

Levi v Companies Auditors and Liquidators Disciplinary Board - [2013] FCA 719

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FEDERAL COURT OF AUSTRALIA

Levi v Companies Auditors and Liquidators Disciplinary Board [2013] FCA 719

Citation: Levi v Companies Auditors and Liquidators Disciplinary Board [2013] FCA 719

Parties: MARK DARREN LEVI v COMPANIES AUDITORS AND LIQUIDATORS DISCIPLINARY BOARD, AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION and ADMINISTRATIVE APPEALS TRIBUNAL

File number: NSD 1296 of 2013

Judge: FARRELL J

Date of judgment: 25 July 2013

Catchwords: ADMINISTRATIVE LAW – review of decision of Administrative Appeals Tribunal to refuse stay of decision pursuant to s 41(2) of the Administrative Appeals Tribunal Act 1975 (Cth) – decision of Companies Auditors and Liquidators Disciplinary Board to cancel applicant's registration as liquidator – jurisdictional error – failure of AAT to deal adequately with prospects of success in stay

application – failure to take into account
relevant mandatory consideration of prospects
of success and prejudice to criminal trial

PRACTICE AND PROCEDURE – stay
application – public interest consideration –
possibility of prejudice to criminal trial

PRACTICE AND PROCEDURE –
suppression order – non-publication order –
whether necessary to prevent prejudice to the
proper administration of justice – whether to
suppress whole judgment

Legislation:

Administrative Appeals Tribunal Act 1975 (Cth) ss
35(2), 41
*Australian Securities and Investments Commission
Act 2001* (Cth) s 218(1)(b)
Corporations Act 2001 (Cth) ss 1292(2), 1296(1), 129
6(1B), 1297
Federal Court of Australia Act 1976 (Cth) ss 37AF,
37AI, 37AG
Judiciary Act 1903 (Cth) s 39B

Cases cited:

*Australian Securities and Investments Commission
v Administrative Appeals Tribunal and Another* (20
09) 181 FCR 130
*Australian Competition and Consumer
Commission v Air New Zealand Limited (No 3)* [20
12] FCA 1430
*Australian Securities and Investments Commission
(ASIC) v HLP Financial Planning (Aust) Pty Ltd* (2
007) 164 FCR 487
*Australian Securities and Investments Commission
v PTLZ* (2008) 48 AAR 559
Collector of Customs v Pozzolanic (1993) 43 FCR
280
*Dranichnikov v Minister for Immigration and
Multicultural Affairs* (2003) 73 ALD 321
*Duncan v Companies Auditors and Liquidators
Disciplinary Board* (2006) 155 FCR 572
Hogan v Australian Crime Commission (2010) 240
CLR 651
Levi v Australian Securities and Investments

Commission (No 2) [2013] NSWSC 932
Liu and Australian Securities and Investments
Commission [2013] AATA 117
Mark Levi v Companies Auditors and Liquidators
Disciplinary Board and ors [2013] AATA 463
ML v Australian Securities and Investments
Commission [2013] NSWCA 109
ML v Australian Securities and Investments
Commission [2013] NSWSC 283
Minister for Aboriginal Affairs v Peko-Wallsend
Limited (1986) 162 CLR 24
Minister for Immigration and Ethnic Affairs v Wu
Shan Liang (1996) 185 CLR 259
Re Griffiths Grif-Air Helicopters Pty Ltd and Civil
Aviation Authority (1993) 31 ALD 380
Re Snook and Civil Aviation Safety Authority (200
8) 109 ALD 122
Sage v Australian Securities and Investments
Commission [2005] FCA 1043
Scott and Australian Securities and Investments
Commission (2009) 51 AAR 114
Twist v Randwick Municipal Council (1976) 136
CLR 106
Zubair v Minister for Immigration and Indigenous
Affairs (2004) 139 FCR 344

Date of hearing:	10 July 2013
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	69
Counsel for the Applicant:	Mr R Sutherland SC and Mr B Hatfield
Solicitor for the Applicant:	Armstrong Legal
Solicitor for the First Respondent:	Mr R O'Shannessy
Counsel for the Second Respondent:	Mr G Johnson SC

Solicitor for the Third Respondent: The third respondent submits save as to costs

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

NSD 1296 of 2013

GENERAL DIVISION

BETWEEN: MARK DARREN LEVI
Applicant

AND: COMPANIES AUDITORS AND LIQUIDATORS DISCIPLINARY
BOARD
First Respondent

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Second Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Third Respondent

JUDGE: FARRELL J

DATE OF ORDER: 25 JULY 2013

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. A writ of certiorari issue to the third respondent quashing its decision of 5 July 2013.
2. A writ of mandamus issue to the third respondent requiring it to consider and determine the applicant's application under s 41(2) and s 35 (2) of the *Administrative Appeals Tribunal Act 1975 (Cth)* according to law.
3. The second respondent pay the applicant's costs of the proceedings on its application to this Court as agreed or assessed.
4. Until the earlier of 22 August 2013 and the date on which the third respondent determines the applicant's application in accordance with order 2, and conditional on the applicant continuing to comply with the undertaking to the Court given by him on or about 10 July 2013:
 - (a) an order in the form of an injunction restraining the first respondent from publication of the decision of the first respondent dated 2 July 2013 (**Decision**) or related information in the *Government Gazette* or elsewhere, and from disclosure of the Decision or any related information in any media releases issued by the first respondent; and
 - (b) an order in the form of an injunction restraining the second respondent from entry of the Decision in any register maintained by the second respondent, from publication of the Decision or related information by the second respondent in the *Government Gazette* or elsewhere, and from disclosure of the Decision or any related information in any media releases issued by the second respondent.
5. The orders made by me on 10 July 2013 and 15 July 2013 in these proceedings are vacated.

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

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

BETWEEN: MARK DARREN LEVI
Applicant

AND: COMPANIES AUDITORS AND LIQUIDATORS DISCIPLINARY
BOARD
First Respondent

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Second Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Third Respondent

JUDGE: FARRELL J

DATE: 25 JULY 2013

PLACE: SYDNEY

REASONS FOR JUDGMENT

1. By an application and statement of claim filed on 8 July 2013, the applicant seeks writs of certiorari and mandamus under s 39B of the *Judiciary Act 1903 (Cth)*, an interim injunction and a non-publication order (**Section 39B Application**). The application relates to a decision of a Deputy President of the Administrative Appeals Tribunal (AAT) delivered on 5 July 2013 in relation to an interlocutory application heard on 4 July 2013 and filed on 2 July 2013 (**Interlocutory Application**): *Mark Levi v Companies Auditors and Liquidators Disciplinary Board and ors* [2013] AATA 463 (Interlocutory Decision). I heard the Section 39B Application on 10 July 2013.

BACKGROUND

2. On 12 October 2012, the Australian Securities and Investments Commission (ASIC) applied to the Companies Auditors and Liquidators Disciplinary Board (**Board**) pursuant to s 1292 of the *Corporations Act 2001* (Cth) (**Corporations Act**) to cancel the registration of the applicant as a registered liquidator and official liquidator.
3. The applicant made an application to the Chairman of the Board to stay a hearing of ASIC's application in December 2012 and it was refused. The applicant also made an application to the Supreme Court of New South Wales to stay the Board hearing (see *ML v Australian Securities and Investments Commission* [2013] NSWSC 283 delivered on 3 April 2013) in which Rothman J refused the stay. A further application for leave to appeal Rothman J's **decision** (see: *ML v Australian Securities and Investments Commission* [2013] NSWCA 109) was refused on 2 May 2013 by Basten JA. Both Rothman J and Basten JA made orders to protect the identity of the applicant.
4. The Board conducted a hearing on 6-9 May 2013, after which it handed down its determination on 14 June 2013. Thereafter it had a further hearing in relation to sanctions.
5. On 2 July 2013, the Board decided that it was satisfied that the applicant was not a fit and proper person to remain a liquidator and pursuant to s 1292 of the *Corporations Act* ordered that the applicant's registration as a liquidator be cancelled, with effect 28 days later (**Decision**). On 2 July, the Board notified the applicant of the **Decision** together with a statement of its reasons (**Reasons**). On the same day, the applicant applied to the AAT for review of the **Decision** (**Substantive Proceedings**) and made the Interlocutory Application.
6. By the Interlocutory Application, the applicant sought a stay under s 41(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) of the operation and implementation of the **Decision**, including entry of the **Decision** in any register maintained by the Board or ASIC, publication of the **Decision** by the Board or ASIC in the *Government Gazette*, and disclosure of the **Decision** in any media releases issued by the Board or ASIC (**stay application**). The applicant also sought confidentiality orders under s 35(2) of the *AAT Act* pending the ultimate determination of the Substantive Proceedings or any further order of the AAT, that the applicant be described by a pseudonym for the purpose of protecting his identity, the hearing to take place in private and that only the parties and their representatives and witnesses, the AAT and its staff be present, and the publication or disclosure of evidence or the contents of documents lodged with or received in evidence by the AAT be restricted to the parties and their representatives and witnesses, the AAT and its staff and Auscript (**confidentiality application**).
7. On 16 July 2013, Rothman J vacated the non-publication order which he made on 3 April 2013 which (having regard to the terms of Basten JA's order) had the effect of terminating Basten JA's order as well.

Decision and its implications under the *Corporations Act*

8. Under s 1296(1) of the *Corporations Act*, the Board must, within 14 days of the **Decision**, give the applicant a notice in writing setting out the **Decision** and the reasons for it, lodge a copy of the notice with ASIC and cause to be published in the *Government Gazette* a notice in writing setting out the **Decision**. Section 1296(1B) enables, but does not require, the Board in addition to meeting the requirements of subsection (1), to take such steps as it considers reasonable and appropriate to

publicise the Decision and the reasons for the Decision including by making the Decision and Reasons available on the internet. It is ASIC's practice to issue a media release when it enters the Decision in registers operated by it.

9. An order made by the Board cancelling a person's registration as a liquidator takes effect (under s 1297(1) of the Corporations Act) at the end of the day on which the person is given notice of the Decision or at the end of such longer period as the Board determines (up to 90 days). In this case, the order is to take effect at the end of 28 days. Section 1297(2) allows the Board to alter the date of effect of its order (until a specified time or until a specified event occurs) so that an application can be made to the AAT for review of the decision to make the order.

Possibility of criminal proceedings

10. It is common ground between the parties that criminal proceedings, arising out of the same factual matrix as that before the Board in the disciplinary proceedings, are "on the cards" though not yet initiated.

SECTION 39B APPLICATION

11. The applicant claims that the Interlocutory Decision is infected by jurisdictional error and constitutes a constructive failure of the AAT to exercise its statutory jurisdiction and as a result the Interlocutory Decision should be quashed and the Interlocutory Application remitted to the AAT for determination according to law.
12. The applicant's grounds of complaint (reflecting the applicant's written submissions) can be summarised as:
 - (a) the first 3 grounds of the application can be addressed together under the complaint that the AAT refused or failed to deal adequately with the prospects of success of the review application: this amounted to a failure to accord natural justice and constructive failure to exercise jurisdiction, there was improper self restraint, which the Deputy President sought to justify on the basis of urgency, as a result of which the reasons were "necessarily not as extensive or polished as might otherwise have been the case"; and the failure to take into account the relevant mandatory consideration of prospects of success; and
 - (b) the failure by the AAT to take into account a mandatory relevant consideration – prejudice of a criminal trial.

STAY APPLICATION

13. Section 41 of the AAT Act relevantly provides:

Operation and implementation of a decision that is subject to review

- (1) Subject to this section, the making of an application to the Tribunal for a review of a decision does not affect the operation of the decision or prevent the taking of action to implement the decision.
- (2) The Tribunal may, on request being made ... by a party to a proceeding before the Tribunal (in this section referred to as the *relevant proceeding*), 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.

...

14. Having acknowledged the statutory basis of the AAT's power to make a stay order, the Deputy President considered, at [24] of the Interlocutory Decision, the factors considered relevant to the AAT's consideration of whether a stay should be granted having regard to the decisions of the AAT in *Re Griffiths Grif-Air Helicopters Pty Ltd and Civil Aviation Authority* (1993) 31 ALD 380, and *Scott and Australian Securities and Investments Commission* (2009) 51 AAR 114 at [4] :

- The prospects of success or merits of the application for review;
- Any prejudice to or effect on the parties or on any person if a stay is not granted;
- The public interest; and
- Whether the review application, if successful, would be rendered nugatory or pointless if a stay is not granted.

15. Following paragraph cited by:

United Business College Pty Ltd and Australian Skills Quality Authority (20 June 2019)
(Chris Furnell, Senior Member)

36. In this regard, those interests are, or at least include, the interests of persons whom an exercise of the registration cancellation power are intended to serve, [13]. In large measure, they are identified by reference to the statutory scheme under which the decisions under review were made, [14] in particular, to those aspects of the scheme which outline the procedures which lead to the making of such decisions. [15].

via

[14] *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719 at [15] ;
Kadeh and Migration Agents Registration Authority (Migration) [2018] AATA 4461 at [25] .

Evans and Tax Practitioners Board (Taxation) (19 June 2019) (Chris Furnell, Senior Member)

50. In this regard, those interests are, or at least include, the interests which an exercise of the registration termination power are intended to serve. [10]. In large measure, they are identified by reference to the statutory scheme under

which the decision under review was made, [11] in particular, to those aspects of the scheme which outline the procedures which lead to the making of such a decision. [12]

via

[11] *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719 at [15]; *Kadeh and Migration Agents Registration Authority (Migration)* [2018] AATA 4461 at [25].

The Deputy President went on to consider at [25] and [26] of the Interlocutory Decision the joint judgment of Downes and Jagot JJ in *Australian Securities and Investments Commission v Administrative Appeals Tribunal and Another* (2009) 181 FCR 130 and drew out factors which may be summarised as:

- In forming an opinion that making an order under s 41(2) of the AAT Act is desirable taking into account the interests of any persons who may be affected by the review, the AAT must identify for itself and consider the relevant interests, which are to be identified by reference to the statutory scheme under which the decision under review was made;
 - In making its decision, the AAT must resolve potentially competing interests. Thus the balance between competing interests must be treated as a fundamental element in the weighing of the competing considerations;
 - The context in which the decision under review has been made is important. In that case, as in this, the context is the scheme established by the Corporations Act for the protection of the public interest, and in this case for maintaining the integrity of and public confidence in the profession of liquidators (accepting a submission of counsel for ASIC).
16. I do not perceive error in these principles, nor do I understand them to be contentious between the parties. The applicant's concern is whether these principles have been applied, and even if they have been, whether the AAT's reasoning has been adequately exposed.

Prospects of success in Substantive Proceedings

17. An affidavit of Mr John Sutton, the solicitor for the applicant, affirmed on 3 July 2013 was marked for identification by the Deputy President; it appears that it was not read at the hearing of the Interlocutory Application and no final ruling was made by the Deputy President as to its admissibility. The parties accept that written submissions in relation to its admissibility supplied after the hearing were not read by the Deputy President.
18. The affidavit may have been relevant to an issue raised by Counsel for the applicant before the Deputy President. He submitted to the Deputy President that, with the benefit of forensic evidence obtained by ASIC, had original BAS statements been available at the Board hearing, a central witness may have given different evidence, giving rise to an issue of procedural fairness which, if addressed properly, would give rise to the prospect of a different outcome: see [13] of the Interlocutory Decision. I will refer to this as the "procedural fairness" argument, although in

submissions at the hearing before this Court it was also referred to as the “natural justice” argument, which sometimes gave rise to confusion having regard to the grounds referred to at [12] above.

Applicant’s submissions

19. The Deputy President needed to turn his mind to, consider and form an opinion on the prospects of the applicant being successful in the Substantive Proceedings on the procedural fairness ground in order to adequately form a view of the “prospects of success”, the first of the four grounds relevant to the exercise of discretion to grant a stay which he identified at [24] of the Interlocutory Decision. The Deputy President’s treatment of this issue at [28] of the Interlocutory Decision was inadequate and amounts to jurisdictional error and a constructive failure to exercise jurisdiction. At [28] of the Interlocutory Decision the Deputy President said:

I acknowledge Mr Sutherland’s submissions about what he contends were issues of procedural fairness with regard to the presentation and treatment of the evidence. I am not in a position to make a considered judgement about such matters in an urgent interlocutory hearing of this kind. But certainly, the prospects of success of the application is one of the matters to be taken into consideration in the balancing exercise that the Tribunal must take in such proceedings.

20. The applicant accepts that the Deputy President did not have to pursue the procedural fairness issue to finality, but says the Deputy President was required to make a proper inquiry into whether the arguments raised by the applicant had *prima facie* merit and to determine: (1) their impact on the applicant’s prospects of success in the Substantive Proceedings, and (2) how that factor should be balanced against other operative factors (such as prejudice or public interest).
21. The applicant submits that it was not enough for the Deputy President to simply identify the issue and indicate that he was not in a position to deal with it. The appropriate approach is demonstrated in *Re Griffiths Grif-Air* at [55]:

Turning to the evidence in this case, we will consider first the prospects of success of the applications for review lodged by Mr Griffiths and Grif-Air. We can do so only on the material before us and this is not the occasion to try the issues or to make findings of fact. That is the tribunal’s role on the substantive hearing. Mr Griffiths has denied the allegations but, apart from his denial, has not led any evidence. On their own and against the weight of evidence led to date by the CAA, they do not lead us to conclude that he has made out a *prima facie* case. He has not shown that, if the facts are as he has stated, he would be successful on his application for review and that of Grif-Air. That is not to say that he would not be successful at a substantive hearing for that will depend upon a consideration of all of the evidence led and tested by both parties.

22. The applicant accepts that the Deputy President may have come to the same conclusion had he gone through this process, but argues that error is revealed because he did not.
23. Further, the argument that the applicant had reasonable prospects of success was clearly set out in written submissions provided to the Deputy President before the hearing and was argued by Counsel at the hearing. The approach taken by the Deputy President is a constructive failure to exercise jurisdiction by failing to respond to a “clearly articulated argument relying upon established facts” within the well known statement of the High Court in *Dranichnikov v Minister*

for *Immigration and Multicultural Affairs* (2003) 73 ALD 321 per Gummow and Callinan JJ at [24]-[25] (with Hayne J agreeing at [95]). It was open to the Deputy President to make orders under s 41(2) and s 35(2) of the *AAT Act* to allow himself sufficient time to evaluate and determine properly the question of admissibility of evidence. While the “failure to respond” in *Dranichnikov* was inadvertent, the failure here is at least of equal gravity because, amongst other reasons, the issue has the potential to undermine the Decision in its entirety and it intersects with other grounds for judicial review of improper self restraint or fetter on decision-making process. Counsel for the applicant accepted at the hearing before this Court that the matters relevant to the “procedural fairness” argument were not “established facts” or even accepted by ASIC, but he says they were not disputed facts before the Deputy President. Those matters were, however, a factor which was identified by the Deputy President and must be taken into account: see *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39-40 per Mason J.

24. Last, neither “urgency” nor “expediency” could justify the approach taken by the Deputy President and the weight the Deputy President gave to these exigencies amounted to a fetter on the AAT’s discretionary power and improper self restraint. While there is a public interest in the Decision coming into effect and its publication as soon as practical absent cogent reasons not to do so, the alleged conduct which gave rise to the Decision occurred in April and October 2009 and proceedings were not commenced by ASIC until October 2012. Further, the Board itself can delay implementation of its decisions for up to 90 days under s 1297(1)(b) of the *Corporations Act*.

ASIC’s submissions

25. Read as whole, the Interlocutory Decision reveals that the Deputy President did take “prospects of success” into account. The Deputy President recorded the procedural fairness argument at [13] of the Interlocutory Decision. The Deputy President acknowledged the procedural fairness argument at [28] of the Interlocutory Decision, thus not ignoring or rejecting it, but correctly said that he did not need to resolve it because the procedural fairness argument (and the factual matters referred to in framing it) would be resolved in the Substantive Proceedings. Any failure of procedural fairness in the Board’s consideration leading to the Decision would be “subsumed” in the substantive application for review. ASIC relied on *Twist v Randwick Municipal Council* (1976) 136 CLR 106 and *Zubair v Minister for Immigration and Indigenous Affairs* (2004) 139 FCR 344 at [32].
26. The procedural fairness argument was (at least implicitly) simply overwhelmed when the Deputy President performed the required balancing of factors in [27]-[28], [30] and the last sentence [31] of the Interlocutory Decision. Paragraph [27] deals with the length of the Board’s hearing, the length and content of the Reasons and the strength of the Board’s findings. Paragraph [30] deals with balancing the applicant’s interests and the public interest in relation to deregistration or issuing a stay subject to the condition that the applicant not practice against the Board’s “weighty decision” and “findings” about [his] dishonesty”. The last sentence of [31] is: “Thus, in conclusion, I am not satisfied on a balancing of the competing interests that I should issue a stay as requested by the Applicant.”
27. None of the matters in [16.2]-[16.5] of the statement of claim is a mandatory relevant consideration on a stay application within the concept in *Peko-Wallsend*. Paragraph [16.2] deals with the alleged failure by the Board to afford the applicant procedural fairness, and the rest deal with considerations relevant to the possibility of criminal proceedings, which are dealt with later in these reasons.

28. In relation to the “urgency” and “expediency” arguments: urgency was sought by the applicant, urgency would not be an impermissible consideration per se, but in any event neither urgency nor expediency was a factor in the Interlocutory Decision.

Consideration

29. The applicant correctly states the starting point for consideration of the Interlocutory Decision as: generally speaking, such reasons are to be read benignly and not picked over with a fine tooth comb to find some ground of error: *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287, approved in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.
30. The application before the Deputy President was interlocutory. The passage from *Re Griffiths Griffith* at [55] to which the applicant drew attention expresses the standard generally accepted by the AAT for assessment of “prospects of success”:

...we will consider first the prospects of success of the applications for review ... We can do so only on the material before us and this is not the occasion to try the issues or to make findings of fact. That is the tribunal’s role on the substantive hearing. ...

31. Following paragraph cited by:

United Business College Pty Ltd and Australian Skills Quality Authority (20 June 2019)
(Chris Furnell, Senior Member)

55. Nevertheless, I should consider “... *whether there are facts and circumstances which, if established at the substantive hearing, would provide a basis for the applicant’s success in the review on application; or whether there are points of law raised which, if sustained, would lead to that conclusion.*” [24].

via

[24] *Re Snook and Civil Aviation Safety Authority* (2008) 109 ALD 122 at [21] cited with approval in *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719 at [31].

Evans and Tax Practitioners Board (Taxation) (19 June 2019) (Chris Furnell, Senior Member)

172. Nevertheless, as submitted on behalf of Mr Evans, I should consider “... *whether there are facts and circumstances which, if established at the substantive hearing, would provide a basis for the applicant’s success in the review on application; or whether there are points of law raised which, if sustained, would lead to that conclusion.*” [50].

via

[50] *Re Snook and Civil Aviation Safety Authority* (2008) 109 ALD 122 at [21] cited with approval in *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719 at [31].

See also *Re Snook and Civil Aviation Safety Authority* (2008) 109 ALD 122 at [21] :

It is well understood that in considering an applicant's prospects of success for the purposes of a stay application, it is not appropriate to conduct a preliminary trial of the issues: see *Re Dart and Director-General of Social Services* (1982) 4 ALD 553 at 555. Rather, the tribunal must consider whether there are facts and circumstances which, if established at the substantive hearing, would provide a basis for the applicant's success in the review on application; or whether there are points of law raised which, if sustained, would lead to that conclusion: see *Re Commonwealth and Quirke* (1986) 9 ALD 92 at 95.

See also *Liu and Australian Securities and Investments Commission* [2013] AATA 117 at [31] :

It is generally recognised that it is also necessary to have regard to the Applicant's prospects of success at the final hearing (see for example *XQZT v ASIC* [2009] AATA 669), but it is not the role of the Tribunal to conduct a preliminary trial of the issues to be raised during the substantive hearing of the application for review: *Re Repatriation Commission and Delkou* (1985) 8 ALDA 454 at [32].

32. By that standard, it was not necessary for the Deputy President to determine finally the issue of the admissibility of Mr Sutton's affidavit. There was considerable argument in oral submissions in these proceedings about whether the original BAS statements (which found the applicant's argument recorded at [13] of the Interlocutory Decision) are able to be provided to the applicant or the Board or the AAT under provisions of taxation legislation dealing with confidentiality. Though the original BAS statements were called for at the Board hearing, they were not able to be brought into evidence. The Australian Taxation Office (ATO) was not able to locate the first statement. The ATO advised that the second statement had been produced to ASIC for forensic examination under provisions of the taxation legislation which permitted release only to ASIC. I understand that the question of the exact scope of the confidentiality provisions of the taxation legislation was the topic of the submissions to which the Deputy President failed to have regard. I do not think it was necessary for the Deputy President to resolve that issue. As disclosed in [13] of the Interlocutory Decision, the availability of one or more of the original BAS statements with the benefit of ASIC forensic evidence is only a first step in testing the credibility of a key witness who may or may not change his evidence based on cross examination. It is clear that the proper place for determining those issues is at the merits review in the Substantive Proceedings.
33. The "nub" of the procedural fairness issue was adequately encapsulated at [13] of the Interlocutory Decision: that is, that there may be evidence available to the AAT in the Substantive Proceedings which was not before the Board and which may bear on the evidence, or credibility, of a key witness. Although the language of [28] of the Interlocutory Decision is not as clear as desirable, the reference back to the applicant's submissions recorded at [13] does indicate that the Deputy President took into account the issue that the applicant may have relevant arguments to put in the Substantive Proceedings. I consider that the Deputy President should be taken to

accept that the procedural fairness argument had some weight, although he did not feel it necessary to make a final determination about them. When the Deputy President said “I am not in a position to make a considered judgement about such matters in an urgent interlocutory hearing of this kind” at [28], I think he should be taken to have been expressing no more than the standard commonly applied, though his message may have been obscured by including the word “urgent”. I do not accept the applicant’s submission that the Deputy President was “specifically and frankly” stating that he was not in a position to deal with the issue at all by reason of urgency or that he thereby failed to take into account a “clearly articulated argument based on established facts”. He plainly took the argument into account: the status of the underlying “facts” and the final resolution of their legal effect is a matter for the Substantive Proceedings.

34. For the purpose of determining “prospects of success”, the Deputy President would not have been entitled to ignore the issue that there may be evidence available at the Substantive Proceeding which was not available to the Board which was recorded at [13] of the Interlocutory Decision on the basis that any breach of natural justice would be subsumed in the determination by the AAT in the Substantive Proceedings as argued by ASIC.
35. Read as a whole, I consider that the Deputy President did take into account that there may be an arguable case of the kind identified in [13] of the Interlocutory Decision but it was, as ASIC suggested, overwhelmed by the nature of the Board’s findings concerning the applicant’s honesty and its extensive Reasons which are referred to at [27] of the Interlocutory Decision.
36. Having said that, I consider that [28] of the Interlocutory Decision is undesirably brief. Paragraphs [27]-[31] are troublingly and ultimately too obscure as to how the “prospects of success” factor weighs in the balance of factors which the Deputy President acknowledged at [24]-[26] of the Interlocutory Decision are relevant to the decision whether to grant a stay. They also do not refer to the possibility of criminal proceedings.
37. There is no doubt that the manner of expression and methodology applied by the AAT in *Re Griffiths Grif-Air* at [55]-[59] is an appropriate and transparent way of exposing how the decision maker took into account and balanced the relevant factors.

Possibility of criminal proceedings

38. ASIC raises two arguments against the applicant’s ground of complaint that the **Interlocutory Decision failed to take into** account a mandatory relevant consideration –prejudice to a criminal trial: (1) although the Deputy President did not refer to this argument under the “Discussion” part of the Interlocutory Decision, he did refer to it at [15] of the Interlocutory Decision. At [15], the Deputy President referred to both the potential for personal prejudice (to professional reputation and to the applicant’s capacity to support his family) and the real prospect of prejudice to any criminal proceedings in anticipation of which the New South Wales Supreme Court had made confidentiality orders. The Deputy President must be taken to have included it in the “balance” of considerations referred to in the last sentence of [31] of the Interlocutory Decision; and (2) this is not a “mandatory relevant consideration” within the reasoning of *Peko-Wallsend* per Mason J at 39-40.
39. I reject ASIC’s first argument. Section 41(2) of the **AAT Act** expressly requires the AAT to form its opinion “after taking into account the interests of any persons who may be affected by the review”. The applicant is at risk of what might be regarded as the “normal jeopardy” that public knowledge of the Board’s decision might bring in relation to his professional standing and

capacity to earn a living. However, with criminal proceedings “on the cards”, he has a greater than normal jeopardy which the AAT should consider when forming its opinion. Further, as acknowledged by ASIC at [26] of its written submissions to the Deputy President, it has been held by North and Downes JJ in *Australian Securities and Investments Commission v PTLZ* (2008) 48 AAR 559 at [42], that the public interest can also be relevant to an application under s 41(2) notwithstanding that it is not specifically referred to in that section. See also *Scott and Australian Securities and Investments Commission* at [4]. The Deputy President also recognised the relevance of “public interest” at [24] of the Interlocutory Decision (referred to at [14] above). There is a considerable public interest in the administration of justice in criminal proceedings.

40. In relation to such a serious issue, the failure of the Deputy President to address it at all in the “Discussion” part of his reasons is significant. At [29] of the Interlocutory Decision, the Deputy President notes that he is mindful of the comments made by Downes and Jagot JJ in *ASIC v AAT* at [57] that the effect on the person’s business and the consequences for the employees and the person’s dependents “may be of lesser significance” than other matters to which they referred and clearly, in particular, than the public interest. At [30] of the Interlocutory Decision the Deputy President refers to the impact of deregistration on the applicant’s reputation and capacity to earn an income, then notes, in light of the Board’s findings of dishonesty, the public interest in publication of the Decision. But he does not deal with the issue of the fact that criminal proceedings are “on the cards”. I do not accept that the simple statement at the end of [31] is enough; that is “Thus, in conclusion, I am not satisfied on a balance of the competing interests that I should issue a stay as requested by the Applicant”.
41. Further, there are two matters which require express consideration having regard to the possibility of criminal proceedings ensuing.

Deregistration

42. If no stay is granted to the implementation of the Decision, with the result that the applicant is deregistered, the public interest is served by ensuring that a person who has been found by the Board not to be fit and proper is removed from practice as a liquidator. That is of considerable importance having regard to the fact that liquidators are court-appointed to administer companies which are subject to a liquidator’s (often exclusive) control and therefore vulnerable to any lack of integrity. Persons registered to act as liquidators or official liquidators are also able to accept other roles in the administration of insolvent companies, such as administrators or receivers and managers. The applicant argued that the protective purpose of the *Corporations Act* is not as wide in relation to deregistration of liquidators as in relation to banning financial services licensees. *ASIC v AAT* dealt with financial services licensees. I reject that: the potential classes whose interests may be affected by a liquidator include creditors, shareholders and employees. Corporations whose size has the capacity to influence significant sectors of the economy can be subject to administration by registered liquidators.
43. At [30] the Deputy President deals with his reasons for rejecting an undertaking offered by the applicant to not practice pending the outcome of the Substantive Proceedings. He balances the impact of deregistration on the applicant’s reputation and income and the public interest in the publication of the Decision in light of the Board’s findings of dishonesty. I do not quibble with his considerations at [30] as far as they go.

44. However, the Deputy President did not consider the balance between the weight to be given to the public benefit of deregistration (including the benefit of that fact coming to the attention of members of the public) compared to the weight to be given to the public interest in the due administration of criminal justice and possible prejudice to the conduct of criminal proceedings if jurors become aware that the applicant has been deregistered. This is significant where, as here, the Deputy President had the option of accepting an undertaking from the applicant not to practice and the likelihood of an expedited hearing of the Substantive Proceedings. The Deputy President would also have been entitled to take into account that although deregistration alone may engender some publicity, its possible impact on subsequent criminal proceedings and the due administration of criminal justice may be minimised because this fact alone is likely to be susceptible of appropriate directions from a judge.

Reasons

45. The second matter is this: If the implementation and operation of the Decision in relation to deregistration of the applicant is not stayed, should there be a stay of a decision of the Board (or ASIC) to publish the Reasons or to provide detail from the Reasons in any media release? Such “implementation” considerations are susceptible of a stay: *Duncan v Companies Auditors and Liquidators Disciplinary Board* (2006) 155 FCR 572 and *ASIC v AAT* at [43].
46. The public would be better informed by having all of the information in the Reasons available to them and that serves a useful purpose. However, publication of the Reasons involves jeopardy to criminal proceedings over and above that involved in deregistration alone. There are a number of factors which it is appropriate to weigh in the balance in deciding whether or not to stay publication of the Reasons:
- The Decision results from a hearing at which the Board is not bound by the rules of evidence under s 218(1)(b) of the *Australian Securities and Investments Commission Act 2001* (Cth). Accordingly the content of the Reasons is highly likely to include material which could not be adduced and taken into account in criminal proceedings;
 - The availability of the Reasons or any media release containing material from the **Reasons on** a website of the Board or ASIC makes them easy to circulate and to edit. Any “balancing” factors in the Reasons might be excised in republication by others so that highly prejudicial material might be highlighted;
 - It is likely (as a practical matter) to be materially more difficult for a judge to give effective directions to a jury to disregard the content of over 120 pages of Reasons compared to the simple fact of deregistration;
 - Widespread public commentary could affect discretions of authorities such as the Commonwealth Director of Public Prosecutions in bringing otherwise available criminal proceedings because the possible prejudice to the proceedings from publicity may affect the likelihood of success of the prosecution. Deterring available prosecution decisions is not consistent with the due administration of justice;
 - The major public jeopardy can be removed by deregistration which disentitles the former liquidator from practice, or by the acceptance of undertakings not to practice pending the outcome of review proceedings;

- The Reasons may be superseded by findings of the AAT in the Substantive Proceedings. The Substantive Proceedings are a merits review of administrative proceedings, not an appeal of judicial proceedings. The AAT can decide to affirm, vary, or set aside the Decision and either remit the matter back to the Board or make a decision in substitution for the Decision. It will have to issue its own reasons for that decision, which could be very different from the findings of the Board. See s 43(1), 43(2) and 43(2A) of the AAT Act ;
- Last but not least, the value of open justice.

47. I note that since this application was heard on 10 July 2013, Rothman J has lifted his suppression order on identification of the applicant in relation to his decision rejecting an application for a stay of the hearing conducted by the Board in May 2013: see *Levi v Australian Securities and Investments Commission (No 2)* [2013] NSWSC 932. In the course of his reasons, Rothman J said:

[37] In the instant proceedings, the suppression orders are sought in order to ensure the plaintiff has a fair criminal trial, if and when one commences. The fact that the criminal trial has not commenced is a factor to be taken into account in this exercise. Nevertheless, as stated in the first judgment, I consider a criminal prosecution likely.

[38] However, orders do not issue to ensure a fair trial. Rather, orders issue to prevent a significant risk of an unfair trial. The risk of unfairness is the publication of the decision of the Board on the internet, including findings of fact therein, and any other mass circulation publicity that may be given to it. That publication or publicity may, in turn, become known to a jury, or members of it.

[39] Adverse publicity relating to an accused is not an unknown occurrence. It is dealt with, regularly, by the courts. So too is information on the internet. The material before the court does not establish a real risk to any subsequent fair trial. If such a risk eventuates, the trial judge can deal with it.

[40] If, eventually, there is a criminal prosecution, there may be a plea of guilty. Assuming there were not, the trial judge can assess what, if any, publicity has been given to the decision of the Board, the nature of the findings, the period of time that has elapsed, and the risk, if any, to a fair trial. ASIC is the moving party before the Board. ASIC is also the complainant or prosecutor for any criminal prosecution.

[41] ASIC must understand that if, as a result of the Board decision and any publicity given to it, a fair trial in a subsequent prosecution were at risk, in the discretion of the court, any prosecution may be stayed, either permanently or for some time. Yet ASIC is entitled to take that risk. It may well be more in the public interest that an inappropriate person be prevented from practising as a liquidator, than a criminal prosecution be successfully completed.

[42] For the foregoing reasons, a suppression order should not be made.

48. This view is consistent with a number of cases dealing with applications for stay of Board hearings. See, for instance, the decision of Goldberg J in *Sage v Australian Securities & Investments Commission* [2005] FCA 1043. Insofar as they relate to considerations of the implementation of the Decision and the publication of the Reasons, these remarks are obiter dicta. Another view (also

obiter dicta, as the application under consideration was for a declaration of contravention of the Corporations Act) was that expressed by Finkelstein J in *Australian Securities and Investments Commission v HLP Financial Planning (Aust) Pty Ltd* [2007] FCA 1868 at [59] :

The case at bar is a particularly good example of one in which the court should not interfere. First of all, a criminal prosecution is on the cards. Second, the facts are not agreed. On the contrary, if there is to be a trial, the Crown would be put to its proof on most issues and some of the “facts” to be asserted by the Crown are likely to be in contest. Third, there is potential for an adverse impact on the jury. The civil case will be decided on evidence that, for the most part, will not be available to the prosecutor in a criminal trial. Imagine what would happen if a jury discovers that a civil court has ruled that Mr Berlowitz’ conduct is illegal. The judge presiding over the criminal trial will be obliged to tell the jury to leave that out of account. It is axiomatic in our courts that jurors can be trusted to leave out of their consideration things that they are instructed to leave out. Yet many regard this kind of instruction as little more than wishful thinking. Perhaps the jurors will have explained to them that the judge who made the ruling acted on evidence not before the jury and that in any event a lower standard of proof was required in the civil court. Whether those instructions will result in a fair criminal trial may be strongly doubted. ...

49. I also reject ASIC’s second ground. While the common formulations of the matters to be addressed by the AAT in applications such as these (for instance, at [24] of the Interlocutory Decision) do not specifically address the potential for criminal proceedings, I consider that that potential is a public interest concern. It should be addressed specifically.
50. The circumstances of each case must be considered individually. It is open to the Deputy President to make or withhold a stay order having taken these considerations into account. However, the Interlocutory Decision does not reveal that this has occurred.

CONFIDENTIALITY ORDERS

51. On 15 July 2013, I was advised by ASIC that on 12 July 2013 the Deputy President made a direction under s 35(2) of the AAT Act that the publication of the name of the applicant and any identifying details of the applicant in the proceedings, the name and any identifying details of any witnesses appearing before the Tribunal, and any of the documents and the contents thereof lodged with or received by the Tribunal is prohibited until further order. It is not clear on what basis this order was made, given that the Deputy President declined to make it in the Interlocutory Decision.
52. The direction does not relate to the issue of whether the hearing of the Substantive Proceedings be held in private. In view of my decision to remit the matter to the AAT for rehearing, this aspect should also be encompassed, taking into account that criminal proceedings are “on the cards”.

URGENCY

53. There was a sense of urgency on behalf of all parties to this matter. As a result, the Deputy President was correct in his observation that his reasons, which were given orally on the morning of 5 July 2013, are “necessarily not as extensive or polished as might otherwise have been the case”.
54. It is very unfortunate that the parties to these proceedings engendered such a sense of urgency. While the issues are serious, it is highly questionable that the urgency expressed was warranted. It appears that the Deputy President was led to believe that he would need to make

his decision by early on 5 July because of time limits expressed by ASIC and the Board: ASIC had provided an undertaking not to register the Decision and Reasons before 10 am on 5 July and the Board said that it would need to lodge the Decision and Reasons on 9 July with the *Government Gazette* for publication on 10 July. It appears that ASIC first indicated to Buchanan J as duty judge in this Court on 8 July that the last date for lodging the Decision with the *Government Gazette* was 15 July or even possibly on the morning of 16 July to allow for publication within the 14 day period required under s 1296(1) on 16 July 2013.

55. This atmosphere of urgency was not either helpful or desirable. It would be highly desirable in future if the true publication timetable were made clear at the outset. It is true that this issue could have been obviated by the Deputy President issuing a temporary stay to enable him time to craft his reasons in a more common format to expose his thinking more clearly which might have obviated the need for this proceeding. However, even this step would have been easier if ASIC and the Board had more clearly advised the Deputy President of the mechanical aspects of publication deadlines. The undoubted public interest in expeditious removal of dishonest or otherwise inappropriate people from the register of liquidators and the public being made aware of that fact appears to have weighed unduly heavily on the minds of the regulators and the Deputy President. The applicant offered an undertaking which would have removed him from practice. The legislature has provided flexibility in time periods: s 1296 allows 14 days for publication of the Decision and s 1297(2) permits the Board to extend the date on which an order for suspension or deregistration comes into effect beyond the 90 days maximum period specified in s 1297(1) where there is an appeal to the AAT. These are factors which should have been taken into account in the parties' dealings with the Deputy President.

CONCLUSION

56. For the reasons given, I find that the Interlocutory Decision is infected by jurisdictional error in the failure to take into account the relevant consideration of the public interest in the due administration of criminal justice and the possible prejudice to criminal proceedings which are "on the cards". While I consider that the Deputy President did take into account "prospects of success" arising from the argument of the applicant recorded at [13] of the Interlocutory Decision, the Interlocutory Decision does not sufficiently disclose the Deputy President's reasoning on the weight to be given to this factor as compared to other factors, including the likelihood of subsequent criminal proceedings. Accordingly I will make the orders sought by the applicant in paragraphs [1] and [2] of the originating process in the Section 39B Proceedings. I will also award costs in favour of the applicant as agreed or as assessed to be paid by ASIC.

INTERIM ORDERS AND UNDERTAKINGS

57. On 10 July 2013, following the hearing of the application, I made the following orders:
1. A non-publication order under s 37AI(1) of the *Federal Court of Australia Act 1976 (Cth)* (*Federal Court Act*) prohibiting the publication of the name of the applicant and any information about this proceeding tending to reveal the identity of the applicant, to remain in effect until further order of this Court.
 2. On the undertaking of the applicant not to take any formal appointments as liquidator, administrator or any other form of insolvency appointment and to forthwith take steps to transfer all existing appointments, an order in the form of an interim injunction restraining the first respondent from publication of the decision or

related information by the first respondent in the *Government Gazette* or elsewhere, and disclosure of the decision or any related information in any media releases issued by the first respondent until further order of this Court.

58. On or about 10 July 2013, the applicant provided a written undertaking to the Court that he would not take any formal appointments as liquidator, administrator or any other form of insolvency appointment and will forthwith take steps to transfer all existing appointments.
59. ASIC by its Counsel provided an undertaking that until the application is decided, the second respondent will not before 4 pm on 15 July 2013 (a) enter the decision of the first respondent in the proceedings under consideration in any register maintained by the second respondent, (b) publish the decision of the first respondent in those proceedings in the *Government Gazette*, or (c) issue any media release regarding the decision of the first respondent.
60. As I did not deliver reasons in this matter by 15 July 2013, I made an order on that day that: on the undertaking of the applicant not to take any formal appointments as a liquidator, administrator or any other form of insolvency appointment and to forthwith take steps to transfer all existing appointments, an order in the form of an interim injunction restraining the second respondent from the entry of the decision in any register maintained by the second respondent, publication of the decision or related information by the second respondent in the *Government Gazette* or elsewhere, and disclosure of the decision or any related information in any media releases issued by the second respondent until further order of this Court.
61. On 22 July 2013 I advised the parties that I would hear submissions about whether I would be in a position to make further orders pursuant to s 37AG of the *Federal Court Act* when I delivered my decision, which I intended to do on 23 July 2013. To inform those submissions, I provided a draft of these reasons up to [57] to Counsel for the parties in Court on 23 July 2013 but did not deliver my decision.
62. ASIC sought leave, which I granted, to file in court an affidavit of Stavros Tsakalos sworn on 23 July 2013. Mr Tsakalos is an employee of ASIC. The affidavit attached screenshots of: (a) an article dated 17 July 2013 in *Sydney Insolvency News* and headed “Levi exposed – judge says criminal prosecution ‘likely’”; (b) a copy of Rothman J’s reasons for his decision dated 16 July 2013 in *Levi v Australian Securities Investments Commission (No 2)*; (c) material on the website of Sydney law firm PMF Legal noting Rothman J’s decision of 16 July 2013; and (d) material on the website of the Insolvency Practitioners Association of Australia posted on 19 July 2013.
63. In essence, the material annexed to Mr Tsakalos’ affidavit discloses that the applicant is a subject of disciplinary proceedings before the Board, those proceedings stem from claims that he took more than \$90,000 from a company in receivership to pay personal debts, that the allegations are denied by the applicant, and that the applicant’s name had previously been suppressed by the Supreme Court in proceedings seeking to stay a hearing by the Board. The *Sydney Insolvency News* article and Rothman J’s reasons taken together disclose that the proceedings before Rothman J and Basten JA in the Supreme Court related to an application for a stay of the Board’s hearing conducted on 6 May 2013 on the basis that criminal proceedings against the applicant are “on the cards”. They do not in terms disclose the Decision, although as ASIC pointed out, the nature of the Decision might reasonably be inferred.
64. Section 37AG(1)(a) of the *Federal Court Act* permits the Court to make a suppression order or a non-publication order. One such order would be an order prohibiting or restricting the

publication or other disclosure of information tending to reveal the identity of the applicant. Section 37AG supersedes s 50 of the [Federal Court Act](#) concerning which there is much settled law.

65. The only relevant ground for making such an order would have been that the order is “necessary to prevent prejudice to the proper administration of justice.” The requirement that an order be “necessary” rather than “convenient, reasonable or sensible” creates a high standard, especially given the propinquity of this ground to the other grounds which contemplate prejudice to the interests of the Commonwealth or a State or Territory in relation to national and international security, the need to protect the safety of a person or to avoid the stress or embarrassment to a party or witness in criminal proceedings involving an offence of a sexual nature. It does not involve a balancing exercise. See [Hogan v Australian Crime Commission](#) (2010) 240 CLR 651 at [30]-[31] and [Australian Competition and Consumer Commission v Air New Zealand Limited \(No 3\)](#) [2012] FCA 1430 at [19]-[21] per Perram J.
66. I consider that it would have been open to me to make such an order. It is greatly in the interest of the administration of justice that both necessary disciplinary action is taken as quickly as possible and criminal proceedings run their course where appropriate. Early disciplinary action is required to ensure that the public is protected from the conduct of persons who are not fit and proper to act as auditors, financial services licensees and liquidators. Criminal proceedings (where appropriate) should be preserved wherever possible and orders which prevent disclosure of the identity of the applicant (or limiting the circulation of the reasons of a disciplinary tribunal) for a limited time to avoid prejudice to the exercise of discretions to bring criminal proceedings and to avoid criminal proceedings being stayed or halted before their conclusion is to my mind appropriate to prevent prejudice to the proper administration of justice.
67. I have considered whether it would be possible to prevent disclosure of the name of the applicant by the use of a different alias than that used in the Supreme Court and whether it would be possible under a suppression or non-publication order to excise from the judgment material which would have identified this matter. Had Rothman J not lifted the suppression order in the Supreme Court proceedings on 16 July 2013, this might have been possible. However considering the proximity in time of publishing these reasons to Rothman J’s decision to lift his suppression order and the subsequent publication of details relevant to Rothman J’s decision as referred to in Mr Tsakalos’ affidavit, it is difficult to see how that could be done in such a way that anyone with a mind to do so who looks at published reasons involving the Board would not be able to identify the applicant. Counsel for the applicant made some suggestions for excision of material from the reasons, however I do not think they have utility because there are necessary references not only to the decision of Rothman J but also details which identify the hearing by the Board and the Decision throughout the judgment. The only effective course would be for me to suppress the judgment in its entirety. That would be too drastic an incursion into the obligation imposed on the Court in deciding to make a suppression order or non-publication order to take into account that the primary objection of the administration of justice is to safeguard the public interest in open justice, even if that were possible having regard to the terms of s 37AF of the [Federal Court Act](#).
68. I am troubled by the fact that the publication of my reasons will, in some respects, rendered nugatory the success of the applicant’s application to this Court to have the Interlocutory Decision remitted back to the AAT. However, in part this results from the applicant’s own actions in seeking to have the Board’s hearing of ASIC’s application stayed by the proceedings which he

took in the Supreme Court. While it is not now possible to protect the identity of the applicant, all other options on the Interlocutory Application remain open to the AAT.

69. So as to preserve the position as far as possible pending the AAT's reconsideration of the Interlocutory Application and as the Board's order cancelling the applicant's registration comes into effect on 30 July 2013 in accordance with the terms of the Decision, in order to provide the AAT with sufficient time to reconsider the Interlocutory Application I will make orders in the form of an injunction restraining ASIC and the Board from taking action to implement the Decision or publish the Reasons for a period of 28 days or until the AAT determines the Interlocutory Application remitted to it, whichever first occurs. In making this order I am relying on the continuing effect of the applicant's undertaking provided to the Court.

I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Farrell.

Associate:

Dated: 25 July 2013

Cited by:

Ristevski and Tax Practitioners Board [2019] AATA 5196 (03 December 2019) (Mr P W Taylor SC, Senior Member)

Levi v Companies Auditors and Liquidators Disciplinary Board [2013] FCA 719

Ristevski and Tax Practitioners Board [2019] AATA 5196 (03 December 2019) (Mr P W Taylor SC, Senior Member)

8. The exercise of the stay power is subject to requirements to take into account the interests of "any persons who may be affected by the review", and the decision maker's position in relation to the stay application:- see *AAT Act ss 41(2) & 41(4)*. Those provisions, and previous decisions of both the Federal Court of Australia and this Tribunal (see *Re Scott and Australian Securities and Investments Commission* [2009] AATA 798; (2009) 51 AAR 114; *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719 at [14] - [15]; *Secretary, Department of Social Services and McNamara* [2016] AATA 189) support the view that a wide range of considerations permissibly inform the exercise of the stay power. That range of permissibly (and in relation to some matters, necessarily) relevant considerations include:-
- (a) the nature of the reviewable decision (including the findings on which it is based),
 - (b) the functions and responsibilities of the statutory decision maker, and the public interest relating to them,
 - (c) the practical consequences of the decision under review (to the parties and to any interested persons), unless its operation is the subject of a stay, after taking into account:-
 - (i) the timing of the reviewable decision, the application, and any likely review hearing,

- (ii) the ability of the applicant to pursue the review proceedings effectively,
- (iii) the likely practical utility of any favourable review outcome, and
- (iv) conditions that might be imposed as a term of any stay,
- (d) an applicant's prospects of obtaining a materially more favourable outcome as a result of the review proceeding, and
- (e) the reasons proffered to support, or oppose, the stay application, and the potential practical consequences of any stay,

United Business College Pty Ltd and Australian Skills Quality Authority [2019] AATA 1389 (20 June 2019) (Chris Furnell, Senior Member)

Levi v Companies Auditors and Liquidators Disciplinary Board [2013] FCA 719
McDonald v Director-General of Social Security

United Business College Pty Ltd and Australian Skills Quality Authority [2019] AATA 1389 (20 June 2019) (Chris Furnell, Senior Member)

36. In this regard, those interests are, or at least include, the interests of persons whom an exercise of the registration cancellation power are intended to serve, [13]. In large measure, they are identified by reference to the statutory scheme under which the decisions under review were made, [14], in particular, to those aspects of the scheme which outline the procedures which lead to the making of such decisions, [15].

via

[14] *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719 at [15]; *Kadeh and Migration Agents Registration Authority (Migration)* [2018] AATA 4461 at [25].

United Business College Pty Ltd and Australian Skills Quality Authority [2019] AATA 1389 (20 June 2019) (Chris Furnell, Senior Member)

55. Nevertheless, I should consider "... whether there are facts and circumstances which, if established at the substantive hearing, would provide a basis for the applicant's success in the review on application; or whether there are points of law raised which, if sustained, would lead to that conclusion." [24].

via

[24] *Re Snook and Civil Aviation Safety Authority* (2008) 109 ALD 122 at [21] cited with approval in *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719 at [31].

Evans and Tax Practitioners Board (Taxation) [2019] AATA 1408 (19 June 2019) (Chris Furnell, Senior Member)

Levi v Companies Auditors and Liquidators Disciplinary Board [2013] FCA 719
Re Mahaffy and Tax Practitioners Board

Evans and Tax Practitioners Board (Taxation) [2019] AATA 1408 (19 June 2019) (Chris Furnell, Senior Member)

50. In this regard, those interests are, or at least include, the interests which an exercise of the registration termination power are intended to serve, [10]. In large measure, they are identified by reference to the statutory scheme under which the decision under review was made, [11] in particular, to those aspects of the scheme which outline the procedures which lead to the making of such a decision. [12]

via

[11] *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719 at [15]; *Kadeh and Migration Agents Registration Authority (Migration)* [2018] AATA 4461 at [25].

Evans and Tax Practitioners Board (Taxation) [2019] AATA 1408 (19 June 2019) (Chris Furnell, Senior Member)

172. Nevertheless, as submitted on behalf of Mr Evans, I should consider “... *whether there are facts and circumstances which, if established at the substantive hearing, would provide a basis for the applicant’s success in the review on application; or whether there are points of law raised which, if sustained, would lead to that conclusion.*” [50].

via

[50] *Re Snook and Civil Aviation Safety Authority* (2008) 109 ALD 122 at [21] cited with approval in *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719 at [31].

HILL and Tax Practitioners Board (Taxation) [2019] AATA 756 (26 April 2019) (Mr P W Taylor SC, Senior Member)

Levi v Companies Auditors and Liquidators Disciplinary Board [2013] FCA 719.

HILL and Tax Practitioners Board (Taxation) [2019] AATA 756 (26 April 2019) (Mr P W Taylor SC, Senior Member)

5. The determinative criterion for the exercise of the Tribunal’s stay power - satisfaction about the desirability and appropriateness of the proposed orders “for the purpose of securing the effectiveness of the hearing and determination of the application for review” - is a permissibly general expression. In relation to the scope of the orders it may make, the Tribunal may restrict a decision maker’s ordinary practices, or compliance with other statutory obligations in relation to publication of the reviewable decision:- see *Australian Securities and Investments Commission v Administrative Appeals Tribunal* [2009] FCAFC 185; (2009) 181 FCR 130 at [71] & [81]. In relation to the considerations that may inform the exercise of the stay power, previous decisions of both the Federal Court of Australia and this Tribunal (see *Re Scott and Australian Securities and Investments Commission* [2009] AATA 798; (2009) 51 AAR 114; *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719 at [14] - [15]; *Secretary Department of Social Services and McNamara* [2016] AATA 189) indicate that they include:-

- (a) the functions and responsibilities of the statutory decision maker, the nature and purpose of the reviewable decision (including the findings on which it is based) and the public interest in relation to it
- (b) an applicant’s prospects of success, in obtaining a materially different outcome as a result of the review proceeding
- (c) the reasons proffered to support, or oppose, the stay application, and the potential practical consequences of any stay

(d) the practical consequences of the decision under review (to the parties and to any interested persons), unless its operation is the subject of a relevant stay, after taking into account:

- (i) conditions that might be imposed as a term of any stay;
- (ii) the timing of the reviewable decision, the application, and any likely review hearing;
- (iii) the ability of the applicant to pursue the review proceedings effectively; and
- (iv) the likely practical utility of any favourable review outcome.

Sher-E-Punjab Pty Ltd and Australian Skills Quality Authority [2018] AATA 46 (15 January 2018)
(Member K. Parker)

27. The Tribunal has also considered the observations of Farrell J in the Federal Court of Australia decision in *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719 as follows, referencing the approach of the Tribunal in a number of other decisions:

[30] The application before the Deputy President was interlocutory. The passage from Re Griffiths Grif-Air at [55] to which the applicant drew attention expresses the standard generally accepted by the AAT for assessment of “prospects of success”:

...we will consider first the prospects of success of the applications for review ... We can do so only on the material before us and this is not the occasion to try the issues or to make findings of fact. That is the tribunal’s role on the substantive hearing. ...

[31] See also Re Snook and Civil Aviation Safety Authority [2008] AATA 861; (2008) 109 ALD 122 at [21]:

It is well understood that in considering an applicant’s prospects of success for the purposes of a stay application, it is not appropriate to conduct a preliminary trial of the issues: see Re Dart and Director-General of Social Services (1982) 4 ALD 553 at 555. Rather, the tribunal must consider whether there are facts and circumstances which, if established at the substantive hearing, would provide a basis for the applicant’s success in the review on application; or whether there are points of law raised which, if sustained, would lead to that conclusion: see Re Commonwealth and Quirke [1986] AATA 57; (1986) 9 ALD 92 at 95.

See also Liu and Australian Securities and Investments Commission [2013] AATA 117 at [31]:

It is generally recognised that it is also necessary to have regard to the Applicant’s prospects of success at the final hearing (see for example XQZT v ASIC [2009] AATA 669), but it is not the role of the Tribunal to conduct a preliminary trial of the issues to be raised during the substantive hearing of the application for review: Re Repatriation Commission and Delkou (1985) 8 ALDA 454 at [32].

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30. The determinative criteria for the exercise of the Tribunal's stay power - satisfaction about the desirability and appropriateness of the proposed orders "for the purpose of securing the effectiveness of the hearing and determination of the application for review" - are opaquely expressed. All three are general expressions that confound exhaustive description of either the permissible scope of the orders or the relevant considerations. In relation to the scope of the orders, the Tribunal may restrict a decision maker's ordinary practices, or compliance with other statutory obligations in relation to publication of the reviewable decision:- see *Australian Securities and Investments Commission v Administrative Appeals Tribunal* [2009] FCAFC 185; (2009) 181 FCR 130 at [71] & [81]. In relation to the permissibly relevant considerations, various decisions (see eg. *Re Scott and Australian Securities and Investments Commission* [2009] AATA 798; (2009) 51 AAR 114; *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719 at [14]-[15]; *Secretary, Department of Social Services and McNamara* [2016] AATA 189) justify a confident conclusion that they include:-

- (a) an applicant's prospects of success, in obtaining a materially different outcome as a result of the review proceeding
- (b) the functions and responsibilities of the statutory decision maker, the nature and purpose of the reviewable decision, and the public interest in relation to it
- (c) the reasons proffered to support, or oppose, the stay application, and the potential practical consequences of any stay
- (d) the practical consequences of the decision under review (to the parties and to any interested persons), unless its operation is the subject of a relevant stay, after taking into account:-
 - (i) conditions that might be imposed as a term of any stay
 - (ii) the timing of the reviewable decision, the application, and any likely review hearing
 - (iii) the ability of the applicant to pursue the review proceedings effectively
 - (iv) the likely practical utility of any favourable review outcome.

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43. The existence of that evidence was pressed as requiring the Tribunal to conclude, for the purposes of the present application, that Mr Dimitropoulos had good prospects of success in the substantive review application. The contention was that previous decisions established that an applicant had demonstrated "good prospects of success" merely by pointing to evidence which, if ultimately accepted, would apparently contradict the basis for the decision under review. This proposition was said to have been established by various decisions - including *Re Dart v Director-General of Social Services* (1982) 4 ALD 553 at p 55; *Avtex Air Services Pty Ltd v Civil Aviation Safety Authority* [2010] AATA 716, and *Levi v Companies Auditors and Liquidators Disciplinary Board* (2013) 61 AAR 82; [2013] FCA 719 (at [30]-[32] per Farrell J).

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47. The decision in *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719 concerned a successful appeal to the Federal Court of Australia against the Tribunal's refusal to stay a decision of the Companies Auditors and Liquidators Disciplinary Board cancelling the registration of a liquidator. That decision was authorised by *CorpAct* s 1292, and was subject

to procedural requirements of prior notification and hearing:- see *CorpAct* § 1294. One of the substantive grounds of the appeal was that the Tribunal had failed to form any view about the applicant's prospects of success on a particular factual issue. The argument put by the applicant was summarised in judgment in the following terms:-

[20] The applicant accepts that the Deputy President did not have to pursue the ... issue to finality, but says the Deputy President was required to make a proper inquiry into whether the arguments raised by the applicant had prima facie merit and to determine: (1) their impact on the applicant's prospects of success in the substantive proceedings, and (2) how that factor should be balanced against other operative factors (such as prejudice or public interest).

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50. Farrell J's criticism of the Tribunal's stay reasoning in *Levi* - that the Tribunal failed to carry out an appropriate evaluation of the comparative weight to be given to the applicant's prospects of success in the particular circumstances - is inconsistent with the proposition advanced, at least initially, on behalf of Mr Dimitropoulos in the present proceedings. That proposition was to the effect that an applicant who can point to apparently arguable facts that would contradict the basis for the decision under review, must be regarded as having good prospects of success. There is no express statement to that effect anywhere in Farrell J's reasoning, and Her Honour's finding that the comparative weight of an applicant's prospects of success must be evaluated, is inconsistent with any proposition of law that the Tribunal must necessarily regard apparently arguable prospects of success as necessarily "good".

Panganiban and Australian Securities & Investments Commission [2016] AATA 703 (09 September 2016)

Levi v Companies Auditors and Liquidators Disciplinary Board [2013] FCA 719.

Panganiban and Australian Securities & Investments Commission [2016] AATA 703 (09 September 2016)

7. The determinative criterion for the exercise of the Tribunal's stay power - satisfaction about appropriateness "for the purpose of securing the effectiveness of the hearing and determination of the application for review" - is somewhat opaquely expressed. It is a general expression that rather defies exhaustive description of permissibly relevant considerations. But they have been helpfully suggested in relevant decisions (see eg. *Re Scott and Australian Securities and Investments Commission* [2009] AATA 798; (2009) 51 AAR 114; *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719 at [14]-[15]; *Secretary Department of Social Services and McNamara* [2016] AATA 189) and certainly include:-
- (a) an applicant's prospects of success, in obtaining a materially different outcome as a result of the review proceeding;
 - (b) the functions and responsibilities of the statutory decision maker, the nature and purpose of the reviewable decision, and the public interest in relation to it;
 - (c) the reasons proffered to support, or oppose, the stay application, and the potential practical consequences of any stay;
 - (d) the practical consequences of the decision under review (to the parties and to any interested persons), unless its operation is the subject of a relevant stay, after taking into account:
- (i) conditions that might be imposed as a term of any stay;

- (ii) the timing of the reviewable decision, the application, and any likely review hearing;
- (iii) the ability of the applicant to pursue the review proceedings effectively; and
- (iv) the likely practical utility of any favourable review outcome.

O'Sullivan v Australian Securities and Investments Commission [2015] AATA 265 (30 March 2015)
(Professor R Deutsch, Deputy President)

Levi v Companies and Liquidator's Disciplinary Board [2013] FCA 719.

O'Sullivan v Australian Securities and Investments Commission [2015] AATA 265 (30 March 2015)
(Professor R Deutsch, Deputy President)

30. This does not, however, give rise to a basis for a suppression order of the kind sought. The authorities clearly recognise that where there are parallel criminal proceedings, such orders may be required in some cases as a protection for the accused: *Levi v Companies and Liquidator's Disciplinary Board* [2013] FCA 719. That reasoning does not extend to concurrent civil proceedings.

Levi vs. Companies Auditors and Liquidators Board & Another [2013] AATA 576 (16 August 2013)
(Deputy President RP Handley)

Levi v Companies Auditors and Liquidators Disciplinary Board [2013] FCA 719.
Levi v Australian Securities and Investments Commission (No 2)

Levi vs. Companies Auditors and Liquidators Board & Another [2013] AATA 576 (16 August 2013)
(Deputy President RP Handley)

1. This is a remittal from the Federal Court pursuant to the decision of Farrell J in *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719. Her Honour issued a writ of certiorari quashing the Tribunal's decision in *Levi and Companies Auditors and Liquidators Disciplinary Board* [2013] AATA 463 and a writ of mandamus requiring the Tribunal to determine the Applicant, Mr Levi's application for a stay of the decision of the Companies Auditors and Liquidators Disciplinary Board (the Board) and for confidentiality orders according to law.