LA TROBE UNIVERSITY

DATA TO DECISIONS CRC

D2D CRC Law and Policy Deliverable D.C3.6

DC25008: Compliance by Design (CbD) and Compliance through Design (CtD).

Solutions to support automated information sharing.

DOI: 10.5281/zenodo.3271520

March, 20th 2019 (final revision June 24th 2019)

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Versions

Version	Author	Tasks	Date
DC3.6vs1	Suzanne O'Toole and Patrick Keyzer	Spent Convictions sentences: identification, selection, and extraction	December 5th
DC3.6vs2	Suzanne O'Toole and Patrick Keyzer	SC case law topics and summary	December 5th
DC3.6vs3	Pompeu Casanovas	Formatting	January 14th
DC3.6vs4	Suzanne O'Toole and Patrick Keyzer	Further analysis	February 4th
DC3.6vs5	Pompeu Casanovas	Review	March 20th, 2019
DC3.6.vs6	Pompeu Casanovas	Final revision	June 24th, 2019

Deliverable D.C3.6

Case Law on Spent Convictions: Analysis

By Suzanne O'Toole and Patrick Keyzer

Independent research report commissioned by the Australian Criminal Intelligence Commission (NCIS Pilot Program)

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Acronyms

CbD	Compliance by Design
CtD	Compliance through Design
D2D CRC	Data to Decisions Cooperative Research Centre

Executive Summary

Under federal legislation, if a person's conviction for a Commonwealth (or Territory) offence is more than ten years old, the person is not required to disclose to any person, the fact that the person has been charged with, or convicted of, the offence. Further, if a person's conviction of a State (or foreign) offence is more than ten years old, the person is not required to disclose to any Commonwealth authority in a State (or in a foreign country), the fact that the person has been charged with, or convicted of, the offence.

Spent conviction rules are important to ensure that people are not tainted by the stigma associated with prior criminal conviction. Spent conviction provisions also ensure that people have behaved lawfully for a substantial period of time before they are able to resume full participation in society. Spent conviction laws also operate in State and Territory jurisdictions in Australia.

The law governing spent convictions is particularly important to people seeking a federal professional licence, such as to be a tax agent, migration agent, or to provide credit services under federal law. It is important because applicants for these licences need to demonstrate that they are a "fit and proper person" to hold such a licence. A criminal conviction would ordinarily disqualify a person from complying with that requirement.

This paper explores the operation of the spent convictions legislation in federal law. It is clear that federal legislation ensures that federal agencies cannot have regard to spent convictions when making a determination that a person is fit and proper. However it is equally clear that federal criminal law authorises appellate tribunals, such as the Administrative Appeals Tribunal, to have regard to any matter that they think is relevant when considering an appeal from an unsuccessful applicant, and, paradoxically, that can include a person's spent convictions.

This anomalous position has been confirmed in a decision of the Federal Court and a decision of the Full Court of the Federal Court. In practical terms, this undermines the efficacy of the federal spent convictions legislation, from the perspective of the person affected. It means that if a person contests an agency determination that they are not a fit and proper person, the agency need only appeal to the Administrative Appeals Tribunal or a court, which can then have regard to the spent convictions as an otherwise relevant matter. The spent convictions provision will therefore only be relevant to persons who seek to rely on it in circumstances where no appeal is taken.

1 Introduction

The work presented in this document has been made in the context of Project C, "Compliance by Design (CbD) and Compliance through Design (CtD) solutions to support automated information sharing", within the Law and Policy Program, Data to Decisions Cooperative Research Centre (D2D CRC).

This deliverable identifies case law on spent convictions that intersects with the relevant federal legislation[1], and analyses the operation of the spent convictions scheme as it is reflected in those cases. The analysis maps the conflicts that occur and identifies the tipping interpretive points defining the implementation of right and the conditions of disclosure.

2 Set of final rulings: purpose and objectives

Lexis Advance, a commercial legal research tool, was used in order to identify relevant cases. The phrase "spent convictions" was deployed. This search returned 143 cases. To ensure our search methods were robust (sufficiently broad to ensure coverage and sufficiently narrow to be on point) we conducted a second, Boolean search using the same phrase, but within quotation marks. This revealed three further cases with more than passing references to the relevant legislation, which we added to the list below. The list was then placed in chronological order based on the date of decision. Virtually all of the cases are available for free via the Australasian Legal Information Institute (these cases are noted below with square bracket citations). The remaining cases are available via Lexis Advance.

Review of the cases by the authors demonstrated that only ten of the 146 decisions examined spent convictions under the relevant Commonwealth legislation in any detail. They are listed in the "References" section at the conclusion of this paper. The rest of the decisions reflected only passing references or functional applications. References will be made to other decisions in the analysis that follows, with citations and other relevant material set out in footnotes.

The cases typically concern circumstances where an applicant for a federal professional licence (for example, to be a migration agent, or a tax agent, or to provide credit services) had to demonstrate that she or he was a "fit and proper person" to hold that licence or enjoy that statutory privilege. The purpose of the requirement is to protect the public and to maintain public confidence in the professional licensing system.[2] Some people present an unacceptable risk to the profession and therefore should not have a licence.[3]

The fit and proper person requirement embraces a broader category of misconduct or unprofessional conduct.[4] It does include matters that could be the subject of criminal proceedings, such as fraud or dishonesty, but also extends to

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[1] (i) Crimes Act 1914 (Cth) – Part VIIC – Division 3: Sections 85ZV, 85ZW and (ii) Regulation 7A Exclusions from Divisions 2 and 3 of Part VIIC of Act (Act s 85ZZGB, 85ZZGC and 85ZZGD).

[2] Re Carbery and Associates Pty Ltd and Tax Agents' Board of Queensland [2001] AATA 107.

[3] Re Scott and Tax Agents' Board of Queensland [2001] AATA 435.

[4] Toohey v Tax Agents' Board [2008] FCA 1796; see further, Tax Practitioners Board Explanatory Paper 02/2010.

other less serious matters such as failure to exercise diligence in the management of client affairs. Obviously, for those varieties of misconduct that have not been the subject of a criminal conviction, spent convictions regimes have no relevance.

A person's record of compliance with their own personal obligations under the relevant regime will be considered by a decision-maker undertaking a fit and proper person determination. For example, a tax agent is expected to have complied with their personal taxation obligations.[5] While a failure to comply with taxation obligations may be a less significant consideration for a decision-maker considering whether to grant a person a licence under another regime where the fit and proper person requirement is imposed (e.g. when a person who has failed to pay tax applies to be a migration agent) the lack of diligence or misconduct may yet be considered.

A fit and proper person determination can also be influenced by the way that the person concerned has dealt with the decision-making tribunal. If the person concerned has provided false and/or misleading information to the tribunal then this will impact the decision. If they have been contemptuous or disrespectful, caused inordinate delays or otherwise behaved unprofessionally in their dealings with the decision-making tribunal, all of these matters may be taken into account.

The significance of the conduct will depend on the circumstances, including the type of conduct, the frequency, and whether it reflects a pattern of conduct. The fit and proper person requirement imposes an obligation on the person denied a licence to persuade the relevant decision-maker that their conduct was temporary or isolated and is unlikely to reoccur in the future.[6]

A person will rarely be found to be a fit and proper person if they have been convicted of a criminal offence or have been involved in any dishonesty. It is in such circumstances that spent conviction regimes become relevant, as the purpose of such regimes is to remove the "stain" of the past conviction after the person has demonstrated good behaviour over a sufficiently long period of time.

One of the ten decisions identified in our search well illustrates the types of issues that can arise in the cases: *Frugtniet v Australian Securities and Investments Commission.*[7] We have decided to focus on the appeal because it is located in the freely available database of the Australasian Legal Information Institute. It also usefully sets out the entire history of Mr Frugtniet's deceptive behaviour, and how he sought to deploy the Commonwealth spent convictions legislation.

[5] Glyman and Tax Practitioners Board [2015] AATA 1012.
[6] Re Scott and Tax Agents' Board of Queensland [2001] AATA 435.
[7] *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162.

3 Frugtniet v Australian Securities and Investments Commission

Mr Frugtniet applied to the Australian Securities and Investment Commission for a licence to engage in credit activities. The Australian Securities and Investments Commission made a "banning order" against Frugtniet under s 80 of the National Consumer Credit Protection Act 2009 (Cth) on the basis that there was reason to believe that he was not a fit and proper person to engage in credit activities.

Mr Frugtniet appealed to the Administrative Appeals Tribunal, which rejected his appeal. Frugtniet appealed to the Federal Court and lost, and to the Full Federal Court, and lost again. The Full Federal Court dismissed an appeal.[8] It does not appear that Mr Frugtniet appealed to the High Court.

Significantly, the Full Federal Court considered whether the Administrative Appeals Tribunal was prevented by Division 3 of Part VIIC of the *Crimes Act* 1914 (Cth) from taking spent convictions into account when determining whether the appellant was a fit and proper person, given that the original decision maker was prevented from taking them into account. The case is important because it outlines important constructional choices under the relevant legislation. The Full Court's analysis will be considered momentarily, however it is useful to have a sense of the factual context before doing so.

In 1978, Rudy Noel (a.k.a. "Brian") Frugtniet, then living in the United Kingdom, was convicted on fifteen counts of handling stolen goods, forgery, obtaining property by deception, and theft. Frugtniet was sentenced to prison and served two years. These were plainly crimes that gave rise to concerns about his character, and whether he could be a "fit and proper person" to discharge obligations under relevant statutory licensing schemes. However, by operation of the Commonwealth legislation, Mr Frugtniet successfully argued that his obligation to disclose these convictions had been removed.[9]

In 1995, the Victorian Administrative Appeals Tribunal found that Mr Frugtniet had been involved in the conduct of a travel agency owned by a company called Tarson Pty Ltd, of which his former wife was a director. Frugtniet's involvement in this company was in breach of a licence condition applicable to the travel agency excluding Frugtniet from any involvement in the business. Frugtniet argued that it was Tarson Pty Ltd that breached the licence condition, not him, and that as he was not a party to the relevant proceeding, the matters should not have been taken into account by the decision-maker when deciding to institute a banning order.[10]

In 1997, a Victorian magistrate held Frugtniet guilty of obtaining property by deception in relation to the issue of airline tickets. He was fined $1000, but no conviction was recorded. Frugtniet argued that because no conviction was

[8] *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162.
[9] *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [7].
[10] *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [8].

recorded, the matter was not relevant to his application for review of the banning order.[11]

In 1998, Frugtniet was charged with six counts of theft and three counts of attempted theft. It was alleged that he had given personal details of account-holders to an accomplice while working at a bank.[12] In March 2000 he was acquitted of the charges, while a person charged as an accomplice pleaded guilty.

However, in 1999, Frugtniet applied to the Migration Agent Registration Authority (MARA) for registration as a migration agent, and answered "no" to a question inquiring whether he was the subject of criminal charges still pending before a court. At the time, Frugniet was the subject of pending criminal charges before a court, the six counts of theft and three counts of attempted theft. For that reason, his answer of "no" to MARA was dishonest.[13]

In 2001, Frugtniet applied to the Victorian Board of Examiners for admission as a barrister and solicitor of the Supreme Court of Victoria. His application was refused, and so he appealed to the Supreme Court. Justice Pagone of the Supreme Court observed:[14] "Mr Frugtniet accepted during his submissions to me that the perjury charges, the ANZ charges and the UK convictions were matters that ought to have been disclosed and considered in deciding whether he was a fit and proper person for admission to practice. The Board of Examiners might itself have found in his favour if he had candidly laid out these matters, and if he had done so, there would have been more prospect of the present appeal succeeding. However, these were matters that only came to light upon investigations undertaken by the Board itself after its adverse decision, after Mr Frugtniet's institution of this appeal and after Mr Frugtniet had filed his first affidavit in this court in support of the appeal. In those circumstances I have no present confidence that Mr Frugtniet would have disclosed these matters if they had not come to the Board's knowledge and had the Board not tendered the evidence in the proceeding before me".

While Frugtniet conceded to the Supreme Court of Victoria that he should have disclosed his 1978 convictions, he need not have. So much was recognised by the Migration Agents Registration Authority, which in May 2002, initiated a complaint against Frugtniet about his conduct as a migration agent concerning possible false declarations he had made. While MARA ultimately decided to take no further action, they informed Frugtniet that: "the Authority reminds you that the legislation requires you to declare any charges **other than spent convictions** and you are required to declare them in the future" (emphasis added). There is no reason to doubt the correctness of this statement.

For the purposes of the appeal to the Full Court of the Federal Court, Frugtniet said that the Australian Securities and Investment Commission had found that no false

[11] *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [9].
[12] *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [9].
[13] *Frugtniet v Board of Examiners* [2005] VSC 332.
[14] *Frugtniet v Board of Examiners* [2002] VSC 140, [12].

declarations were made, and that, accordingly, the matters were not relevant to the review of the banning order.[15]

In July 2004, Frugtniet again applied to the Victorian Board of Examiners for admission to legal practice. His application was refused in February 2005 and in August 2005, the Supreme Court (Justice Gillard) dismissed his appeal.[16] Justice Gillard drew attention to Frugtniet's false declaration to MARA regarding the theft charges, and extracted an admission from Frugtniet that he should have answered "yes", not "no". His Honour concluded that Frugtniet carried "a massive bag of dishonest conduct" stretching out over many years and that he "is a person who does not appear to have learned from his experiences".[17]

In the following years, Frugniet was found to have knowingly made false statements in support of an application for social security benefits (2004),[18] made a false declaration to a potential business party that he had not been refused membership of a statutory professional body (2005) and deliberately and falsely represented to a barrister that he was a solicitor and deliberately gave to a magistrate the false impression that he was a solicitor (2010). In respect of the latter matter, the Victorian Civil and Administrative Tribunal upheld an application by the Law Society of Victoria that Frugtniet be disqualified from conducting a conveyancing business for a period of three years. In 2013 the Tax Practitioners Board terminated his registration as a tax agent and disqualified him for five years. Frugtniet appealed and his appeal was rejected.[19] In November 2014, MARA cancelled his registration as a migration agent following a complaint that he had provided false information to authorities. Frugtniet did not disclose this matter to ASIC.

In his later appeal to the Full Court of the Federal Court in respect of the banning order made by ASIC, Frugtniet said that he did not accept the Administrative Appeal Tribunal's decision terminating his registration as a tax agent and that he was appealing that decision to the Federal Court on questions of law. Frugtniet also contended that the banning order concerned credit activities, and the legal disqualification was therefore irrelevant. Notwithstanding all of this, Frugtniet continued to be associated with a business that provided credit services, and a conveyancing business although disqualified from doing so.

It was in this context and with this background in mind that the Full Federal Court, Reeves, Farrell and Gleeson JJ, considered Mr Frugtniet's submissions relating to the operation of the federal spent convictions legislation that is the subject of this paper. Frugtniet argued that the Tribunal had impermissibly had regard to his spent convictions in making its determination. The Tribunal had regard to the 1978 UK convictions as evidence of dishonest conduct. The Tribunal also had

[15] *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [14].
[16] *Frugtniet v Board of Examiners* [2005] VSC 332.
[17] *Frugtniet v Board of Examiners* [2005] VSC 332, [67].
[18] Frugtniet *and Secretary, Department of Family and Community Services* [2004] AATA 996.
[19] *Frugtniet v Tax Practitioners Board* [2014] AATA 766; 148 ALR 401.

regard to the 1997 finding of criminal guilt, even though a conviction had not been recorded. These grounds of appeal, grounds 2 and 4, were determined as follows:

Frugtniet argued in grounds 2 and 4 (which were relevantly identical) that the Administrative Appeals Tribunal erred when it decided that s 80(2)(c), which prohibited regard to spent convictions, precluded a decision-maker (here, ASIC) from having regard to the subject matter of the spent convictions, or any other matter therefrom as "any other relevant matter" under s 80(2)(d).

Frugtniet was faced with the difficulty of overcoming the precedential effect of the decision of Middleton J in *Toohey v Tax Agents Board of Victoria.* [20], which considered the operation of those 2 provisions under Div 3 of PtVIIC of the Crimes Act – ss 85ZV and 85ZW. Middleton J observed that those provisions "are, in express terms, made subject to Div 6 of PtVIIC. Section 85ZZH relevantly says that Div 3 does not apply in relation to the taking into account of information by a tribunal established under a Commonwealth law for the purposes of making a decision". Middleton J concluded that in his view, "that provision is of general import, and does not just apply where a tribunal is making a determination specifically referred to in relation to a conviction, or where it is otherwise bound to take into account a conviction". Reeves, Farrell and Gleeson JJ upheld this analysis, noted that the Tribunal had also applied this approach, and rejected the appeal. While ASIC might have been precluded from having regard to Frugtniet's spent convictions, the Tribunal was not, by dint of s 80(2)(d) of the NCCP Act, which should be interpreted the same way as s 85ZZH of the *Crimes Act* had been in *Toohey*.

4 Conclusions

As noted at the start, under federal legislation, if a person's conviction for a Commonwealth (or Territory) offence is more than ten years old, the person is not required to disclose to any person, the fact that the person has been charged with, or convicted of, the offence. Further, if a person's conviction of a State (or foreign) offence is more than ten years old, the person is not required to disclose to any Commonwealth authority in a State (or in a foreign country), the fact that the person has been charged with, or convicted of, the offence.

The law governing spent convictions is particularly important to people seeking a federal professional licence, such as to be a tax agent, migration agent, or to provide credit services under federal law. It is clear that federal legislation ensures that federal agencies cannot have regard to spent convictions when making a determination that a person is fit and proper. There is no doubt that systems could be developed to ensure that information about such convictions could be removed from federal databases.

However it is also clear that federal criminal law authorises appellate tribunals, such as the Administrative Appeals Tribunal and appellate courts, to have

[20] [2007] FCA 431; 171 FCR 291 at [30].

regard to any matter that they think is relevant when considering an appeal from an unsuccessful applicant, and that can include a person's spent convictions. This anomalous position has now been confirmed in a decision of the Federal Court and a decision of the Full Court of the Federal Court.

In practical terms, this undermines the efficacy of the federal spent convictions legislation, from the perspective of the person affected. It means that if a person contests an agency determination that they are not a fit and proper person, the agency need only appeal to the Administrative Appeals Tribunal or a court, which can then have regard to the spent convictions as an otherwise relevant matter.

5 References

- *Earl Seymour Davis v Clive James Murray*, 23 December 1993
- *Earl Seymour Davis v Commonwealth Director of Public Prosecutions*, unreported, 21 April 1994
- *VX96A v Insurance and Superannuation Commissioner* (1996) 23 AAR 427
- *AA, Re; Australian Prudential Regulation Authority* [2001] AATA 979
- *VWOK v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 336; [2005] FCAFC 249
- *Seymour v Migration Agents Registration Board* [2007] FCAFC 76
- *Hartwig v PE Hack, Deputy President, Administrative Appeals Tribunal* [2007] FCA 1039
- *Xerxes Behram Surty v John Keith Bowyer* [2009] WASC 286
- *Volonski v Migration Agents Registration Board* [2010] AATA 765
- *Porter, Re; Application under the Superannuation Industry (Supervision) Act 1993* [2012] FCA 1431
- *Frugtniet v Tax Practitioners Board* [2013] FCA 752; [2015] FCA 1066; [2017] AATA 1393
- *Frugtniet v Australian Securities and Investments Commission* [2015] AATA 128; [2016] FCA 995; [2017] FCAFC 162