

PART 4

THE APPLICABLE LAW

The legislative scheme for the licensing of credit providers is mainly contained within Part IV of the Administration Act. In this matter objections were made in accordance with Section 43 of the Administration Act and accordingly the application was referred to the Authority pursuant to Section 43(2). That having occurred, the application falls to be dealt with in accordance with section 45(2) which is in the following terms -

"Where an application for a licence is referred to the Authority under this section or section 43 or 60 being an application by a body corporate that -

- (a) is not under official management or in the course of being wound up under the Companies (Victoria) Code or under the corresponding law of another State or of a Territory;
 - (b) is not a body corporate in respect of the property, or part of the property, of which a receiver, or a receiver and manager has been appointed under the Companies (Victoria) Code or under the corresponding law of another State or of a Territory;
- and

- (c) has not, whether within or outside the State, entered into a compromise or scheme of arrangement with its creditors, being a compromise or scheme of arrangement that is still in operation -

the Authority shall, as soon as reasonably practicable after the expiration of fourteen days after publication of notice under section 42, grant a licence to the applicant with authority to carry on business under the name or names specified in the application if, after consideration of the objection or objections (if any) notice of which is given under section 43 and any other relevant matters -

- (d) the Authority is satisfied as to the experience of the officers of the applicant having regard to the nature of the duties of the holder of a licence;
- (e) the Authority does not believe that the applicant will not perform the duties of a holder of a licence efficiently, honestly and fairly; and
- (f) the Authority does not believe that a director or other officer of the applicant who in the opinion of the Authority exercises control over the management of the applicant is not of good fame or

character or is not likely to exercise that control efficiently, honestly and fairly -

but otherwise the Authority shall refuse the application or refuse to grant the licence with that Authority."

Of particular importance in the Authority's view is the passage -

"...consideration of the objection or objections (if any) notice of which is given under Section 43 and any other relevant matters..."

It is the Authority's view that a consequence of the reference to "and any other relevant matters" is that the Authority is not to be confined to matters brought forward by the objections.

As to what the word "relevant" means, the Authority has adopted the approach that a matter is relevant if it is a matter the consideration of which will assist in determining the question whether the applicant would, if licensed, perform the duties of the holder of a licence efficiently, honestly and fairly.

It appears to the Authority that there is another reason for which the inclusion of the words "and any other relevant matters" entitles the Authority to look at matters not raised by the objections. An application for a licence may be referred by the Registrar for determination by the Authority under Section 45(2) even where there has been no objection lodged - see Section 45(1)(e). In those circumstances, there being no objection, the Authority obviously must have regard to matters not raised by an objection in order to satisfy

itself one way or the other as to the matters set out in paragraphs (d), (e) and (f) of Section 45(2). We do not believe that where there is an objection that there is any warrant for giving a more restricted interpretation to the words "and any other relevant matters".

From time to time throughout the hearing of this application matters arose which seemed to the Authority to be possibly relevant to determining the questions that have to be answered in terms of paragraphs (d), (e) and (f) of Section 45(2). However, whenever it seemed to the Authority that a matter was potentially relevant, its interest in the matter (if not already evident to the Applicant) was made known in order that the applicant knew the limits of the case that it had to meet and had ample opportunity to address the Authority upon it and, if it desired, to adduce evidence concerning that matter.

The interpretation to be accorded to each of paragraphs (d), (e) and (f) of Section 45(2) is of obvious importance to the determining of the application. The Authority has derived much assistance from the decision of Young, J in the Equity Division of the Supreme Court of New South Wales in the matter of Story v National Companies and Securities Commission (1988) 13 NSW LR 661 where His Honour was concerned amongst other things with the interpretation to be given to Section 60(1) of the Securities Industry Code, the terms of which are as follows:

"Subject to section 622, if -

- (a) the holder of a licence contravenes or fails to comply with a condition or restriction applicable in respect of the licence;

- (b) the Commission has reason to believe that the holder of a dealers licence, an investment advisers licence or a representatives licence has not performed the duties of a holder of such a licence efficiently, honestly and fairly; or

- (c) the application for a licence contained matter that was false in a material particular or materially misleading in the form or context in which it appeared, or there was an omission of material matter from the application for a licence,

the Commission may revoke the licence.

In particular the Authority was assisted by the reasoning of His Honour on the subject of the meaning of the phrases "perform the duties of the holder of a licence" and "efficiently, honestly and fairly" as contained in section 60(1)(b).

His Honour determined that the word "duties" in that case did not refer merely to the statutory obligations of a licence holder and expressed the view "it is close to the mark to define "duties" as meaning "functions". In the Authority's view it is appropriate when dealing

with Section 45(2) of the Administration Act to take a similar approach.

In Story's case, supra, at page 672, His Honour also dealt at some length with the meaning to be given to the phrase "efficiently, honestly and fairly" It is appropriate to set out the full terms of His Honour's views on the meaning of that phrase.

"Thus I turn to the phrase "efficiently, honestly and fairly". In one sense it is impossible to carry out all three tasks concurrently. To illustrate, a police officer may very well be most efficient in control of crime if he just shot every suspected criminal on sight. It would save a lot of time in arresting, preparing for trial, trying and convicting the offender. However, that would hardly be fair. Likewise a Judge could get through his list most efficiently by finding for the plaintiff or the defendant as a matter of course, or declining to listen to counsel, but again that would hardly be the most fair way to proceed. Considerations of this nature incline my mind to think that the group of words "efficiently, honestly and fairly" must be read as a compendious indication meaning a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty.

"To take the contrary view, as the defendant Commission did is to read "and" as "or". That proposition, of course, runs contrary to Blackburn, J's famous dictum that "the proposition that 'and' can sometimes mean 'or', is true neither in law nor in English usage." Re The Licensing Ordinance (1968) 13 FLR 143, 147.

There are, of course, cases where in a statute one does construe "and" as "or", but I cannot see how, in the instant case, those exceptions apply as there is no absurdity or unintelligibility in reading "and" as "and", or giving the word some dispersive effect. However, in the long run it does not seem to me to much matter whether one reads the words cumulatively or disjunctively, because unless a licence holder possesses the three attributes whether as one package or as three separate parcels, the Commission can revoke his licence.

"So far as "efficient" is concerned, someone is an efficient person or performs his duties efficiently if he is adequate in performance, produces the desired effect, is capable, competent and adequate, see eg Spotts v Baltimore & Ohio Railroad Co (1939) 102 F (2d) 160, 162. Although that definition comes from a case dealing with handbrakes on railway cars, it seems to me that it can be applied to the word used in the current statute.

"I do not think I need dwell on the meaning of the word "honestly" except to remark that it is significant that it is used in conjunction with the word "fairly".

Those words tend to give the flavour of a person who not only is not dishonest, but also a person who is ethically sound, indeed, the sort of person reflected in the words of Psalm 15".

Finally, the applicant submitted that the terms of section 45(2) are such as to create a presumption in its favour with respect to the matters in paragraphs (e) and (f). We rather doubt that it is necessary or even helpful to attempt to categorise the effect of those provisions in terms of presumptions.

In our view the effect of section 45(2), insofar as the matters in paragraph (e) are concerned, is clear. The Authority must refuse to grant a licence if it believes that the applicant will not perform the duties of a holder of a licence efficiently, honestly and fairly but any other belief requires the Authority to grant a licence. Thus it must grant a licence not only if it believes that the applicant will perform its duties efficiently, honestly and fairly but also if the Authority considers the evidence to be so equivocal as to prevent it from forming a belief one way or the other. The same conclusion must apply to section 45(2) in relation to paragraph (f).

