

## INDIVIDUAL RIGHTS AND PROTECTION OF THE PUBLIC – THE CORPORATE REGULATOR, THE AAT AND BALANCING THE COMPETING INTERESTS

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The decision of the Full Court of the Federal Court of Australia in *Australian Securities and Investments Commission v Administrative Appeals Tribunal* (2009) 181 FCR 130; [2009] FCAFC 185 (*ASIC v AAT*) has clarified the scope of the power of the Administrative Appeals Tribunal ('the AAT') to issue stay and confidentiality orders. In doing so, the Full Court also provided a salient reminder as to the proper role of the AAT as part of the continuum of administrative decision making. Where the exercise of power by the AAT requires the resolution of competing interests, due regard must be paid to the objects of the statutory scheme under which the primary decision was made. While public awareness of the primary decision may have damaging consequences for the individual seeking review before the AAT, the purposes served by the underlying statutory scheme are of fundamental importance and are likely to prevail in the majority of cases.

This paper looks at the reasoning of the Full Court in *ASIC v AAT*, and considers the implications of the decision for the processes and decision making of administrative tribunals. The paper also comments on how the decision in *ASIC v AAT* impacts on those seeking review of decisions made by regulatory bodies.

### **The AAT's powers to make stay and confidentiality orders**

The AAT's power to grant a stay pending the hearing and determination of an application for review derives from s 41(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (*'the AAT Act'*) which relevantly provides that:

The Tribunal may, ... if the Tribunal is of the opinion that it is desirable to do so after taking into account the interests of any persons who may be affected by the review, make such order or orders staying or otherwise affecting the operation or implementation of the decision to which the relevant proceeding relates or a part of that decision as the Tribunal considers appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review.

Section 35 of the *AAT Act* concerns the hearing of a proceeding by the AAT, and has been relied on by the AAT to make certain orders about confidentiality. The provision, which is titled 'Hearings to be in public except in special circumstances' relevantly provides:

- (1) Subject to this section, the hearing of a proceeding before the Tribunal shall be in public.  
.....
- (2) Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may, by order:
  - (a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; and
  - (aa) give directions prohibiting or restricting the publication of the names and addresses of witnesses appearing before the Tribunal; and
  - (b) give directions prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal; and

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- (c) give directions prohibiting or restricting the disclosure to some or all of the parties to a proceeding of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceeding.
- (3) In considering:
  - (a) whether the hearing of a proceeding should be held in private; or
  - (b) whether publication, or disclosure to some or all of the parties, of evidence given before the Tribunal, or of a matter contained in a document lodged with the Tribunal or received in evidence by the Tribunal, should be prohibited or restricted;

the Tribunal shall take as the basis of its consideration the principle that it is desirable that hearings of proceedings before the Tribunal should be held in public and that evidence given before the Tribunal and the contents of documents lodged with the Tribunal or received in evidence by the Tribunal should be made available to the public and to all the parties, but shall pay due regard to any reasons given to the Tribunal why the hearing should be held in private or why publication or disclosure of the evidence or the matter contained in the document should be prohibited or restricted.

### **Review of ASIC banning/disqualification decisions by the AAT**

Prior to the decision in *ASIC v AAT*, it had become common for the AAT to make stay and confidentiality orders where review was sought of decisions by the Australian Securities and Investments Commission ('ASIC') to disqualify a person from managing corporations under s 206F of the *Corporations Act 2001* (Cth) ('the *Corporations Act*') or ban a person from providing financial services under s 920A of the *Corporations Act*.<sup>1</sup>

This tendency is demonstrated by the history of the proceedings in *Australian Securities and Investments Commission v PTLZ* (2008) 48 AAR 559; [2008] FCAFC 164. In this case, a 2 year banning order was made by ASIC on 23 November 2007 and the person who was the subject of that order was notified of the decision on 29 November 2007. On the day of notification, an application for review of the substantive decision and an interlocutory application seeking orders under s 41(2) and s 35(2) of the *AAT Act* were filed with the AAT. Stay and confidentiality orders were initially made by Deputy President Forgie on the afternoon of 29 November 2007. These orders were subsequently extended until the hearing of the interlocutory application, which took place on 11 December 2007. As the decision was reserved at the conclusion of the hearing, the orders were again extended. On 11 February 2008, Deputy President Forgie continued the stay and confidentiality orders and published her reasons for the making of the orders. ASIC then appealed this decision. On 16 September 2008, the Full Court of the Federal Court upheld the decision and orders of the AAT.

The stay and confidentiality orders that were made in *Re PTLZ* were broad in operation.<sup>2</sup> Firstly, the orders prohibited ASIC from publishing its decision under s 920E(2) and s 915F(2) of the *Corporations Act*, or from entering the decision in the Register that ASIC is required to maintain under s 922A of the *Corporations Act* and associated provisions of the *Corporations Regulations*. Secondly, it was ordered that the applicant be described by way of pseudonym. Thirdly, publication of the name of the applicant, of any material tending to identify the applicant and of any matters contained in the documents lodged with the AAT, was restricted to the staff and members of the AAT and to the parties and legal representatives. Further, by reason of the terms of the initial orders that were made by Deputy President Forgie, ASIC was required to alter or withdraw a media release that had already been issued in relation to its decision.<sup>3</sup>

The terms of the orders that were made in *Re PTLZ* also provide a useful insight into the particular issues that arise when review is sought of an ASIC banning or disqualification decision. If ASIC makes a banning order under s 920A of the *Corporations Act*, it is required by s 920E(2) to publish a notice in the *Commonwealth Government Gazette* as soon as practicable thereafter. Further, s 922A of the *Corporations Act* and reg 7.6.06 of the *Corporations Regulations* require ASIC to maintain a register relating to financial services which includes certain information about banning orders.<sup>4</sup> How are the AAT's powers to

make stay and confidentiality orders to be reconciled with these specific statutory obligations? Further, does the general requirement that ASIC must strive to ensure that information is available as soon as practicable for access by the public impact on the issue?<sup>5</sup>

### **The decision in *ASIC v AAT***

#### ***The background and orders***

*ASIC v AAT* involved an ASIC s 920A banning order. Before ASIC had published notice of the banning order or made entries in the register, the second respondent applied to the AAT for review of the banning decision. The second respondent also filed an interlocutory application seeking stay and confidentiality orders.

After hearing from the parties, on 4 September 2009 Deputy President Handley granted stay and confidentiality orders and published his reasons for doing so.<sup>6</sup> The orders provided that:

- 1 Pursuant to s 41(2) of the Administrative Appeals Tribunal Act 1975 (Cth), the Tribunal stays the operation and implementation of the decision under review, including entry of the decision in any register maintained by the respondent, publication of the decision in the Gazette, and disclosure of the decision in any media releases issued by the respondent; and
- 2 Pursuant to s 35(2) of the Administrative Appeals Tribunal Act 1975 (Cth), pending the ultimate determination of the substantive application or any further order of the Tribunal, that:
  - (a) XQZT be described by a pseudonym for the purpose of protecting his identity; and
  - (b) the hearing shall take place in private and that only the parties and their representatives and witnesses, the Tribunal and its staff may be present; and
  - (c) the publication or disclosure of evidence or the contents of documents lodged with or received in evidence by the Tribunal is restricted to the parties and their representatives and witnesses, the Tribunal and its staff and the staff of Auscript.

ASIC immediately filed an application in the Federal Court relying on s 39B of the *Judiciary Act 1903* (Cth) and s 1337B(1) of the *Corporations Act*, seeking orders that the AAT's orders be quashed and related declarations in relation to the nature of ASIC's duties under s 920E(2) and s 922A of the *Corporations Act*. It was subsequently determined by the Acting Chief Justice that the matter was of sufficient importance to be referred to the Full Court for determination.<sup>7</sup>

#### ***ASIC's submissions***

The submissions that were made on behalf of ASIC are outlined in detail in the joint judgment of Downes and Jagot JJ.<sup>8</sup>

As explained by their Honours, ASIC did not challenge the exercise of power by the AAT on the basis of the usual grounds of judicial review.<sup>9</sup> Rather, ASIC's principal case was that the AAT had no power to make the stay and confidentiality orders. Framing the argument in this way imposed a heavy burden, as it required the Full Court to accept that the AAT could never make an order affecting ASIC's duties to publish notice of the making of a banning order irrespective of the circumstances of the particular proceeding.<sup>10</sup>

ASIC's position and the general arguments in support of this position are summarised at paragraph [17] of the joint judgment as follows:

- (1) ASIC must comply with ss 920E(2) and 922A of the Corporations Act by reason of the mere fact of the making of the banning order. It is immaterial whether the banning order is affirmed or set aside by the AAT or is valid or invalid.
- (2) Once the statutory regimes are properly analysed it is apparent that the AAT's purported orders under s 41(2) of the AAT Act cannot have been made "for the purpose of securing the effectiveness of the hearing and determination of the application for review". This is because the

- AAT's powers under s 41(2) cannot extend to interfering with the carrying out of ASIC's duties under ss 920E(2) and 922A of the Corporations Act.
- (3) The AAT's purported orders under s 41(2) of the AAT Act relating to ASIC's obligations under ss 920E(2) and 922A(1) of the Corporations Act and ASIC's issue of any media release do not stay or otherwise affect the "operation or implementation of the decision to which the relevant proceeding relates".
  - (4) The AAT's errors in respect of s 41(2) of the AAT Act affected its approach to its exercise of its powers pursuant to s 35(2).
  - (5) Section 35(2) of the AAT Act does not empower the AAT to order parties or persons to describe an applicant in a particular way.
  - (6) The terms of the AAT's purported pseudonym order are defective and thus the order is ineffective.

### ***The joint judgment of Downes and Jagot JJ***

At the outset of their reasons, Downes and Jagot JJ stated that resolution of the issues raised by the case rested on the proper construction of the statutory provisions vesting functions in the AAT and ASIC. This required general principles of statutory interpretation to be understood and then applied to the two statutory schemes relevant to the exercise of the AAT's powers. Their Honours' noted that courts do not lightly infer that, in enacting statutes, a parliament intended to contradict itself.<sup>11</sup> Further, in undertaking the interpretative task it was important not to focus on any provision in isolation. It is the legislative context that is critical.<sup>12</sup>

Downes and Jagot JJ considered that ASIC's arguments concerning the lack of power of the AAT were misplaced. More persuasive would have been a case that focussed on the AAT's actual decision. This was because the AAT's power under s 41(2) of the AAT Act is contingent on the AAT having formed the opinion that the making of an order under the subsection "is desirable... taking into account the interests of any persons who may be affected by the review". This requires that the AAT identify and then consider the relevant interests. These interests must be identified by reference to the statutory scheme under which the decision under review was made. Given the nature of a banning order, the 'persons who may be affected by the review' are not only the subject of the banning order and his or her dependents, but also include the banned individual's existing and potential clients and the public at large.

Their Honours then continued:

Determining whether the making of an order under s 41(2) of the AAT Act is desirable requires resolving these potentially competing interests. In this process of resolution the scheme embodied by the legislation under which the banning order is made is central. The context set by that scheme is a "fundamental element" in the formation of the opinion according to law: *R v Hunt*; *Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329; 25 ALR 497 at 504. The scheme discloses that a banning order protects the public. It is intended to protect the public from obtaining financial services from a person who (among other things) has not, or ASIC reasonably believes has not, complied with a financial services law or has had their Australian financial services licence suspended or cancelled: s 920A(1).<sup>13</sup>

Also important to the AAT's task was recognising the key role that the flow of information plays in ensuring that markets operate effectively and fairly. At [54], the following rhetorical questions were posed:

Is not an investor who is about to deposit funds with a person providing financial services entitled to know that a banning order has been made against the person? If the order has been stayed on substantial grounds the person is also entitled to know that. The informed investor may continue with the proposal. If the investor does not, then that is just an example of the operation of the market place. The critical matter is that the market is fully informed. If the banning order is not disclosed, but subsequently upheld, is not the investor entitled to complain that all the circumstances should have been made public?

Following these observations, the AAT's reasons for making the stay and confidentiality orders were analysed. Downes and Jagot JJ expressed that view that these reasons did not appear to grapple with the context set by the Corporations Act, or the importance of the availability of information to the market generally and to existing and potential customers, as a critical element in the public interest.

ASIC's argument that the duty to publish a notice is irrevocably enlivened by the fact of a banning order having been made was dismissed by their Honours, for three principal reasons. First, the contention was inconsistent with the reasoning in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 in which it was relevantly held by the High Court that in cases of jurisdictional error an administrative decision will be entitled to treat its own decision as "no decision at all" without the need for a court to make orders or declarations to this effect. If a decision to ban a person from providing financial services was made either without jurisdiction or in excess of jurisdiction, ASIC would therefore be entitled to treat the purported banning order as not enlivening its obligations to publish and enter details of the decision in the register. In the case of merits review which resulted in the decision being set aside, by reason of s 43(6) of the *AAT Act*, the decision of the AAT would be deemed to be the decision of ASIC and would take effect from the date of the purported banning order. In both of these circumstances, there would be no duty imposed on ASIC by s 920E(2) or s 922A(1) of the *Corporations Act*. Second, the contention was said to ignore the operation of the *AAT Act*. Contrary to ASIC's view, the statutory provisions were not inconsistent and were capable of working together. Finally and linked to the second reason, ASIC's argument was inconsistent with the principle that each statute emanating from a single legislature is, if possible, to be construed as having full force and effect according to its terms.

Also rejected was the argument that an exercise of power under s 41(2) of the *AAT Act* purporting to prevent ASIC from performing its statutory duties can never be "for the purpose of securing the effectiveness of the hearing and the determination of the application for review" given that ASIC was bound to exercise its statutory duties irrespective of the outcome of review. Again, this submission was not reconcilable with the terms of s 43(6) of the *AAT Act*. Further, the ordinary meaning of the terms 'operation' or 'implementation' made it clear that these concepts were wide enough to encompass the banning order's publication both by notice and entry in the register.

At [71], Downes and Jagot JJ then summarised their findings in relation to the power of ASIC to make an order under s 41(2) as follows:

For these reasons we do not accept that the AAT has no power to make an order under s 41(2) of the *AAT Act* staying or otherwise affecting ASIC's actions under ss 920E(2) and 922A(1) of the *Corporations Act*. We consider that the matters exposed by ASIC's arguments do not indicate a lack of power to make such orders. Rather, they indicate the careful consideration which must be given by the AAT in any exercise of power under s 41(2) of the *AAT Act* to the balance of competing rights and interests struck by parliament as embodied in the terms of the *Corporations Act*, particularly the balance between the rights and interests of the recipient of the banning order and of the public including existing and potential future clients of the recipient of the banning order. As we have said the scheme which the provisions of the *Corporations Act* embody — with the potential making of a banning order to remain private unless and until ASIC decides to make such an order after having given the recipient an opportunity to be heard — is not mere statutory background or a neutral factor in the process of the formation of the required opinion about what is desirable under s 41(2) of the *AAT Act*. **The scheme which parliament has established in the *Corporations Act*, and the public interest in the right of the market to know relevant information as soon as practicable, must be treated as a fundamental element in the decision-making process required under s 41(2) of the *AAT Act*.** (emphasis added)

ASIC's contentions in relation to the operation of s 35(2) were also rejected. In this regard, Downes and Jagot JJ noted the importance of the norm established by s 35(1) which requires that proceedings before the AAT be conducted in public.<sup>14</sup> When deciding whether it

is satisfied that it was desirable to exercise its powers under s 35(2), the AAT must therefore reach a state of satisfaction which recognises the existence of the norm and the values that it is intended to protect. The existence of the norm means that the power to depart from the norm is only to be exercised sparingly.<sup>15</sup> The consequences of this were noted to be:

When measured against the existence of the norm of a public hearing and the scheme established by the Corporations Act with respect to banning orders, it is apparent that the AAT would need some cogent reason by reference to the particular case to depart from the ordinary requirement of a public hearing. It is difficult to accept that harm (even serious harm) to the recipient's reputation resulting from public awareness of the banning order will be a sufficiently cogent reason to justify the grant of a stay in most cases. This is because the risk of harm of this type is inherent in the nature of a banning order.<sup>16</sup>

Finally, Downes and Jagot JJ dismissed ASIC's argument that because s 35(2) of the *AAT Act* does not refer to the name of parties (in contrast to the names of the witnesses), the AAT had no power to suppress the names of parties to a proceeding.<sup>17</sup> It was held that s 35(2)(b) was of sufficient scope to empower the AAT to give directions to restrict the publication of both names and the addresses of the parties. The provision would also permit the allocation of pseudonyms as a method of identification in the rare case that such action was required.

### ***The judgment of Moore J and the AAT's power to restrain ASIC media releases***

In a separate judgment, Moore J expressed general agreement with the reasons of Downes and Jagot JJ. In particular, his Honour agreed with the observations concerning the failure of the AAT to pay sufficient regard to the bias in the statutory scheme in the *Corporations Act* favouring timely disclosure of the identity of a person who is the subject of a banning order and the significance of the norm established by s 35(1) that proceedings before the AAT shall be in public.

The point of departure between the two judgments related to the issue of whether the AAT has power to make orders concerning ASIC media releases. In the view of Moore J, such an act was of a general administrative character and therefore did not concern either the operation or implementation of the decision to make the banning order. This was in contrast to the reasoning of Downes and Jagot JJ, who stated that it would be an odd result if ASIC could be restrained from a mandated publication (i.e. in the *Gazette*) but not from an informal publication (i.e. in a media release).<sup>18</sup>

### **The likely consequences for Tribunal decision making and those seeking review**

The immediate lessons from *ASIC v AAT* are clear. Where the AAT is exercising a general power, the values and norms that are protected by surrounding and relevant statutory provisions must be given due weight. Of particular importance will be the legislative scheme under which the primary decision was made. This scheme does not play a neutral role. Rather, it is fundamental and must be taken into account by the AAT when forming the requisite opinion as to whether stay and confidentiality orders are appropriate. For this reason the public interests embodied by the *Corporations Act* which are directed at protecting the public through the provision of information, and the presumption that AAT hearings shall take place in public, work heavily against the making of stay or confidentiality orders. In circumstances where the AAT fails to attach adequate weight to the importance of these factors, any orders made will be liable to be set aside by way of application for judicial review.<sup>19</sup>

The question then arises – how are the interests of the individual seeking review to be protected? The answer seems to come from the Full Court's earlier judgment in *Re PTLZ*:

Where a stay is granted it should ordinarily be accompanied by directions for the expedition of the matter, with the earliest possible hearing and decision, so as to limit any adverse effect of the stay of the decision if the stay under review is ultimately denied. **The same is true if a stay is denied – to limit the adverse effect of a decision which may be set aside.**<sup>20</sup> (emphasis added)

Even prior to the decision in *ASIC v AAT* being handed down, the need for expedited hearings in this context was already influencing the AAT. For example, in refusing to grant stay orders in *Re Scott and Australian Securities and Investments Commission* [2009] AATA 798 the President of the AAT noted that a speedy hearing was the preferable option rather than the granting of a stay.<sup>21</sup> Following *ASIC v AAT*, such treatment of interlocutory applications for stay and confidentiality applications can only be expected to continue.

For advisers of clients who are the subject of a disqualification decision or banning order, the message is clear. The bias towards information disclosure that is reflected in the statutory scheme established by the *Corporations Act* is a significant hurdle that will be difficult to overcome in most cases. Further, any application for stay and confidentiality orders will need to be made promptly. An exercise of power under s 41(2) of the *AAT Act* may have little utility if ASIC has already published notice of a banning order, and the utility of an order is always a relevant consideration when considering exercise of the power.<sup>22</sup> The strength of any application will therefore be greater the earlier it is made, and a poorly informed recipient of a banning order may lose his or her opportunity.<sup>23</sup>

The influence of *ASIC v AAT* has already been seen. In *Catena v Australian Securities and Investments Commission* [2010] FCA 598, the applicant had applied for a stay order under s 44A of the *AAT Act* pending an appeal from a decision of the AAT (which had affirmed the decision of ASIC). After discussing *ASIC v AAT*, Barker J continued:

It seems to me that the administrative decision-making processes having been completed, in this appeal a range of different considerations apply to the applications made. I think it is reasonable to say in these circumstances that the public right generally to know what the decision of the AAT is, is compelling.<sup>24</sup>

Barker J also refused to make an order suppressing the applicant's name under s 50 of the *Federal Court of Australia Act 1976* (Cth), noting that the mere embarrassment or unfortunate financial effects on an appellant or their dependents (or other persons) are usually not adequate reasons.<sup>25</sup> Nor were the applicant's concerns about the effect publication may have on his future prospects in his industry a sufficient reason to grant the order sought.

While it does not make reference to *ASIC v AAT*, the recent decision of Deputy President Forgie in *Re JTMJ v Australian Securities and Investments Commission* [2010] AATA 471 also bears the stamp of the Full Court's reasoning and concerns.<sup>26</sup> In this regard, it was relevantly noted in *Re JTMJ* that:

Publication of the background facts to the banning order at this time is also consistent with the Tribunal's place in administrative decision-making. As explained by Davies J in *Jebb v Repatriation Commission*, that "... the general approach of the tribunal has been to regard the administrative decision making process as a continuum and look upon the tribunal's function as part of that continuum..." **It has played its role in the process as ASIC did before it and as the Federal Court would have done after it had JTMJ lodged an appeal under s 44 of the AAT Act. That role must be to complement the others who play their part in the continuum. On this occasion, it is to complement ASIC's role in fulfilling its statutory duties under the Corporations Act.**<sup>27</sup> (emphasis added)

It is perhaps by reference to the above passage that the decision in *ASIC v AAT* is best explained and understood. The decision represents an important reminder of the proper role to be played by the AAT as part of the administrative decision making process.

**Endnotes**

- 1 See, for example, *Re XTWK and Australian Securities and Investments Commission* (2007) 98 ALD 131; *Re PTLZ and Australian Securities and Investments Commission* (2008) 100 ALD 648 ('*Re PTLZ*'); *Re PYVM and Australian Securities and Investments Commission* (2008) 106 ALD 578; *Re YFFM and Australian Securities and Investments Commission* [2009] AATA 409; *Re XQZT and Australian Securities and Investments Commission* [2009] AATA 669. Stay and confidentiality orders have also been made by the AAT in other regulatory contexts, including the insurance, superannuation and taxation sectors: see, for example, *Re VBJ and Australian Prudential Regulation Authority* (2005) 87 ALD 747.
- 2 See generally *Re PTLZ and Australian Securities and Investments Commission* (2008) 100 ALD 648 and *Australian Securities and Investments Commission v PTLZ* (2008) 48 AAR 559; [2008] FCAFC 164 at [26].
- 3 These orders were made on 29 November 2007: see *Re PTLZ and Australian Securities and Investments Commission* (2008) 100 ALD 648, DP Forgie at [2], [90]-[99].
- 4 Section 1274 of the Corporation Act imposes a general obligation on ASIC to keep registers, which are to be made available (subject to certain exceptions) for inspection by the public. Further, 1274AA of the Corporations Act specifically requires that ASIC keep a register of company directors who have been disqualified from managing corporations.
- 5 See s 1(2)(f) of the *Australian Securities and Investments Commission Act 1989* (Cth).
- 6 *Re XQZT and Australian Securities and Investments Commission* [2009] AATA 669.
- 7 Under s 20(1A) of the *Federal Court of Australia Act 1976* (Cth).
- 8 *Australian Securities and Investments Commission v Administrative Appeals Tribunal* (2009) 181 FCR 130; [2009] FCAFC 185, Downes and Jagot JJ at [17]-[18], [39]-[47], [73], [77], [80]-[81].
- 9 At [18].
- 10 At [58], [83].
- 11 Pearce and Geddes, *Statutory Interpretation in Australia* (Sydney, LexisNexis Butterworths, 2006, 6th ed) at [7.10].
- 12 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.
- 13 At [52].
- 14 As reinforced by the requirements of s 35(3) of the *AAT Act*.
- 15 Referring to *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33, Brennan J at 55.
- 16 At [76].
- 17 This argument relied on the decision of DP Walker in *Re Graeber and Australian Prudential Regulatory Authority* (2007) 46 AAR 115; [2007] AATA 1966.
- 18 While it was not necessary to decide the issue, at [82] Downes and Jagot JJ expressed the view that orders made by the AAT requiring ASIC to withdraw a media release would be within the AAT's power.
- 19 As noted by the Full Court of the Federal Court in *Australian Securities and Investments Commission v PTLZ* (2008) 48 AAR 559; [2008] FCAFC 164 at [56]-[57], the Federal Court would have jurisdiction under s 39B of the *Judiciary Act 1903* (Cth) (by which it is conferred jurisdiction with respect to any matter in which a writ of mandamus of prohibition or an injunction is sought against an officer or officers of the Commonwealth). In *Re PTLZ*, the Full Court did not express a view on whether there would also be jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). However, it was held that an appeal would not lie under s 44(1) of the *AAT Act*.
- 20 *Australian Securities and Investments Commission v PTLZ* (2008) 48 AAR 559; [2008] FCAFC 164, North and Downes JJ at [29].
- 21 *Re Scott and Australian Securities and Investments Commission* [2009] AATA 798, Downes J at [14].
- 22 *Australian Securities and Investments Commission v Administrative Appeals Tribunal* (2009) 181 FCR 130; [2009] FCAFC 185, Downes and Jagot JJ at [64].
- 23 *Ibid.* See also *Re Scott and Australian Securities and Investments Commission* [2009] AATA 798, Downes J at [14].
- 24 *Catena v Australian Securities and Investments Commission* [2010] FCA 598, Barker J at [20].
- 25 *Ibid* at [24].
- 26 The decision is also interesting for its discussion of the potential impact of the *Privacy Act 1988* (Cth) on the making of orders under s 35 of the *AAT Act*: see *Re JTMJ v Australian Securities and Investments Commission* [2010] AATA 471, DP Forgie at [27]-[46].
- 27 *Ibid* at [25].