

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

FLYNN v WESTPAC BANKING CORPORATION ACN 007 457 141 (Discrimination) [2022] ACAT 21

DT 26/2020
DT 62/2020

Catchwords: **DISCRIMINATION** – where complaint was referred to the ACAT under the *Human Rights Commission Act 2005* – where respondent is alleged to have unlawfully discriminated against the applicant by refusing to provide him with banking services because of his occupation as a digital currency exchange provider – where the respondent relies on protection from liability afforded by section 235(1)(e) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) – whether reliance on section 235(1)(e) is colourable – where the question whether the proceedings in the Tribunal “do not lie” against Westpac must await the outcome of proceedings in a court of competent jurisdiction to determine whether section 235(1)(e) applies – applications stayed until further order

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008* ss 9, 83
Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) ss 5, 6, 36, 41, 81, 82, 84, 229, 235, 236
Discrimination Act 1991 ss 4A, 7, 8, 20, 57N, 70
Human Rights Commission Act 2005 ss 53A, 53CA, 53E
Jurisdiction of Courts (Cross-vesting) Act 1993 s 8
Listening Devices Act 1992 s 4

Subordinate Legislation cited: *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (Cth) ch 15

Cases cited: *Applicant 202053 v Employers Mutual Limited* [2022] ACAT 9
Burns v Corbett [2018] HCA 15
Dong v Song [2018] ACTSC 82
The Appellants v Council of the Law Society of the ACT and Another [2011] ACTSC 133
The Legal Practitioner v Council of the Law Society of the ACT and Another [2011] ACTSC 207

Tribunal: Presidential Member G McCarthy
Senior Member M Orlov

Date of Orders: 17 March 2022
Date of Reasons for Decision: 17 March 2022

**AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL)**

**DT 26/2020
DT 62/2020**

BETWEEN:

ALLAN FLYNN
Applicant

AND:

WESTPAC BANKING CORPORATION
ACN 007 457 141
Respondent

TRIBUNAL: Presidential Member G McCarthy
Senior Member M Orlov

DATE: 17 March 2022

ORDER

The Tribunal orders that:

1. Applications numbered DT 26/2020 and DT 62/2020 are stayed until further order with liberty to apply on 7 working days notice in writing.

.....
Senior Member M Orlov
For and on behalf of the Tribunal

REASONS FOR DECISION

Introduction

1. The applicant, Mr Flynn, ran a business as a digital currency exchange, meaning that he exchanged money for digital currency (also referred to as cryptocurrency) and digital currency for money. The funds related to his trading activities flowed through his personal account with Westpac and a business account with St George Bank (a division of the Westpac Group). This went on for about 10 months. Then, without warning, in June 2018 Westpac and St George wrote to Mr Flynn to advise that his accounts would be closed and that he was barred permanently from being provided with banking services by any division of the Westpac Group. This is referred to as ‘de-banking’. No explanation was offered for the decision.
2. In September 2019, Mr Flynn opened another account with Westpac which the bank promptly closed. This led to Mr Flynn making a complaint to the Human Rights Commission (**HRC**) alleging that Westpac had discriminated against him by refusing to provide banking services to him on the grounds of his occupation contrary to the *Discrimination Act 1991* (**the Discrimination Act**).
3. Mr Flynn subsequently made a second complaint to the HRC about the closure of his accounts in June 2018, again alleging that Westpac discriminated against him by refusing to provide banking services to him on the grounds of his occupation.
4. The HRC referred Mr Flynn’s complaints to the Tribunal where they were treated as applications to the Tribunal.¹ Although the parties were afforded a full hearing, we are satisfied that it is not open for the Tribunal to determine Mr Flynn’s claims until a threshold issue raised by Westpac has been determined – namely, whether a proceeding in relation to alleged unlawful discrimination ‘does not lie’ against Westpac in the current circumstances. Where we are satisfied that the Tribunal does not have jurisdiction to determine that issue, the appropriate thing to do is

¹ Mr Flynn’s first complaint was treated as an initiating application in proceeding DT 26 of 2020. His second complaint was treated as an initiating application in proceeding DT 62 of 2020.

to stay Mr Flynn's applications until further order with liberty to apply and leave it to the parties to determine how the matter should proceed from here.

Background

5. The basic facts are largely uncontroversial.
6. After working as an architect for many years, in 2014 Mr Flynn started his own business doing architectural design, minor renovations, installations and building repairs, operating under the unregistered business name 'Atelier Finesse'.² In July 2015, he became interested in trading digital currency and, in October 2015, opened an account with LocalBitcoins, a peer-to-peer internet-based Bitcoin trading platform, using the name 'CanberraBitcoin'. He made his first Bitcoin purchase in December 2015, but the evidence suggests this may have been an isolated transaction.
7. Mr Flynn identifies 24 July 2017 as the date when he commenced trading as a digital currency exchange provider. The AUSTRAC³ website describes a digital currency (or cryptocurrency) exchange provider as an individual, business or organisation that exchanges Australian or foreign currency for digital currency, and digital currency for Australian or foreign currency, as part of a digital currency exchange business.⁴ The latter is often referred to as a 'digital currency exchange' or **DCE**.
8. On 8 August 2017, Mr Flynn opened a Westpac Choice personal account in his name and, few days later, a Freedom Business account with St George Bank (a division of the Westpac Banking Corporation) in his name trading as 'Atelier Finesse'. At the time, Mr Flynn had other personal accounts with St George Bank, including a Complete Freedom, Direct Saver, Maxi Saver, Incentive Saver and Express Freedom account.
9. Mr Flynn's business practice was to purchase Bitcoin, a well-known cryptocurrency, from established DCEs, mainly BTC Markets and Independent

² Mr Flynn registered the business name 'Atelier Finesse' under his personal ABN on 7 August 2018

³ Australian Transaction Reports and Analysis Centre

⁴ <https://www.austrac.gov.au/business/industry-specific-guidance/digital-currency-exchange-providers>

Reserve, and then transfer funds electronically to those entities to pay for his purchases. When he had Bitcoins to sell, he advertised them for sale through CanberraBitcoin on the LocalBitcoins website.

10. Mr Flynn used accounts with several banks for his Bitcoin trading. An advertisement for CanberraBitcoin published on the LocalBitcoins website offered the following payment options:⁵

Payment Method	Currency	Amount
Cash deposit: CBA/ WBC/ NAB/ SGB – Smart ATM or Transfer (/ad/521150/purchase-bitcoin-cash-deposit-cba-wbc-nab-sgb-smart-atm-or-transfer-australia)	AUD	300 – 618 AUD
Canberra ACT 2601, Australia (/ad/521153/buy-bitcoins-with-cash-canberra-act-2601-australia)	AUD	1,000 – 10,000 AUD
Cash deposit: SMART ATM \$50-\$100 (/ad/545290/purchase-bitcoin-cash-deposit-smart-atm-50-100-australia)	AUD	50 – 100 AUD

11. Mr Flynn said that he initially used an account with the Commonwealth Bank for his DCE business, until the bank closed the account in February 2018. There was no evidence of the amounts transacted through the Commonwealth Bank. However, Mr Flynn estimated that over about a 10-month period, payments relating to his DCE business totalling about \$197,703 were transacted through the Westpac Choice account, and about \$307,023 through the St George Freedom Business account. Westpac did not dispute these figures.
12. Westpac became aware that Mr Flynn was operating a DCE in early April 2018. A review of his accounts by an internal risk-management team identified cash deposits and transfers to known DCEs spread across his personal account with Westpac and his business account with St George. An internet search of the LocalBitcoins website on 6 April 2018 identified the CanberraBitcoin advertisement mentioned earlier, which was identified as a business associated with Mr Flynn. The team assessed that Mr Flynn was no longer within Westpac's

⁵ Joint Bundle page 677

risk appetite and recommended that he should be ‘exited’ as a customer of the bank.

13. On 5 June 2018, the assessment and recommendation were escalated to Raymond Shanks, who was then the State Operations Manager, Regional New South Wales and ACT, for Westpac. Mr Shanks is now the National Site and Operations Manager for Westpac. In his previous role, he was responsible for reviewing risk assessments for customers living in regional New South Wales and the ACT and deciding whether to endorse recommendations to exit or retain customers. Mr Shanks reviewed Mr Flynn’s assessment and decided that the bank should terminate its relationship with him. He says he did so:

...based on my experience in identifying actions which presented a risk to Westpac’s AML/CTF⁶ compliance, and I did so in order to comply with those requirements, including Westpac’s obligation to make risk-based decisions about whether or not to provide banking services to particular customers. On this basis I decided that the Applicant should be exited as a customer of Westpac.⁷

14. On 12 June 2018, St George Bank wrote to Mr Flynn, informing him of the bank’s decision to close his Freedom Business Account on 17 July 2018. A second letter, also dated 12 June 2018, informed him of the bank’s decision to close his Complete Freedom, Direct Saver, Maxi Saver, Incentive Saver and Express Freedom Accounts. The letters stated that after his accounts were closed, he would not have access to other Westpac Group services, including St George Bank, Bank of Melbourne, Bank SA, RAMS and BT. The letters gave no explanation for the decision, other than to describe it as a “commercial decision”.⁸
15. On 12 June 2018, Westpac wrote a similar letter to Mr Flynn informing him of the bank’s decision to close his Westpac Choice account on 17 July 2018.
16. Subsequently, Mr Flynn registered with AUSTRAC as a digital currency exchange provider⁹ and registered the business name ‘CanberraNumismatics’.¹⁰

⁶ Anti-Money Laundering/Counter-Terrorism Financing

⁷ Joint Bundle page 682, at [16]

⁸ Joint Bundle pages 14, 16

⁹ On 31 October 2018

¹⁰ On 22 January 2019

17. On 28 August 2019, Mr Flynn met with a Customer Service Specialist at the Gungahlin branch of the St George Bank to discuss opening an account for his digital currency exchange business. Mr Flynn covertly recorded the conversation.¹¹ At one point the bank’s representative said, “We don’t deal with Bitcoin customers”.¹²
18. On 9 September 2019, Mr Flynn met with the Retail & Business Banking Manager of the Gungahlin branch of Westpac to open a business banking account for his digital currency exchange business. Again, Mr Flynn covertly recorded the conversation. A Westpac Business One Low account was opened in his name and, the same day, he deposited an ANZ bank cheque for \$61,006.75 into the account. Mr Flynn says the funds came from a “recently debanked ANZ account” and comprised the full working capital of his business.¹³ Later that afternoon two LocalBitcoins customers deposited funds into the Westpac account to pay for Bitcoin purchases. Mr Flynn immediately transferred a sum of \$1,250 to BTC Markets via the Westpac banking app to purchase Bitcoin on behalf of one of the customers. However, Westpac blocked the payment and credited the \$1,250 back to Mr Flynn’s account. The next morning, Westpac froze the account.
19. On 10 September 2019, Mr Flynn provided his AUSTRAC registration details to the Westpac branch at Gungahlin. Two days later, Mr Flynn met again with the Retail & Business Banking manager to discuss the frozen account. Again, Mr Flynn covertly recorded the conversation. The manager informed him that Westpac had a policy of not dealing with anyone “who deals with Bitcoins, because it’s against the [sic] money laundering policies”.¹⁴
20. On 17 September 2019, Westpac wrote to Mr Flynn advising him of the closure of the Westpac Business One Low account:

We refer to our previous correspondence to you dated 12 June 2018.

¹¹ The transcript of the recorded conversation was allowed into evidence over Westpac’s objection pursuant to section 4(3)(b)(i) of the *Listening Devices Act 1992*, applying *Dong v Song* [2018] ACTSC 82. The ruling applied also to covertly recorded conversations with the Retail & Business Banking manager of the Westpac branch at Gungahlin on 9 and 12 September 2019.

¹² Joint Bundle page 135, at [33(i)]

¹³ Joint Bundle page 137, at [139]

¹⁴ Joint Bundle page 138, at [43(c)]

As our previous notice confirmed, Westpac had made a commercial decision to no longer provide you with financial services. That decision was made in accordance with our policies and notice was given to you under our usual terms and conditions. Our decision to no longer provide you with financial services is permanent.

Our previous notice also confirmed that once your accounts had been closed, you would not be able to access further financial services from any Westpac Group services.

It has come to our attention that you have since opened the following further account with Westpac. As it appears that you have been able to access further financial services, we apologise for the confusion.

...

*We confirm our position that Westpac Group will not provide you with financial services. As we have previously given you notice of this decision, the account shown above was closed **today**. A bank cheque for any credit balance is **enclosed**. In addition, should your bank/credit cards be in debit you are still required to make normal repayments.*

General

Following the closure of the account, access to other Westpac Group services including Westpac Bank, St George Bank, Bank of Melbourne, Bank SA, RAMS or BT will not be available to you.

If you have any questions, please contact Customer Care on 132 032. [emphasis in original]¹⁵

21. On 23 September 2019, Mr Flynn sought an explanation from Westpac for its decision to bar him permanently from being provided financial services. He received a reply by email sent on 27 September 2019, which confirmed that the decision no longer to provide him with financial services was permanent, but shed no light on the reasons for the decision except to say:

It is not a comment on your conduct, or any other aspect of your relationship with us. We hope you will appreciate that we are not able to provide you with any further information about our commercial imperatives.¹⁶

22. On 19 December 2019, Mr Flynn made a complaint to the HRC about the closure by the ANZ Bank of certain ANZ accounts in August 2019, and the closure by Westpac of the Business One Low account in September 2019.¹⁷ The complaint gave the following details:

¹⁵ Joint Bundle page 263

¹⁶ Joint Bundle, page 265

¹⁷ Joint Bundle, page 292

The event:

...

What happened: After initially granting a business bank account for my lawfully operated and registered Australian digital currency exchange and allowing it to operate for only a few weeks supposedly in error, both Westpac and ANZ Bank then separately closed my business banking account without a reasonable explanation [sic]. As demonstrated by their lack of due diligence regarding my legal status and/or risk procedures then, refusal to state why they were denying me banking services, it is evident that both banks operated in an unfair discriminatory manner.

...

How has this affected you: Unfortunately I am completely without banking services and unable to earn a living as a non bank financial services which I have heavily invested time and effort over the last 3 years, and have had to revert to working in construction along with all its associated high risks to, among other things, continuing work, non-payment from contractors, physical health and wellbeing. I have suffered a loss of income.

Outcomes:

What would you like to have happen to resolve your complaint: I would like ANZ and Westpac to provide access to their business banking services for my digital currency exchange.

Action already taken:

Have you approach the person or organisation complained about: Yes Both banks refused to reconsider their debanking based on my risk management procedures, or my AUSTRAC registration as a non bank financial service. Both banks refused to provide a reasonable explanation [sic] why they should close my accounts.¹⁸

23. On 15 June 2020, the HRC referred the complaint against Westpac to the ACT Civil and Administrative Tribunal (ACAT) pursuant to section 53A of the *Human Rights Commission Act 2005* (HRC Act).
24. On 25 September 2020, Mr Flynn made a further complaint to the HRC about the closure of his Westpac and St George Bank accounts in June 2018. On 5 November 2020, the HRC referred the second complaint to the ACAT.
25. Each referral by the HRC was treated as a new application to the ACAT. The Tribunal heard the applications at the same time.

¹⁸ Joint Bundle page 294

The issues to be determined under the Discrimination Act

26. Section 20 of the Discrimination Act makes it unlawful for a person who provides services to discriminate against another person, among other things, by refusing to provide those services to the other person. Section 20 states:

20 Goods, services and facilities

*It is unlawful for a person (the **provider**) who (whether for payment or not) provides goods or services, or makes facilities available, to discriminate against another person—*

- (a) by refusing to provide those goods or services or make those facilities available to the other person; or*
 - (b) in the terms or conditions on which the provider provides those goods or services or makes those facilities available to the other person; or*
 - (c) in the way in which the provider provides those goods or services or makes those facilities available to the other person.*
27. Mr Flynn’s complaint is that Westpac unlawfully discriminated against him by refusing to provide banking services to enable him to carry on business as a digital currency exchange (i.e. de-banking him).¹⁹ Mr Flynn claims that he is the victim of direct discrimination on the grounds of his profession, trade, occupation, or calling, which he initially said was as a DCE, but later amended to DCE operator or provider.
28. Direct discrimination occurs where a person treats another person unfavourably because the other person has one or more protected attributes.²⁰ Relevant to this case, a person’s profession, trade, occupation, or calling is a protected attribute.²¹
29. Where there is more than one reason for treating a person unfavourably, it is enough for discrimination to occur if one of the reasons for the unfavourable treatment is because the person has a protected attribute, even if it is not the dominant or substantial reason for the treatment.²²
30. A rebuttable presumption will arise that direct discrimination has occurred if the complainant establishes that the treatment was unfavourable and presents

¹⁹ Australian Government: AUSTRAC, ‘AUSTRAC statement 2021: de-banking’ (Statement, 29 October 2021)

²⁰ Discrimination Act section 8(1)

²¹ Discrimination Act section 7(1)(p)

²² Discrimination Act section 4A(2)

evidence that would enable the ACAT to decide, in the absence of any other explanation, that the treatment was because of the person's protected attribute.²³

The presumption is rebutted if the person against whom the complaint is made establishes that the treatment was not because of the person's protected attribute.²⁴

31. Westpac submits that it did not treat Mr Flynn unfavourably by de-banking him. It says that in deciding that question the Tribunal should consider:
 - (a) the regulatory framework in which Westpac operates, specifically under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**);
 - (b) Westpac's policies and procedures responding to its legal and regulatory obligations;
 - (c) the terms and conditions of its commercial relationship with Mr Flynn; and
 - (d) the services Westpac has decided to provide to consumers and the circumstances in which it has decided to do so.
32. Mr Flynn, on the other hand, points to the effect of Westpac's decision to de-bank him, which amounts to a refusal by Westpac, for itself and all other divisions of the Westpac Group, to provide banking services to him in **any** private or business capacity **in perpetuity**, a decision, he says, that self-evidently amounts to unfavourable treatment.
33. Westpac submits that a 'digital currency exchange' is not a profession, trade, occupation or calling. Mr Flynn accepts that the term describes the service he was providing or the business he was engaged in, rather than his occupation, but says that his occupation at relevant times was as a digital currency exchange provider.
34. The most contentious issue is – why did Westpac decide to de-bank Mr Flynn? If **one** reason was his occupation as a digital currency exchange provider, it would be immaterial if there were also other reasons for the decision.²⁵

²³ HRC Act section 53CA(2)

²⁴ HRC Act section 53CA(3)

²⁵ Discrimination Act section 4A(2)

35. Causation is a question of fact. Although the test for causation has often been framed in discrimination proceedings in the ACAT as a question whether the complainant’s protected attribute is a “real, genuine, or not insubstantial reason” for the treatment, the correctness of that formulation has been doubted in a recent decision of the tribunal.²⁶ We consider that the task for this Tribunal, if the applications proceed, is to find whether a causal connection exists between Westpac’s decision to de-bank Mr Flynn and Mr Flynn’s occupation as a DCE provider – i.e. whether he was de-banked ‘because of’ his occupation, even if it was also ‘because of’ other matters. In deciding that issue the Tribunal must consider all relevant circumstances. Central to that factual enquiry is Mr Shanks’ written and oral evidence, as it was his assessment of the banker/customer relationship that led him to decide that Mr Flynn should be exited permanently as a customer of Westpac, a decision that apparently was acquiesced in by other relevant decision-makers.
36. If causation is established, it is then necessary to ask whether the exception provided by section 57N of the Discrimination Act applies. Section 57N states:

57N Discrimination in profession, trade, occupation or calling

Part 3 does not make it unlawful to discriminate against a person on the ground of the profession, trade, occupation or calling of the person in relation to any transaction if profession, trade occupation or calling is relevant to that transaction and the discrimination is reasonable in those circumstances.

37. Westpac bears the onus to establish the exception.²⁷
38. Westpac’s case is that it de-banked Mr Flynn because **his use** of accounts with Westpac and St George to operate a digital currency exchange business fell outside Westpac’s risk appetite. It was this, rather than **his occupation** as a DCE operator or provider, that was the reason for its decision. Westpac argues that there is an important distinction between a person’s occupation (in this case, as the owner or operator of a digital currency exchange business) and the business itself. The former is a protected attribute. The latter is not. Mr Flynn’s response is that the distinction is without substance and further, that to allow such a

²⁶ *Applicant 202053 v Employers Mutual Limited* [2022] ACAT 9 at [27]–[32]

²⁷ Discrimination Act section 70

distinction would be contrary to the purpose and objects of the Discrimination Act.

39. Westpac says that its subsequent decision to close the account Mr Flynn opened in September 2019 was because Westpac’s internal processes identified Mr Flynn as a previously exited customer. Once a customer is exited, they are exited for all time. The decision on that occasion had nothing to do with his occupation. Mr Flynn’s response is that there is a direct causal link to Westpac’s original decision to de-bank him, which he says was because of his occupation as a DCE provider.
40. It is common ground that Westpac’s policy at relevant times was (and remains) that it does not provide services to DCE providers in the ordinary course of business except where it determines that exceptional circumstances apply.
41. Westpac claims that its policy is informed by two main considerations. The first is its obligations under the AML/CTF Act as a “reporting entity” within the meaning of that term in section 5 of the Act and a provider of “designated services” within the meaning of that term in section 6 of the Act. The second is Westpac’s assessment of the regulatory and reputational risks involved in providing banking services to DCE providers.²⁸
42. Westpac says the decision to de-bank Mr Flynn was a ‘transaction’ within the meaning of section 57N. The way Mr Flynn used his accounts was relevant to its decision to de-bank him, which Westpac says was reasonable in the following circumstances:
 - (a) Westpac is a bank operating in a complex legal and regulatory environment within the framework of the AML/CTF Act and has implemented policies and procedures to ensure compliance with its legal and regulatory obligations. As required by section 81 of the AML/CTF Act, Westpac has in place an AML/CTF Program, which comprises a Part A and a Part B. Part A has the primary purpose of identifying, mitigating, and managing money laundering and terrorism financing risk. Failure to comply with the

²⁸ Joint Bundle page 62, at [4] (**Further Amended Response**)

AML/CTF Act carries significant penalties.

- (b) The decision to de-bank Mr Flynn was made having regard to Westpac's AML/CTF policies and procedures. Westpac considered Mr Flynn's use of the accounts specifically and decided it fell outside its risk appetite, which was a reasonable conclusion in all the circumstances.
 - (c) It is reasonable for Westpac to choose the risks that it is willing to take. Mr Flynn was at liberty to cease his banking arrangements with Westpac at any time. Just as Westpac cannot force Mr Flynn to bank with it, Mr Flynn cannot force Westpac to bank outside its risk appetite.
 - (d) It is the practice of all Australian banks not to provide services to DCEs, largely based on the same AML/CTF concerns as informed Westpac's decision in this case. Those practices must be seen as reasonable insofar as they are common industry practice. It would be unreasonable to require Westpac to adopt a risk management approach that it considers could expose it to the risk of penalty, loss, or other detriment.
43. Mr Flynn's response is that the decision to de-bank him absolutely and unconditionally was self-evidently unreasonable. There was no reason for Westpac to deny personal banking services to him in perpetuity, even where those services may be wholly unrelated to the operation of a DCE.
44. Mr Flynn claims that Westpac's policy of not providing banking services to DCE providers unless there are exceptional circumstances is unreasonable and entrenches discrimination for a purpose other than managing the bank's ML/TF risk. His "central complaint" is that:

Mr Flynn was judged by reference to a stereotype of a digital currency exchange. Our complaint is that Westpac set out to determine not whether Mr Flynn posed an anti-money laundering risk, but rather, set out to determine whether he was operating a digital currency exchange, which, of course, he was.

We say that Westpac now applied its policy, which is not really in doubt... We say that in doing so, it applied stereotyped assumptions about digital currency exchanges. That, we say, is the essence of the discrimination.²⁹

²⁹ Transcript of proceedings 21 October 2021, page 12, lines 21-31

45. Mr Flynn accepts that Westpac has genuine money laundering concerns and that DCEs have a high risk for money laundering. He says that lawyers, real estate agents, accountants and even the other three ‘Big 4’ banks also have a high risk of money laundering. He says that money laundering risk is not a defence to unlawful discrimination, but accepts it is relevant to the issue of reasonableness for the purposes of the defence under section 57N of the Discrimination Act.
46. Mr Flynn claims that the vice in Westpac’s conduct towards him is that Westpac failed to consider his individual circumstances. There was no attempt to identify how he ran his DCE or to engage with him about his business, any risks that it posed, the convenience and cost of providing banking services to him, or whether alternative measures could be implemented to manage any risk. Ultimately, Mr Flynn says, Westpac simply assumed that all DCEs have the same risk and for a multitude of reasons did not want them as customers. He sees himself as a victim of a commercial policy that is fundamentally discriminatory.

*Gross generalisations, and heavy-handed responses, are common features of discrimination. “A major objective of anti-discrimination legislation is to prevent people being stereotyped; that is, judged not according to their individual merits but by reference to a general or common characteristic”.*³⁰

The issues to be determined under section 235 of the AML/CTF Act

47. Westpac’s Further Amended Response raises a potential statutory bar to Mr Flynn’s claim under section 235(1)(e) of the AML/CTF Act. Paragraph 22(d) of the Further Amended Response reads as follows:

Further or in the alternative, if the Tribunal considers that the respondent did discriminate against the applicant on the basis of his profession, trade, occupation or calling (which the respondent denies), its actions were done in good faith in compliance with a requirement under the AML/CTF Act and the AML/CTF Rules, such that pursuant to ss 235(1)(e) of the AML/CTF Act, no action can lie against the respondent under the Discrimination Act.

Particulars

The requirements of the AML/CTF Act include s36 and 82 (under s82 of the AML/CTF Act, Westpac must comply with Part A of its AML/CTF Program. Westpac’s Part A Program sets out (amongst other things) its approach to ML/TF risk assessments, transaction monitoring and customer due diligence). The requirements of the AML/CTF Rules include cl. 15.10(6) of

³⁰ Joint Bundle page 98 at [47] (citations omitted)

the AML/CTF Rules.

48. The AML/CTF Rules are legislative instruments made by AUSTRAC under section 229 of the AML/CTF Act and prescribe matters required or permitted by other provisions of the Act to be prescribed by the rules. The instrument presently in force is the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (Cth) (**AML/CTF Rules**).

49. Section 235(1) of the AML/CTF Act provides:

An action, suit or proceeding (whether criminal or civil) does not lie against:

- (a) *a person (the **first person**); or*
- (b) *an officer, employee or agent of the first person acting in the course of his or her office, employment or agency;*

in relation to anything done, or omitted to be done, in good faith by the first person, officer, employee or agent:

...

- (e) *in compliance, or in purported compliance, with any other requirement under:*
 - (i) *this Act; or*
 - (ii) *the regulations; or*
 - (iii) *the AML/CTF Rules.*

50. The following parts of the AML/CTF Act and AML/CTF Rules are relevant.

51. Section 36(1) of the AML/CTF Act states:

A reporting entity must:

- (a) *Monitor the reporting entity's customers in relation to the provision by the reporting entity of designated services at or through a permanent establishment of the reporting entity in Australia, with a view to:*

- (i) *identifying; and*
- (ii) *mitigating; and*
- (iii) *managing;*

the risk the reporting entity may reasonably face that the provision by the reporting entity of a designated service at or through a permanent establishment of the reporting entity in Australia might (whether inadvertently or otherwise) involve or facilitate:

- (iv) *money laundering; or*

- (v) *financing of terrorism; and*
- (b) *do so in accordance with the AML/CTF Rules.*

52. A ‘designated service’ and the person to whom the designated service is provided is defined in Table 1 of section 6. ‘Designated services’ include opening an account in the capacity of account provider, where the account provider is a bank.³¹

53. Section 81(1) of the AML/CTF Act states:

A reporting entity must not commence to provide a designated service to a customer if the reporting entity:

- (a) *has not adopted; and*
- (b) *does not maintain;*

an anti-money laundering and counter-terrorism financing program that applies to the reporting entity.

54. Section 82(1) of the AML/CTF Act states:

If a reporting entity has adopted:

- (a) *a standard anti-money laundering and counter-terrorism financing program; or*
- (b) *a joint anti-money laundering and counter-terrorism financing program;*

that applies to the reporting entity, the reporting entity must comply with:

- (c) *Part A of the program; or*
- (d) *if the program has been varied on one or more occasions – Part A of the program as varied.*

55. Sections 36(1), 81(1) and 82(1) are civil penalty provisions.³²

56. Section 84(1) of the AML/CTF Act provides for a standard anti-money laundering and counter-terrorism financing program to be divided into two parts – Part A (general) and Part B (customer identification). Section 84(2) provides that the primary purpose of Part A is to identify, mitigate, and manage money laundering and financing of terrorism risks (i.e. the risks referred to in section 36). Section 84(3) provides that the primary purpose of Part B is to set out the applicable customer identification procedures for the purposes of the application

³¹ AML/CTF Act section 6, Table 1, item 1(b)

³² AML/CTF Act sections 36(2), 81(2) and 82(2)

of the Act to customers of the reporting entity.

57. Chapter 15 of the AML/CTF Rules is concerned with ongoing customer due diligence. Among other things, a reporting entity must include a transaction monitoring program in Part A of its AML/CTF Program. This must include appropriate risk-based systems and controls to monitor the transactions of customers, the purpose of which is to identify, considering ML/TF risk, any transaction that appears to be suspicious within the terms of section 41 of the Act. The program should have regard to complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or visible lawful purpose.
58. A further requirement is that a reporting entity must include an enhanced customer due diligence program in Part A of its AML/CTF Program. The reporting entity must apply the enhanced customer due diligence program when, among other things, it determines under its risk-based systems and controls that the ML/TF risk is high. The enhanced customer due diligence program must include appropriate risk-based systems so that, in such circumstances, the reporting entity undertakes appropriate measures that may include, among other things, undertaking more detailed analysis and monitoring of the customer's past and future transactions and seeking senior management approval for continuing a business relationship with a customer and whether a designated service should continue to be provided to the customer.
59. Westpac has adopted an Anti-Money Laundering & Counter-Terrorism Financing Program, Part A and Part B. Relevantly, Part A was updated on 2 May 2018 and 6 March 2019. The Part A AML/CTF Program was approved by the Board Risk and Compliance Committee under delegation by the Westpac Banking Corporation Board for adoption by all entities in the Westpac Designated Business Group (**DBG**). Its primary purpose is said to be:

*[to] Identify, mitigate and manage the risk each member of the Westpac DBG may reasonably face that the provision of designated services at or through its Australian operations (whether inadvertently or otherwise) involve or facilitate money laundering or financing of terrorism...*³³

³³ Joint Bundle page 646

60. Relevant parts of Westpac’s Part A AML/CTF Program were provided to the Tribunal on a confidential basis and were referred to in the written and oral evidence of Professor Louis de Koker, who gave evidence as an expert in Mr Flynn’s case, Michael McCarthy, who gave evidence for Westpac in his capacity as Executive Manager, Regulatory Engagement – Financial Crime, Compliance and Conduct (Westpac Banking Corporation) and Mr Shanks to whom we referred earlier.
61. Westpac submits that to comply with its AML/CTF Program, it is required to undertake enhanced customer diligence when the risk identified with dealing with a particular customer is high, or where a suspicious matter reporting obligation arises. Where Westpac determines that a customer is outside its risk appetite, it is required to consider whether to cease providing the customer with banking services. Westpac submits that the evidence shows this is what it did in relation to Mr Flynn. The consequence, Westpac submits, is that:

*Westpac’s decision was in compliance with its AML/CTF Program because Mr Flynn’s status as an operator of a DCE was identified during the course of enhanced customer due diligence, at which point Westpac identified that his risk profile was outside its risk appetite. Westpac’s actions were therefore in compliance, or in purported compliance, with s 82 of the AML/CTF Act. Section 235 of the AML/CTF Act therefore prevents the re-agitation of that action in this forum.*³⁴ [emphasis added]

62. We accept Westpac’s submission that the present applications are proceedings for alleged unlawful conduct under the Discrimination Act, and therefore are an “action, suit or proceeding” for the purposes of section 235(1).³⁵ The issue is whether the proceedings “do not lie” against Westpac.
63. We do not accept that section 235(1)(e) is a defence to Mr Flynn’s claims, as Westpac submits and as it has pleaded in its Response.³⁶ Unlike section 57N of the Discrimination Act, it does not make lawful conduct that otherwise would amount to unlawful discrimination in breach of section 20 of the Discrimination Act. If section 235(1)(e) applies, it does not mean that Westpac is entitled to a

³⁴ Joint Bundle page 125, at [88]

³⁵ Joint Bundle pages 120-122, at [66]–[72]

³⁶ Contrast section 236 of the AML/CTF Act which provides a defence of taking reasonable precautions, and exercising due diligence, to avoid a contravention in certain kinds of proceedings.

finding that it did not discriminate against Mr Flynn. Rather, it means that Mr Flynn’s proceeding under the Discrimination Act “does not lie” against Westpac. Where a proceeding does not lie against a person in relation to a particular matter, it means that a proceeding cannot be commenced against that person in relation to that matter, or if a proceeding has been commenced, it cannot be continued. If section 235(1)(e) applies here, the appropriate relief is an order permanently staying the current proceedings and the underlying issue – whether Westpac unlawfully discriminated against Mr Flynn – must remain undetermined.

64. We accept Westpac’s submission³⁷ that the Tribunal does not have jurisdiction to decide a matter under section 235(1)(e) of the AML/CTF Act, because the matter arises under a law of the Commonwealth and so would (impermissibly) involve the Tribunal exercising federal jurisdiction.³⁸ Only a court vested with appropriate authority under Chapter III of the Constitution can determine the matter and grant relief to Westpac in the form of a permanent stay of the ACAT proceedings.
65. Mr Flynn submits that the section 235(1)(e) issue is ‘colourable’, and that Westpac should not be permitted to rely on it. ‘Colourable’ in the present context means that the issue is not raised bona fide, but rather is raised simply to prevent the Tribunal from exercising its jurisdiction to determine Mr Flynn’s claims. Mr Flynn submits that it is impossible to discriminate in good faith and that the Tribunal should make a finding to that effect. The immediate problem this submission encounters, is that it inverts the order in which the issues arise for determination. Paragraph 22(d) of the Further Amended Response suffers from the same problem. The Tribunal cannot determine whether Westpac’s decision to de-bank Mr Flynn amounts to discrimination unless it is first determined by a court of competent jurisdiction whether Westpac is entitled to the protection against liability afforded by section 235(1)(e).
66. Having considered the evidence and the parties’ submissions, we are satisfied that the question whether section 235(1)(e) applies is a real (rather than colourable)

³⁷ Joint Bundle page 126, at [90]–[92]

³⁸ *Burns v Corbett* [2018] HCA 15

issue. Until that issue is determined it is not possible to know whether, as Westpac contends, Mr Flynn's proceedings under the Discrimination Act 'do not lie' against Westpac.

67. As Westpac seeks to invoke the protection from liability afforded by section 235(1)(e), it is a matter for Westpac to establish in a court of competent jurisdiction that the decision to de-bank Mr Flynn was made in good faith, and in compliance, or in purported compliance, with a requirement of the AML/CTF Act or the AML/CTF Rules. It appears to us that this issue can be determined only by proceedings brought by Westpac in a court able to exercise the requisite federal jurisdiction.
68. If Westpac establishes that section 235(1)(e) applies and obtains a permanent stay of the ACAT proceedings, Mr Flynn's applications must be dismissed. If Westpac fails to establish that the section applies, the applications must be determined on their merits.

Where to from here?

69. No proceeding for unlawful discrimination can lie against any person unless the complainant has made a complaint to the HRC. If the complaint is not resolved and the complainant requests it, the HRC must refer the complaint to the ACAT under section 53A of the HRC Act. The referral is treated as an application under an authorising law for the purposes of section 9 of the *ACT Civil and Administrative Tribunal Act 2008 (ACAT Act)*. The jurisdiction to make orders under section 53E of the HRC Act is vested in the ACAT alone.
70. If the parties to an application jointly apply to have the matter removed to the Supreme Court, the tribunal must order that the matter be removed.³⁹ That has not happened in this case. The tribunal may remove a matter to the Supreme Court on the application of a party if the tribunal considers it appropriate.⁴⁰ No such application has been made to date. We note that where a matter is removed to the Supreme Court under section 83 of the ACAT Act, it is well established that the

³⁹ ACAT Act section 83(1)

⁴⁰ ACAT Act section 83(2)

Court is exercising the jurisdiction of the tribunal.⁴¹

71. The Supreme Court also has power pursuant to section 8(1) of the *Jurisdiction of Courts (Cross Vesting) Act 1993* (ACT) on the application of a party to a proceeding pending in the ACAT, to make an order removing the relevant proceeding to the Supreme Court where it appears to the Court either that the proceeding arises out of, or is related to, another proceeding pending in the Federal Court (among other courts) and, if an order is made under the section, there would be grounds on which the other proceedings could be transferred to the Supreme Court, or an order should be made under the section so that consideration can be given whether the relevant proceeding should be transferred to another court.
72. If our opinion is correct that only a court able to exercise the requisite federal jurisdiction can decide an application under section 235(1)(e), it is a matter for the parties to consider whether Mr Flynn's applications can and should be determined by the same court and to take whatever procedural steps they consider may be necessary for that to happen, or whether the proceedings in the Tribunal should abide the decision of a court of competent jurisdiction in relation to the section 235(1)(e) issues.
73. We are not persuaded that Westpac is entitled to an order dismissing Mr Flynn's applications merely because it has raised section 235(1)(e) as a potential bar to the proceedings without having sought and obtained appropriate relief in a court of competent jurisdiction. Nor can we disregard the potential operation of section 235(1)(e) and proceed to determine Mr Flynn's applications on the merits unless Westpac abandons its reliance on the section or fails to take necessary steps to have the tribunal proceedings permanently stayed by a court of competent jurisdiction. Faced with the jurisdictional bar raised by section 235(1)(e), it is also not appropriate for us to comment on the merits of Mr Flynn's claims or the questions of statutory construction that arose at hearing regarding the operation

⁴¹ *The Appellants v Council of the Law Society of the ACT and Another* [2011] ACTSC 133 at [16]–[17]; *The Legal Practitioner v Council of the Law Society of the ACT and Another* [2011] ACTSC 207 at [36]–[49]

of the relevant provisions of the Discrimination Act.

74. The appropriate order in those circumstances is to stay Mr Flynn's applications until further order with liberty to apply on 7 working days notice in writing.
75. It is a matter for the parties to determine what steps they should now take.

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 Senior Member M Orlov
 For and on behalf of the Tribunal

Date(s) of hearing:	21, 22 October 2021
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