitted as a legal” - I would have said that. What actually happened was I was confronted with a situation where the lawyer or the barrister I should say, for the other side, approached me and in the course of, I think him asking me as to from what firm I was from. I said “Sole practitioner”. I know it might seem implausible but I didn’t intend to convey that I was a sole practitioner as in lawyer but that’s how it was read and I can’t help but feel - given that I could easily have got leave and done what I did.

But so then the situation arose in court where I think it is stated the Magistrate says to me, “please stand” and the question is put to me, “What firm are you from?” And I said, “Sole practitioner”. Looking back on it obviously it could not have done anybody any good other than to convey the impression that I was a sole practitioner practising law.

(Footnote omitted, emphasis in original.)

1. in the disciplinary proceeding instituted by the LIV in VCAT against Mr Frugtniet (**LIV Proceeding**), the barrister who appeared for the opposing party in the Magistrates’ Court gave evidence consistent with the evidence given by Mr Frugtniet to the Tribunal. However, VCAT’s decision in the LIV Proceeding records that Mr Frugtniet gave evidence to it denying that he said the words “sole practitioner” or “solicitor” to the barrister;
2. Mr Frugtniet’s evidence given in the LIV Proceeding was inconsistent with the evidence he gave before the Tribunal. Further, Mr Frugtniet gave evidence in that proceeding to the effect that he appeared “personally through a power of attorney as the spokesperson for the firm of Vasta and others” and claimed that his entitlement to appear arose out of a power of attorney executed by his clients such that he did not need to seek leave to appear. The Tribunal found that Mr Frugtniet’s evidence in the LIV Proceeding could not be reconciled with the evidence that he gave to the Tribunal; and
3. it was clear from the evidence given by Mr Frugtniet to it that he defended the LIV Proceeding on a false basis in that he denied under oath facts about a conversation which he now admitted occurred in the same way as described by the other witness, the barrister, in the LIV Proceeding.
4. The Tribunal was satisfied that Mr Frugtniet’s evidence of his conversation with the barrister given in the LIV Proceeding was knowingly false and that he made the false statement in a deliberate attempt to avoid an adverse disciplinary finding: reasons at [64].
5. We are satisfied that those findings were supported by the material before the Tribunal.
6. First, as is apparent from the transcript of the hearing before the Tribunal, Mr Frugtniet gave the evidence recorded at [113(3)] above. In that evidence he plainly conceded that he made a misrepresentation about his status as a lawyer who was a “sole practitioner” to a barrister and a Magistrate in the course of the LIV Proceeding.
7. Secondly, in VCAT’s decision in the LIV Proceeding, which was admitted into evidence before the Tribunal, commencing at [75] VCAT set out the evidence given by and on behalf of Mr Frugtniet to it including at [77]-[80] that:

77 On 25 May 2010 [Mr Frugtniet] said he had arrived late to Werribee Magistrates Court, Mr Vasta accompanied him to the Registry Counter where he said:

“My name is Frugtniet. I appear as spokesman pursuant to a power of attorney.” I handed it over the counter, the original, and I said, “Could you please stamp and provide me a copy, stamp it and give me a copy.”

78 The original Power of Attorney was stamped and he was given back a copy of the stamped original.

79 In relation to his initial conversation with Mr Lowry at the Werribee Magistrates Court:

a. He denied that Lowry carried a book;

b. He denied that he said “sole practitioner” or “solicitor:’

c. Mr Vasta was with him and within hearing of their conversation;

d. The conversation which he said occurred was as follows:

“I’m Stephen Lowry, barrister, and I appear for the defendant.” I said, Mr name is Rudy Frugtniet.” I don’t recall him asking me to say can you spell it or anything or even repeat it, I said, “Rudy Frugtniet.” I said, “I appear personally through a power of attorney as the spokesperson for the firm Vasta & Ors.” And he said, “Are you appearing for Vasta or are you appearing for Vasta and the others, and my answer, to the best of my recollection was, “I appear for them all but they are not here at the moment…”

80 When [Mr Frugtniet] appeared before the Magistrate and answered “sole practitioner” he was merely referring to the fact that he was a sole practitioner migration agent, tax agent and conveyancer. He did not have legal practitioner in mind. Furthermore, he had already filed the Power of Attorney with Registry and had no reason to believe that the Magistrate did not have such document in the file before him.

1. It is apparent from VCAT’s reasons that Mr Frugtniet gave evidence to VCAT in which, in contrast to his evidence before the Tribunal, he denied that he said to the barrister that he was a sole practitioner or solicitor, gave evidence of his conversation with the barrister to the effect that he appeared through a power of attorney and evidently made no mention of being “a sole practitioner” and explained what he had intended to convey when he informed the Magistrate that he was a “sole practitioner”.
2. This evidence supports the Tribunal’s finding that there was a discrepancy between the evidence Mr Frugtniet gave to VCAT in the LIV Proceeding and the evidence he subsequently gave to the Tribunal about events which took place at the Magistrates’ Court.
3. In the circumstances, there was sufficient probative evidence to support the Tribunal’s findings in relation to Mr Frugtniet’s conduct in the Magistrates’ Court and the evidence he gave in the LIV Proceeding about his attendance at and appearance before that court.
4. The second finding which Mr Frugtniet contends was not supported by probative evidence is the Tribunal’s finding that Mr Frugtniet was involved in falsifying an immigration skills assessment. The Tribunal made its findings at [69]-[75] of its reasons. In doing so the Tribunal:
5. referred to the decision in *Frugtniet v Migration Agents Registration Authority* [2016] AATA 299 (***Frugtniet v MARA***) in which the Tribunal, differently constituted, affirmed a decision of MARA to cancel Mr Frugtniet’s registration as a migration agent and as part of that decision considered whether Mr Frugtniet was involved in fabrication of documents used to obtain a favourable skills assessment to support a skilled visa application for Mr Bastola;
6. noted that before it Mr Frugtniet accepted that Mr Bastola was his client and that he had assisted him to prepare a visa application but denied his involvement in the preparation of the application to TRA which included documents which fabricated Mr Bastola’s work experience;
7. set out that part of *Frugtniet v MARA* where the facts relating to the fabrication of those documents were recorded; and
8. set out the evidence given by Mr Frugtniet to it noting first that Mr Frugtniet maintained that he was not involved in the preparation of the false work history which enabled Mr Bastola to obtain a favourable skills assessment from TRA but also that much of his evidence confirmed many of the critical facts found in *Frugtniet v MARA*.
9. At [74]-[75] of its reasons the Tribunal found, based on Mr Frugtniet’s own evidence, that the basic facts giving rise to the deception were not in dispute and that Mr Frugtniet’s explanation to it as to why the conspirators chose his contact details for “Mr Evans”, who signed the letter in support of the skills assessment application which detailed Mr Bastola’s work experience, was not credible and explained why it had formed that view.
10. Mr Frugtniet’s evidence to the Tribunal, recorded at [72] of its reasons, supports the Tribunal’s findings. Mr Frugtniet accepted that Mr Bastola submitted a skills assessment to TRA which included a letter purportedly signed by a Mr Evans who was described as a director and executive chef of Café Miro. The letter from Mr Evans stated that Mr Bastola had completed 900 hours of work experience at Café Miro and that if TRA wished to discuss its content it could contact Mr Evans by sending a request to a GPO box or fax number or by phone at a mobile phone number. The GPO box provided belonged to Mr Frugtniet at one point and then to Unique Mortgage Services Pty Ltd. Mr Frugtniet accepted that he had access to the GPO box at all times, and the mobile phone number provided for Mr Evans was Mr Frugtniet’s mobile phone number. Given those facts there is no basis on which it could be said that the Tribunal’s findings were not open to it or that they were not supported by probative evidence.
11. The third matter about which Mr Frugtniet complains is the Tribunal’s findings about an answer he gave to MARA in 1999 when completing a form (**1999 Form**) to renew his registration as a migration agent. The Tribunal addressed this issue at [76]-[79] of its reasons. The form in question was not in evidence before the Tribunal. Rather the Tribunal had before it a letter dated 19 December 2005 from MARA to Mr Frugtniet (**2005** **MARA Letter**) which included:

In your application for repeat registration received by the Authority on 27 October 1999 and declared by you as being complete, correct and up to date in every detail on 26 October 1999 you were asked the following question:

11. Are you the subject of any criminal charges still pending before a Court, or have you ever been convicted of an offence which is not spent? Refer to Part VIIC Crimes Act 1914 (Cth) for a definition of a spent conviction.

You answered no to this question. According to the information before the Authority you were subject to criminal charges still pending before a court. You had been charged with six counts of theft and three of attempted theft, but were not acquitted of these charges until 23 March 2000.

1. The Tribunal noted that in evidence before it Mr Frugtniet accepted, on the balance of probabilities, that what was recorded in the 2005 MARA Letter accurately reflected the question he was asked and the answer he gave in the 1999 Form and that he was the subject of pending criminal charges at the time he answered the question posed in the 1999 Form. Based on that evidence, the Tribunal found that it had no reason to doubt that the 2005 MARA Letter accurately reflected the question asked and the answer given in the 1999 Form and that by answering “no” Mr Frugtniet gave “incorrect” information to MARA.
2. Once again there was evidence before the Tribunal to support its findings. As it observed, it did not have the 1999 Form but it had before it the 2005 MARA Letter which set out the question asked and the answer given at the relevant time. In cross examination the 2005 MARA Letter was put to Mr Frugtniet by counsel for ASIC. Mr Frugtniet gave the following evidence:

Q: Would you accept that it’s more likely than not that MARA’s got it right, about what you answered in your form?

A: Yes, I’m trying to accede to that proposition.

And:

Q: Thank you. All right. So, assuming that it’s more likely than not that you answered “no” to this question, would you accept that that answer is false?

A: I don’t know how you define false. In the context of an innocent mistake or an intentional response – I can’t quite agree with you in that sense of the word. No. I don’t agree with you on the face of it. You can make an innocent mistake. You can, for reasons that I’ve canvassed, define the answer to be incorrect. But, to be false, context are not more than that.

Q: So, what you’re doing there is really taking issue with the word “false”, trying to say well, I didn’t – I may not have meant it, therefore it’s no false. Is that what you’re trying to say?

A: Well, yes, I mean it could have been mistake, it could have been a misapprehension, or what I thought needn’t be disclosed, you know. In that sense of the word. For the reasons that I’ve canvassed.

Q: But do you accept that it’s not factually accurate?

A: Yes, it would not be factually accurate. Yes, that would be correct.

Q: All right. So, I think after all of that, I hesitate to summarise, but we’ve gotten to the point where you accept that it was more likely than not you answered no. And that if you did answer no, that that answer would have been incorrect – or factually inaccurate?

A: That would be right.

Q: Okay. Because – and the reason it would have been factually inaccurate is because, at that time, you were actually the subject of pending criminal charges relating to your employment at the ANZ Bank. Is that correct?

A: Correct.

Q: And obviously those charges were ultimately thrown out. Is that right?

A: Weren’t thrown out. They were – I was acquitted by a jury.

1. We are satisfied, based on the available evidence, that the Tribunal’s findings were reasonably open to it.
2. The final two matters about which Mr Frugtniet raises an issue are the references to a VCAT decision in relation to a review of a decision by the Travel Agent’s Licensing Authority to cancel Corine Frugtniet’s (Mr Frugtniet’s former wife) travel agent’s licence (at reasons [46(a)]) (which we will refer to as the **Tarson Decision**) and the decision in *Re Frugtniet and Secretary, Department of Family and Community Services* (2004) 84 ALD 774 (at reasons [46(d)]) (which we will refer to as the **Newstart Allowance Decision**). Mr Frugtniet contends that by the Tribunal’s reliance on those decisions he was denied procedural fairness because he was not a party to the proceeding giving rise to the Tarson Decision and because the Newstart Allowance Decision was set aside.
3. The Tarson Decision was one of the adverse findings to which ASIC took the Tribunal in relation to its consideration of whether it had reason to believe that Mr Frugtniet was not a “fit and proper person” to carry on credit activities. Mr Frugtniet was not a party to the proceeding which gave rise to the Tarson Decision but gave evidence in the proceeding. The Tribunal’s sole reference to the Tarson Decision is at [46(a)] of the reasons where it referred to VCAT’s finding about Mr Frugtniet as a witness saying he:

…was verbose and argumentative in his answers. His accounts of events, in some cases, were inconsistent…[m]oreover his evidence at some points, particularly in regard to [an IATA inspector’s] visit was simply incredible.

1. At [49] of its reasons, in response to a submission by Mr Frugtniet that in some cases the decisions referred to at [46] of the Tribunal’s reasons had been set aside and in other cases he was unable to challenge the veracity of some of the findings made against him, including in the Tarson Decision, the Tribunal said:

Even if we disregard the adverse findings contained in decisions that were set aside on appeal or where the applicant did not have an opportunity to challenge the evidence, we are satisfied the balance of the adverse findings provide ample reason to believe the applicant is not a fit and proper person to engage in credit activities.

1. That is, while not expressly disavowing reliance on the findings in the Tarson Decision, the Tribunal was satisfied, even excluding those decisions which had been set aside on appeal or where Mr Frugtniet had not had an opportunity to challenge the evidence (e.g. the Tarson Decision) and based only on the balance of the decisions, that it had reason to believe that Mr Frugtniet was not a fit and proper person to engage in credit activities.
2. But even if the Tribunal did place some reliance on the findings about Mr Frugtniet in the Tarson Decision we do not accept that any procedural unfairness arose.
3. The Tarson Decision was included in the T-documents such that Mr Frugtniet had advance notice of the fact that it was to be before the Tribunal. He was cross examined in relation to the Tarson Decision and the evidence he gave to VCAT in the proceeding before it. He had an opportunity to respond to the questions in cross examination and to make submissions about the Tarson Decision, including whether the Tribunal should have regard to the findings in it, which it seems he did.
4. Further, a review of the reasons in the Tarson Decision shows that, while Mr Frugtniet was not a party to the proceeding before VCAT, he was one of four witnesses and in VCAT’s opinion he “dominated” the proceeding, “seemed to usurp the positions both of client and instructing solicitor”, was referred at one time by Mr Palmer, counsel appearing for Mrs Frugtniet, as “my client” and made an unsuccessful application to be joined as a party. The reasons disclose that Mr Frugtniet had more than a passing interest in the proceeding giving rise to the Tarson Decision and seemed to have a significant involvement in it.
5. As a final matter we note that Mr Frugtniet raised an almost identical argument in *Frugtniet v Australian Securities and Investments Commission*  [2016] FCA 995; 152 ALD 31 (***Frugtniet v ASIC***)*.* There, among other things, Mr Frugtniet contended that it was procedurally unfair for the Tribunal in that case to have had regard to the findings made in the Tarson Decision. In addressing that contention at [87]-[89], in a finding that was not disturbed on appeal, Bromberg J relevantly said:

[87] … The question is only whether it was procedurally unfair for the [Tribunal] to have had regard to findings that were made in a proceeding in which Mr Frugtniet had no ability to appeal. The answer is that it was not.

[88] Mr Frugtniet was aware that the findings made in the Tarson proceeding were in issue before the [Tribunal]. He was aware of the nature and content of the findings made in the Tarson proceeding. He had the opportunity to deal with those findings in the course of the hearing before the [Tribunal]. It was open to him, for example, to argue that they should be given no or diminished weight as a consequence of his inability to appeal. He had the ability to put information and submissions to the [Tribunal] in support of an outcome consistent with his interests.

[89] Taking a broader view, there was no practical injustice in the procedure adopted by the Tribunal. Indeed, it is difficult to see what more it could have done with a view to enabling Mr Frugtniet to address the substance of the Tarson findings as he saw fit. The procedural fairness ground fails. …

1. To like effect are the findings of a Full Court of this Court (Fox, Blackburn and Lockhart JJ) in ***Barbaro*** *v Minister for Immigration and Ethnic Affairs* (1982) 44 ALR 690; (1982) 65 FLR 127 in relation to a submission that the Tribunal there denied natural justice to the appellant by relying on the “Report of the New South Wales Royal Commission into Drug Trafficking”, which was before it, to conclude that the appellant was involved in the activities of a criminal organisation and had a role beyond that of a mere labourer. The Full Court found that the submission failed as a matter of fact because of the content of the report. However it went on to observe that, while the question was academic, it doubted that there would have been a denial of natural justice if the Tribunal had drawn more from the report. At 693-4 the Full Court said:

The essence of the objection is that the appellant did not appear, nor was he represented, or asked to appear, before the Royal Commission: he did not have an opportunity to test the evidence given to it. To stop there, we think it is highly unlikely that he was unaware of the Royal Commission or of the nature and extent of its inquiries, so far as the latter might affect him. It is therefore a matter of surmise whether he had the opportunity to seek representation, or to appear in person, before the Commission. However, accepting the submission on this aspect, his complaint is that it was an impossible task for him to overcome, before the Tribunal, the Royal Commissioner’s finding. The fact was, however, that he was represented by counsel before the Tribunal, and then gave evidence himself, denying the alleged membership, and, indeed, knowledge of the alleged organization.

The content, or requirements, of natural justice vary with the circumstances of each case, but some guidelines have been formulated. It is established that, in general, reliance by a tribunal upon a provision such as s 33(1)(b) and (c) of the Administrative Appeals Tribunal Act is not *per se* a breach of the rules of natural justice (see per Diplock LJ in *R v Deputy Industrial Injuries Commissioner; Ex parte Moore* [1965] 1 All ER 81; [1965] 1 QB 456; *Myers v Director of Public Prosecutions* [1964] 2 All ER 8 81; [1964] 3 WLR 145; *Kavanagh v Chief Costable of Devon and Cornwall* [1974] 2 All ER 697 at 698; [1974] QB 624 at 633 per Lord Denning MR; *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 686–90; 4 ALD 139 at 156–7 , per Deane J).

The admission of an adverse hearsay report, without an opportunity being provided to cross-examine the author, does not by itself amount to a denial of natural justice (*T A Miller Ltd v Minister of Housing and Local Government* [1968] 2 All ER 633; [1968] 1 WLR 992; *Kavanagh v Chief Constable of Devon and Cornwall, supra*: see also *R v War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* (1933) 50 CLR 228 at 244, 250). Consideration of whether there has been a denial of natural justice must have regard to statutory provisions, such as s 33 of the Administrative Appeals Tribunal Act (as well as ss 30, 31 and 32). In the present case, it seems to us that the appellant was treated fairly. He had an opportunity by his own evidence, and by any other he could produce, to refute statements in the Report, and he had a legal representative through whom all appropriate submissions could be made.

1. The findings in *Frugtniet v ASIC* and the observations of the Full Court in *Barbaro* apply equally to the argument made here in relation to the Tribunal’s reference and regard to the findings in the Tarson Decision.
2. The Tribunal considered the Newstart Allowance Decision at [46(d)] of its reasons. It said:

In its decision in *Re Frugtniet and Secretary, Department of Family and Community Services* (2004) 84 ALD 774, which related to an overpayment of social security payments to Mr Frugtniet, the AAT concluded Mr Frugtniet had received an overpayment. The AAT made the following findings about his conduct:

(i) When he first applied for Newstart Allowance on 6 March 1998 the applicant falsely stated in the application form that he had not been studying in the last six months;

(ii) In a form completed by the applicant on 10 March 1998 Mr Frugtniet falsely stated that he was not self-employed or the owner of a business;

(iii) When he commenced paid employment on 27 April 1998 the applicant failed to disclose this to Centrelink;

(iv) Over at least two years the applicant failed to disclose to Centrelink his employment and income;

(v) On forms submitted to Centrelink in April and May 2000 the applicant falsely stated that he was not employed;

(vi) During the period from 22 August 1998 to 6 July 2000 the applicant’s actual income was $76,828.66 but he only declared income of $200.

1. In the Newstart Allowance Decision the Tribunal found that Mr Frugtniet had given false answers in the forms he completed as part of his application for the Newstart allowance and failed to subsequently disclose the total income he had received over a two year period. While the Tribunal ultimately found that there had been an overpayment of the Newstart allowance to Mr Frugtniet, it set aside the decision under review because of the respondent’s failure to comply with s 11 of the *Data-Matching Program (Assistance and Tax) Act 1990* (Cth). It found that the respondent should not have taken any action to recover the overpayment until such time as there was compliance. Because Mr Frugtniet had been successful in the proceeding, he could not appeal the AAT’s decision and thus challenge the adverse findings of fact.
2. Mr Frugtniet contends that given his inability to challenge the findings, the Tribunal ought not to have placed reliance on those findings and that it was procedurally unfair for it to do so. However, as with the Tarson Decision, the Tribunal’s reliance on the findings in the Newstart Allowance Decision was extremely limited, if at all, given its approach and the finding it expressed at [49] of its reasons. Further, as was the case with the Tarson Decision, the Newstart Allowance Decision was included in the T-Documents, Mr Frugtniet had notice of the fact that it would be in the material before the Tribunal and had the opportunity to address the Tribunal in relation to it.
3. Having regard to the matters set out above, there was ample evidence to support the Tribunal’s findings about which Mr Frugtniet complains and no denial of procedural fairness in the Tribunal’s reliance on the two matters identified by Mr Frugtniet.
4. Ground 3 is not made out.

# CONCLUSION

1. For those reasons the appeal should be dismissed. As Mr Frugtniet has been unsuccessful he should pay ASIC’s costs.
2. We will make orders accordingly.

|  |
| --- |
| I certify that the preceding one hundred and forty-four (144) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Markovic, McElwaine and McEvoy. |

Associate:

Dated: 17 February 2023