# ACT CIVIL & ADMINISTRATIVE TRIBUNAL

**FLYNN v AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED ACN 005 357 522 (Discrimination) [2021] ACAT 50**

**DT 27/2020**

**Catchwords:** **DISCRIMINATION** – application to set aside a subpoena on grounds of relevance, oppression and 'fishing' – setting aside a subpoena in whole or in part – where a subpoena is an impermissible 'fishing exercise' – whether a document sought under subpoena has a legitimate forensic purpose – use of subpoenas in order to obtain documents that go to credibility

**Legislation cited:**
*ACT Civil and Administrative Tribunal Act 2008* ss 6, 7, 41
*Discrimination Act 1991* ss 7, 8, 57N
*Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)
*Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017* (Cth)

**Cases cited:**
*A v Z* [2007] NSWSC 899
*Begley v SA Police* (1995) 66 SASR 514
*Commonwealth v Human Rights and Equal Opportunity Commission* (1995) 63 FCR 74
*Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commissioner* [1997] FCA 1311
*Edgley v Federal Capital Press of Australia Pty Ltd* [1999] ACTSC 95
*FANDS (ACT) Pty Ltd v Commissioner for ACT Revenue* [2017] ACAT 65
*Finnie v Dalglish* [1982] 1 NSWLR 400
*Fried v National Australia Bank Limited* [2000] FCA 911
*Jacomb v Australian Municipal Administrative Clerical and Services Union* [2003] FCA 1143
*Ragg v Magistrates' Court of Victoria* [2008] VSC 1
*Re Porter; Re Transport Workers Union of Australia* [1989] FCA 342
*Sahore v Ahmad* [2021] ACTSC 30
*Taylor v Tracey O'Neill t/as O'Neil Marengo (a Firm)* [2012] NSWSC 626
*Waters v Public Transport Corporation* [1991] HCA 49

**Tribunal:** Presidential Member H Robinson
**Date of Orders:** 18 June 2021
**Date of Reasons for Decision:** 18 June 2021

**AUSTRALIAN CAPITAL TERRITORY )**
**CIVIL & ADMINISTRATIVE TRIBUNAL ) DT 27/2020**

BETWEEN:

**ALLAN FLYNN**
Applicant

AND:

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED ACN 005 357 522**
Respondent

**TRIBUNAL:** Presidential Member H Robinson

**DATE:** 18 June 2021

**ORDER**

The Tribunal orders that:

1. By consent:
   The respondent is to disclose any relevant ANZ Policy document from the period November 2017 to September 2019 addressing any policy concerned with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) legislative obligations and requirements insofar as they relate to currency traders.

2. The subpoena is set aside insofar as it requires the production of:
   (a) Category 5(b) and (c);
   (b) Category 6;
   (c) Category 7 (b) and (c);
   (d) Category 9(g), other than documents about the applicant's accounts the subject of these proceedings;
   (e) Category 11;
   (f) Category 13; and
   (g) Category 15.

……..
Presidential Member H Robinson

## REASONS FOR DECISION

### Background

1. By way of the substantive application, the applicant seeks compensation for discrimination in the provision of banking services by reason of his occupation or profession contrary to the *Discrimination Act 1991* (**Discrimination Act**). He claims that the respondent, a bank, refused to provide banking services to him because he is a cryptocurrency dealer or exchanger.

2. The applicant has sought to have issued a subpoena seeking various categories of document from the respondent. The respondent seeks to have various categories set aside on the grounds of relevance, oppression and that they are an impermissible 'fishing exercise'.

### Subpoenas in the tribunal

3. Section 41(1)(a) of the *ACT Civil and Administrative Tribunal Act 2008* (**ACAT Act**) provides that the tribunal may, by subpoena given to a person, require the person, at a stated time and place, to appear before the tribunal to produce a stated document or other thing relevant to the hearing.

4. Section 41(6) of the ACAT Act provides that, on application by a party or someone else having a sufficient interest, the tribunal may set aside a subpoena completely or partly.

5. A subpoena process is the only means by which a party to a proceeding in the tribunal may compel production of documents. The tribunal does not have a discovery process, nor do its rules provide for notices to produce. Because of this, the tribunal takes a somewhat more expansive approach to the use to subpoenas than would be the case in other forums.[1] For example, in the tribunal, parties routinely use subpoenas to obtain documents from each other, when in many other jurisdictions subpoenas are more commonly used to compel the production of documents by non-parties.

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[1] See *FANDS (ACT) Pty Ltd v Commissioner for ACT Revenue* [2017] ACAT 65 at [45] per President Neate AM

6. Nonetheless, the general principles enunciated in superior courts still apply. The respondent seeks to set aside the subpoenas on the grounds of relevance, 'fishing' and oppression.

7. The principles relating to 'relevance' and 'fishing' in relation to Court issued subpoenas were recently summarised by McWilliam AsJ in *Sahore v Ahmad*,[2] and I adopt her Honour's observations:

> *17. The test for relevance is less stringent than that which applies in the context of admissibility of evidence at trial: Gloucester Shire Council v Fitch Ratings [2016] FCA 587 (Gloucester Shire Council) per Wigney J at [23], in the context of a relatively recent discussion of the established authorities which have been applied in this Court (see [20] of these reasons below).*
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> *18. Informing the principle is the public interest in a fair trial, which should be conducted on the footing that all relevant documentary evidence is available, subject to other public interest considerations, such as legal professional privilege: see Grant v Downs [1976] HCA 63; (1976) 135 CLR 674 at 685, cited in Gloucester Shire Council at [24].*
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> *19. Accordingly, the approach a Court takes in determining whether the documents sought under subpoena have apparent relevance is broad rather than narrow. The Court should not too readily exclude the possibility that a document or class of documents might at the end of the day be relevant to a fact in issue in the litigation: Gloucester Shire Council at [23]. I have emphasised those words to highlight the low threshold for apparent relevance.*
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> *20. There are various descriptions among the authorities of the question for the Court. These include whether the documents could 'possibly throw light on the issues in the main case' (being the language used by Beaumont J in Trade Practices Commission v Arnotts [1989] FCA 248; (1989) 88 ALR 90 at 103), and whether it is 'on the cards' that the documents sought will materially assist the party at whose request the subpoena has been issued: Alister v R [1984] HCA 85; (1984) 154 CLR 404 (Alister) at 414; Portal Software v Bodsworth [2005] NSWSC 1115 (Portal Software) at [24]. See also DPP v Warren [2015] ACTSC 111 at [22] and Elmaraazey v Capital Lawyers Pty Ltd [2016] ACTSC 54 at [44], where Mossop AsJ (as his Honour then was) cited in addition Spencer Motors Pty Ltd v LNC Industries Ltd [1982] 2 NSWLR 921 at 926–927 and Re North Coast Transit Pty Limited [2013] NSWSC 1912 at [7]–[9].*
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> *21. A mere 'fishing' expedition is impermissible. That is, a party cannot seek documents in an attempt to discover if the issuing party has a case (hence the fishing metaphor of casting a wide net to see what is caught). It can only seek documents to support a case that has already been articulated:*

[2] [2021] ACTSC 30

> *Commissioner for Railways v Small [1938] NSWStRp 29; (1938) 38 SR (NSW) 564 at 575.*
>
> *22. The party issuing the subpoena bears at least a forensic onus of showing the relevance of the documents sought to the issues in the proceedings: see Portal Software at [29] and the cases there-cited.*[3]

8. Of particular importance is the broad approach taken to relevance at the production stage. To be producible under a subpoena it need only be 'on the cards' that the documents will materially assist a party's case.[4] Different issues arise when considering whether access should be granted and, even where access orders are made, the tribunal may ultimately take a different view as to the document's relevance or weight. Nonetheless, to permit the use of a subpoena to compel the production of large volumes of documentation that is unlikely to materially assist the resolution of the matter would be inconsistent with the objects of the ACAT Act to ensure access is simple and inexpensive,[5] and the principle that the procedures of the tribunal must be implemented in a way that facilitates the resolution of issues between the parties in a manner that is proportionate to the importance and complexity of the manner.[6]

9. 'Oppression' covers a broader range of objections, but in the context of this matter, the respondent's concerns primarily relate to the broad, unparticularised nature of some of the categories of documents sought. The respondent relied upon the observations of Justice Rath in *Finnie v Dalglish*:

> *The central question is whether these subpoenas are oppressive in the sense that they place on the persons to whom they are addressed an obligation to form a judgment as to which of their documents relate to issues between the parties. In substance each subpoena requires the person to whom it is addressed to form a judgment as to the relevance of his papers to a subject matter. The subject matter is not stated in terms of an issue between the parties, and indeed there are presently no issues joined between the parties except in the broadest and most imprecise terms. On the authorities I think it is apparent that a subpoena is oppressive as requiring discovery when it requires the person to whom it is addressed to produce documents described as relating to a matter of fact that is capable of being an issue in the proceedings. A subpoena requiring such production is as oppressive upon the person to whom it is addressed, whether a stranger or a party, as*

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[3] *Sahore v Ahmad* [2021] ACTSC 30
[4] *Alister v* R (1983) 154 CLR 404.
[5] See particularly *ACT Civil and Administrative Tribunal Act 2008* sections 6(b) and 7(a)(ii)
[6] *ACT Civil and Administrative Tribunal Act 2008* sections 7(a)(ii)

> *a subpoena which describes the documents in terms of a defined issue in the proceedings.*[7]

10. Even allowing for a somewhat more flexible approach by the tribunal, a subpoena that requires the recipient to form an opinion as to whether documents are relevant to issues in the case may well be oppressive.

11. Another area of objection raised by the respondent is that some of the categories of documents require the respondent to create a document. It is well established that a document that can only be "created by the application of computer expertise, possibly at considerable expense from outside consultants" is not "a document".[8] However, documents that require reformatting or disclosure of data or other retrievable information will be producible.

12. Turning to broader principles, the Tribunal has a statutory obligation to ensure that proceedings are as simple, quick, inexpensive and informal as is consistent with achieving justice,[9] and evidence gathering processes should not be permitted to undermine this. These considerations are also relevant to what may be considered 'oppressive' in the context of a tribunal proceeding.

13. Finally, it is important to emphasise that, just because a subpoena is not set aside at this stage, does not mean the applicant will gain access to the entirety of the produced document. There may be other grounds of objection to inspection of the documents. Moreover, not all documents produced on subpoena will be admissible in proceedings, as the Tribunal may take a different view on what is relevant to the proceedings.

**Background and scope of these proceedings**

14. In order to determine whether this subpoena, or some categories of it, should be set aside, it is necessary to consider some background to this matter, and what will be in issue at the hearing.

15. The applicant is engaged in trading cryptocurrencies, particularly Bitcoin. While the exact nature of the applicant's enterprise will be the subject of evidence at the

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[7] *Finnie v Dalglish* [1982] 1 NSWLR 400 page 407
[8] *Jacomb v Australian Municipal Administrative Clerical and Services Union* [2003] FCA 1143 at [5]
[9] *ACT Civil and Administrative Tribunal Act 2008* section 7

hearing, in broad terms, 'cryptocurrency' is a medium of exchange that is digital, encrypted, and decentralised. It may be contrasted to other forms of digital currency that are controlled by central banking systems. If a person wants to convert cryptocurrency into digital or traditional currency (rather than spending the cryptocurrency directly), that person will either need to trade their cryptocurrency for traditional cash, or they will need to use the services of at least one intermediary: a cryptocurrency exchange or a bank, or both.

16. The respondent is a bank providing the kind of banking and financial services the applicant requires to do this.

17. In 2017 the applicant made an application to open a personal bank account with the respondent and an account was duly opened in his name. Sometime later that year the account was closed by the respondent. The respondent opened a business banking account in July 2019, and that account was closed later that month too.

18. The applicant says that both accounts were closed because he was trading in cryptocurrencies. He says that this is his "profession, trade, occupation or calling", and is therefore a protected attribute under section 7(1)(q) of the Discrimination Act, and therefore the closure of his accounts was unfavourable treatment on the basis of his occupation, and is direct or indirect discrimination under that Act.

19. The respondent agrees that it closed the applicant's accounts. However, it says it closed the account in order to comply with Commonwealth government policies that are directed towards combating money laundering, and because of the risk profile attached to the operation of accounts for cryptocurrency trading (**the risk profile reason**). In particular, it references its obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) introduced by the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017* (Cth), which brought cryptocurrencies and tokens within the scope of Australia's anti-money laundering regime.

20. In the alternative, the respondent relies upon a defence available under section 57N of the Discrimination Act, which provides it is not 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 the profession, trade, occupation or calling is relevant to that transaction and the discrimination is reasonable in those circumstances" (**the reasonableness defence**).

21. The 'transaction' identified by the respondent for the purposes of section 57N would appear to be the establishment or closing of accounts.

22. This leaves two areas of dispute to which the documents may relate:

    (a) Whether the closure was *because* of the applicant's activities as a crypto-currency trader – this would appear to require the Tribunal, and the parties, to consider what the AML/CTF Act requires the respondent to do, and particularly whether it requires the respondent to close the applicant's accounts; and

    (b) In the event that the Tribunal is not satisfied that the respondent's actions were required by the AML/CTF Act, whether those actions were nonetheless both relevant to the 'transaction' between the parties, and reasonable in those circumstances.

23. On this basis, the primary question before the Tribunal is whether each and every category of document sought under this subpoena has a legitimate forensic purpose that goes to one of these questions.

24. The first question is a relatively straight forward test of causation – that is, does compliance with the AML/CTF Act framework require that the respondent take the steps that they did, including closure of the applicant's accounts? This will rely upon factual evidence.

25. The second is more complicated. The test of 'reasonableness' in section 57N is not well explored, although the concept of 'reasonableness' in relation to indirect discrimination in sections 8(2) and (3) of the Discrimination Act has been. Justice Miles of the ACT Supreme Court opined in *Edgley v Federal Capital Press of Australia Pty Ltd*[10] that:

> *71. It is to be observed that s57N is concerned with discrimination 'in relation to any transaction where profession, trade, occupation or calling is relevant to that transaction'. It is not clear exactly what*

[10] [1999] ACTSC 95

> *these words mean. However, central to their meaning is that there has to be a transaction between the alleged discriminator and the person allegedly discriminated against. In accordance with the broad approach necessary to be taken to anti- discrimination legislation, I think that the term "transaction" should not be read as a transaction completed between the appellant and the respondent…*
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> *72. However, otherwise, on the question of reasonableness, there is nothing, in my view, in the circumstances of the present case to distinguish what is reasonable for the purposes of s8(2) and s8(3) and what is reasonable for the purposes of s57N. Whilst it is true that s8(3) focuses on the disadvantage which results from the discriminatory condition and s57N focuses on discrimination in relation to a transaction, regard must be had in each case to all relevant circumstances. I cannot see how the relevant circumstances could differ in either case. The two sections, in my view, sufficiently overlap to the extent that the Tribunal, having found positively that the condition was reasonable for the purposes of s8(2), which it was entitled to find, the Tribunal could not have held consistently that the discrimination was unreasonable under s57N. It may have been otherwise if the Tribunal had found simply that the appellant had failed to discharge the onus under s8(2).*

26. While this is not the occasion to undertake an in-depth consideration of reasonableness for the purposes of the Discrimination Act, it is generally accepted that:

> *...the criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.*[11]

27. Ultimately, what is relevant will depend on the case, but generally includes the financial or economic and regulatory circumstances of respondent, including its ability to accommodate the needs of the aggrieved applicant.[12] In this case, the question will be whether ANZ's legislative requirements reasonably required it to take the actions it did in its transactions with the applicant.

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[11] *Re Secretary of the Department of Foreign Affairs and Trade v Helen Styles and Philip Arthur Harrison* [1989] FCA 342 per Bowen CJ, Pincus and Gummow JJ; approved in *Waters v Public Transport Corporation* [1991] HCA 49 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); 173 CLR 349 at pages 395-396, per Dawson and Toohey JJ; at 383, per Deane J; compare at page 365, per Mason CJ and Gaudron J

[12] *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commissioner* (1997) 80 FCR 78 per Sackville J at page 111

28. It is important to note that while subjective factors may be relevant, the test is primarily an objective one, applied after consideration of all the facts.[13]

**The applicant's arguments**

29. The applicant does not appear to cavil with the respondent's position that the subpoena involves some degree of 'fishing'. However, the applicant says that in light of the imbalance in information between the parties, the interests of justice require that the Tribunal take a flexible approach to the subpoena. He asks the Tribunal to "open the door to documents" in four areas as a means of redressing this imbalance by allowing him to obtain evidence of:

    (a) the policy and procedures that were "used against him" in relation to the AML/CTF Act and the human rights policies;

    (b) ANZ's other policy and procedures used against him and others;

    (c) how ANZ "mismanaged their risk" in relation to him and others in accordance with their policies; and

    (d) how ANZ overreached in relation to him and his family connections in relation to the application of that policy including in relation to their treatment of others.

30. Each of the seventeen categories of documents sought in the subpoena, the applicant submits, goes to strengthening his overall case for a breach of the Discrimination Act.

**A further note about the Discrimination Act in the Territory**

31. Before moving on to look at the relevant principles, it is necessary to explicitly state what is *not* in issue in this case.

32. As has been observed in numerous cases, the Territory's Discrimination Act differs from equal opportunity legislation in some other jurisdictions in that it does not require that an applicant establish that they have been treated unfavourably *in comparison* to a person who does not have the protected attribute.

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[13] *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commissioner* (1997) 80 FCR 78 per Sackville J at pages 110-111, citing *Commonwealth v Human Rights and Equal Opportunity Commission & Anor* (1995) 63 FCR 74 at pages 82-83 per Lockhart J

It requires that they be treated unfavourably *because* of the protected attribute. The distinction is quite important in this case because the basis upon which the applicant seeks access to many of the documents sought under subpoena is to show that he has been treated less favourably *when compared to* other persons. However, documents that are sought simply to establish a comparator are not relevant to a fact in issue in the proceedings.

33. The applicant also contends that documents that show the treatment or regulation of other industries may be relevant in preparing a response to the respondent's defence of reasonableness. In relation to this, the respondent's counsel stated that the respondent would seek to call evidence from an expert witness on what steps may be necessary to reduce the risk of criminal or other activity and to comply with the AML/CTF Act. It appears that the applicant is seeking evidence on how other entities in other similarly "high-risk' areas are governed to show this evidence is contrived (e.g. to put credibility in issue) or that there are alternative approaches that render the respondent's approach in this case unreasonable. At this point in the proceedings, this is a highly speculative exercise, but it provides context for the documents sought by the applicant.

**The categories of documents sought**

34. Having set out the principles, I will now turn to each of the categories.

**Category 1**

***A copy of this subpoena***

35. Category 1 is not in dispute.

**Category 2**

***Any and all of the respondent's non-public policy documents concerning digital currency and/or the provision of goods or services to digital currency businesses from 2017 to 2020 (except for the respondent's AML/CTF Policy), as authored by the respondent or their consultants, including but not limited to the following document types containing the information:***

*(a)* ***Board minutes***

*(b)* ***Reports, periodic reviews and/or recommendations***

*(c)* ***Reviews and/or recommendations anticipating and/or following implementation of the Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017***

***(d) Feasibility studies on the provisions of goods and services to digital currency businesses.***

36. It is not in dispute that policy documents, including non-public policy documents, that concern the provision of financial services to digital currency businesses are relevant to these proceedings. Accordingly, the respondent has agreed to the production of:

> *any relevant ANZ Policy document from the period November 2017 to September 2019 addressing any policy concerned with the AML-CTL legislative obligations and requirements insofar as they relate to currency traders.*

37. The applicant seeks a broader range of documents. This is based upon the assertion, by the respondent to the HRC, that its policy in relation to cryptocurrency exchangers "…was established in 2014." The applicant says that at that time the applicant had publicly stated that it did not do business with cryptocurrency exchanges because "they were unregulated", but for the present purposes it is claiming that it was complying with its obligations under the AML/CTF Act.

38. The applicant says:

> *iv. The documents in subpoena 2 are needed for the tribunal to weigh whether or not the respondent's discrimination against me was reasonable; we can't just take their mixed statements as being sufficient indication.*
>
> *v. The respondent cites in their reply to amended application only <u>one</u> clause from its non-public policy on digital currency exchange. The Tribunal needs to see the intent of the policy across the spectrum to determine the reasonableness of their discrimination against me.*
>
> *vi. If the documents show respondent did not follow their policy and conduct reasonable, well informed and timely reviews of the provision of services to digital currency exchanges before or after the introduction of legislation for the regulation of digital currency exchange in Australia, this would demonstrate their actions against me, which those factors influenced, were arbitrary and capricious - and assist to advance my case.*[14] [emphasis in original]

39. In other words, the applicant contends that the documents go to 'the intent of the policy' and hence the intent of the respondent. For example, in relation to the

[14] Applicant's reply summary to respondent's subpoena objections, page 4

Board minutes, the applicant says that the 'legitimate forensic purpose' of the board minutes is to identify the 'intent' of the policy, and in relation to the reports, periodic reviews and recommendations, the applicant says that documents go to whether there is a 'basis for the policy'. Hence, the forensic purpose of the documents sought under this category is to prove that the respondent had some other motivation, beyond compliance with the AML/CTF legislation, to develop the policies under which it denied services to the applicant. This goes to credibility.

40. It is well established that a court or tribunal should exercise caution in permitting the use of subpoenas in order to obtain documents that go only to credibility,[15] and not any other issue in dispute. It is certainly not appropriate to permit a subpoena to stand which does little more than trawl for documents which may be used to impugn the credit of a particular witness.[16]

41. The applicant does not appear to have any substantive evidence of an ulterior purpose. Hence, the subpoena appears 'fishing', in the sense of casting a net to see what is caught.[17] While this is permissible to a limited extent in the Tribunal, the current terms of the subpoena arguably amount more to trawling the ocean to see what he can find, rather than fishing in a pond, and hence is beyond the scope of a permissible use of a subpoena.

42. In saying that, however, I am not without some sympathy for the applicant's claim that there is a significant imbalance in the evidence and no other way for him to balance the situation. This is perhaps one consequence of the Tribunal's limited information gathering processes. However, prejudice to the applicant must be weighed against the cost and procedural ease of litigating in this forum.

43. Even putting the issue of fishing to one side for the moment, there is a more significant concern. This category is simply too broadly defined and drafted to operate as an effective order to produce documents. For example, the wording refers to 'policy documents', a term that is not well defined, but would generally

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[15] *Fried v National Australia Bank Limited* [2000] FCA 911 per Weinberg J at [27]
[16] *Fried v National Australia Bank Limited* [2000] FCA 911 per Weinberg J at [29]
[17] See *Sahore v Ahmad* [2021] ACTSC 30 at [21]

be taken to mean documents relating to "a definite course of action adopted as expedient or from other considerations: *a business policy*".[18] It then goes on to 'include' a variety of documents, including board minutes, reviews and feasibility studies, which are not documents that would readily be described as 'policy documents' so much as internal working documents. The result is that subparagraphs (a) through (d) operate to broaden the scope of the documents being sought rather than narrow or define them. This means that in responding to the subpoena, the respondent is being asked to exercise considerable judgement and discretion in determining what falls within the scope of the subpoena. This is impermissible and oppressive.

44. The Tribunal cannot rewrite the subpoena to clarify it. This category must be set aside.

45. It seems likely that many of the more relevant documents sought will fall within the scope of the documents the respondent has agreed to disclose. In particular, it appears that policy documents relating to the provision of financial services to digital currency exchanges would fall within the scope of the documents that the respondent has agreed to produce as set out at paragraph 35 above. The applicant may of course seek to refine the documents sought.

**Category 3**

***Any and all respondent's public policy statements concerning digital currency and/or the provision of goods or services to digital currency businesses from 2014 to 2020, including by not limited to press releases and statements including social media posts and recordings.***

46. In support of this category, the applicant says:

> *In 2018 the ABC quoted the respondent saying it prohibited business with digital currency exchangers because they were unregulated. The respondent knew full well at the time that legislation to regulate digital currency in Australia had passed parliament the year before and it knew that very legislation was going to be implemented only 2 months later. We know because ANZ had spent 2 years prior commenting and advising legislators on the formation of Australia's AML CTF Amendment Act as part of extensive industry consultation.*

[18] Macquarie Dictionary (7th ed, 2017) 'policy' (def 1)

> *When considering reasonableness the tribunal needs to compare ANZ's reasons given in response to this application against reasons given in public statements made previously.*[19]

47. Again, I understand the applicant to be arguing that these documents go to the respondent's 'true' motives – in other words, they again go to credibility. The cautious approach outlined above should be applied.

48. The documents sought are not of a kind that impugn the credibility of a particular witness. Rather, they go to the institutional intent of the respondent. While it seems to be drawing a long bow to say that the respondent's policy position in relation to proposed legislation prior to 2017, and particularly its policy position in relation to proposed legislative change, are relevant to its actions under the present AML/CTF legislative, it is conceivable that they go to the applicant's position that there are other reasons, beyond legislative compliance or risk management, and this may go to reasonableness in the sense of motivation or credibility.

49. In this regard, I note the observation of Justice Brereton in *A v Z*:

> *I would approach the question primarily on the basis of asking whether, on the one hand, the documents called for are apparently relevant or capable of providing a legitimate basis for cross-examination, in which case there is a legitimate purpose for the issue of subpoena, or whether on the other, they are manifestly irrelevant and incapable of touching matters of credit, in which case the subpoena would be an abuse of process.*[20]

50. While I have some doubts about the relevance of the evidence sought, I am satisfied that some of the documents could provide some basis for cross examination, and hence this is not a fishing exercise.

51. The difficulty is that the applicant has, again, worded the subpoena so broadly that the scope is oppressive. The use of the 'including' meaning that any statement concerning digital businesses would need to be identified and disclosed. This is simply too broad.

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[19] Applicant's reply summary to respondent's subpoena objections, page 4

[20] *A v Z* [2007] NSWSC 899 at [19] per Brereton J; see also *Taylor v Tracey O'Neill t/as O'Neil Marengo (a Firm)* [2012] NSWSC 626 at [23] per McCallum J

52. Moreover, to the extent that these documents are public, the applicant should be able to obtain them without the use of a subpoena.

53. Relevant policy documents, whether public or private, will be required to be disclosed under the revised category 2. Otherwise, this category is disallowed as being oppressive.

**Category 4**

***Any and all respondent's record of any training guidelines in any form regarding any and all of the respondent's polices and procedures relating to the investigation of a customer's bank account to include by not limited to:***

- ***a. Training manuals and policy guidelines for how to open a new client account;***
- ***b. Training manuals and policy guidelines for how to conduct due diligence prior to opening a new client account***
- ***c. Training manuals and policy guidelines regarding a suspicious or flagged account;***
- ***d. Training manuals and policy guidelines on how or when to report a suspected fraudulent banking transaction;***
- ***e. Training manuals and policy guidelines of type and detail of informing a customer of the investigation***
- ***f. Training manuals and policy guidelines regarding how and when to conclude an investigation***
- ***g. Training manuals and policy guidelines of an appeals process for the customer***

54. This category would seem to cover two distinct sets of documents – policy guidelines that establish or explain the policies implemented by the respondent, and training manuals, which train staff on their implementation.

55. Policy guidelines that relate to management of cryptocurrency accounts will fall within the scope of agreed disclosure discussed in category 2. Additionally, having had regard to the applicant's submissions, I am satisfied that the following policies may be relevant to a fact in issue:

(a) Policy guidelines for how to conduct due diligence prior to opening a new client account.

(b) Policy guidelines regarding a suspicious or flagged account.

(c) Policy guidelines on how or when to report a suspected fraudulent banking transaction.

(d) Policy guidelines of type and detail of informing a customer of investigation.

(e) Policy guidelines regarding how and when to conclude an investigation.

(f) Policy guidelines of an appeals process for the customer.

56. The applicant says that the training manuals are materially relevant to whether the respondent followed its internal policies in relation to the onboarding and management of his account, and acted in good faith. The applicant also submitted that ANZ has a regulatory duty and a corporate commitment to ensure its staff are trained and informed, and that it would have relied upon these documents when undertaking any investigation. The implication appears to be that the Tribunal should consider these documents when determining whether the processes adopted by the respondent were reasonable. I am not satisfied that these issues are relevant to questions under the Discrimination Act.

**Category** 5

***Respondent's compiled policy data indicating 'black list' and 'white list' categories including:***

***(a) List of any and all business types and/or customer types, activities or sectors prohibited by the respondent from the provision of goods and/or services***

***(b) List of any and all business and/or customer types, activities or sectors considered by the respondent as high risk***

***(c) List of any and all business and/or customer types activity or sectors considered by the respondent as high risk but yet which the respondent provides goods or services to.***

57. This category refers to "black" and "white" lists. The respondent says this is not a nomenclature used by ANZ. However, it is reasonably clear that what the applicant seeks is documents that state which industries or occupations are marked for differential treatment or 'high risk'. The subpoena is not limited to any type of 'risk'.

58. It is unclear to the Tribunal whether the respondent has such a document, or whether this information can be readily extracted from its computer system. There

was insufficient evidence before me to draw any conclusions about this. In the absence of such evidence, I am not prepared to set the subpoena aside on this basis.

59. The applicant contends that these documents will go to the 'reasonableness' of the respondent's actions, and his submissions suggest that he will invite the Tribunal to consider the appropriateness of the respondent's approach to risk management by way of comparison with the approach taken to other industries. It is difficult, on the material available, to assess the relevance of this, although it is foreseeable that it may go to a fact in issue.

60. I will allow category (a). It is relatively finite and does not require any assessment of what may fall within the scope of it.

61. I will set aside categories (b) and (c), and the terminology used – "high risk" – is too vague, and it requires the respondent to exercise an unreasonable degree of judgement in assessing what may fall within the description of the documents. This makes it oppressive.

**Category 6**

***Respondent's compiled computer data, identifying entities as AUSTRAC registered or unregistered, showing:***

***a.*** ***Any and all digital currency exchanges and/or digital currency businesses the respondent provides banking services to, including for each, the date and period serviced.***

***b.*** ***From this list 7 of top 11 Australian digital currency exchanges, any all those the respondent has provided banking services to, including the date and period serviced.***

***c.*** ***Any and all digital currency exchanges and/or digital currency businesses the respondent has de-banked or given notice of de-banking to, but subsequently reinstated their banking services to on appeal, from 2017 to 2020***

***d.*** ***An anonymised list showing any and all digital currency exchanges and/or digital currency businesses the respondent has de-banked since forming its discriminatory policy against digital currency business including for each, the date, period serviced and AU$turnover***

***e.*** ***An anonymised list showing any and all individuals identified as purchasers of digital currency the respondent has de-banked since forming its discriminatory policy against digital currency including for each, the date, period serviced and AU$ turnover***

62. The applicant says that:

> *…if this data shows the respondent has treated me less favourably in the provision of services than other cryptocurrency traders or account holders whether few or many, that would demonstrate discrimination against me and would strengthen my case.*[21]

63. The Discrimination Act does not call for a comparator, and there is no need for the applicant to show that he was treated "less favourably" than another person.

64. Evidence about the bank's provision of services to other cryptocurrency businesses may be relevant, but it is difficult to see how it could strengthen the applicant's case, other than perhaps demonstrating a differentially unfavourable treatment of Bitcoin. There is nothing to suggest that the respondent intends to argue that there is something distinctive about the applicant, as compared to other cryptocurrency traders. The subpoena process should not be used to 'fish' for evidence of the respondent's defence if it does not raise it.[22]

65. No legitimate forensic purpose has been identified in relation to these documents and the category is set aside.

**Category** 7

***Any and all of the respondent's AML/CTF program concerning digital currency and/or provision of services to digital currency business dated 2017 to 2020 including but not limited to:***

***a. Due diligence procedures to onboard cryptocurrency business***

***b. Due diligence procedures for business and/or customer types or sectors the respondent considers as high risk but yet provides goods and/or services to***

***c. Detection method/s used to identify the presence of digital currency transactions***

66. Policy documents relating to the AML/CTF investigation or enforcement process and cryptocurrency assessments must be disclosed under category 2. Otherwise, this category appears to be seeking additional documents relating to due diligence procedures and detection measures for 'high risk' businesses more generally, as well as methods for identifying other cryptocurrency exchanges. The respondent's due diligence procedures, other than as they relate to the applicant

[21] Applicant's reply summary to respondent's subpoena objections, page 7

[22] See R*agg v Magistrates' Court of Victoria* [2008] VSC 1; see also *Begley v SA Police* (1995) 66 SASR 514

and his business, are not relevant to any contested issue, and there is nothing before the Tribunal to suggest that detection methods are either. Subcategories (b) and (c) are set aside on the basis that there is no apparent relevance to these proceedings.

**Category 8**

***Any and all AML/CTF risk assessments authored by respondent's internal officers or their consultants concerning digital currency and/or the provision of goods or services to the digital currency business sector***

67. The purpose of these documents is to identify whether the applicant's business presents the 'risk' contended for in the respondent's response. In support of this ground, the applicant argues that:

> *The respondent refers to 'risk' as being the reason it does not bank digital currency businesses but provides no evidence, but the tribunal needs to determine by all the reasons, why 'risk' is a reasonable exclusion from discrimination.*
>
> *If the respondent's risk intentions were inadequately reflected in the policy and procedures used to discriminate against me that would strengthen my allegation of unlawful discrimination.*[23]

68. It appears 'on the cards' that these may be relevant, at least as far as they relate to the cryptocurrency business sector generally. The documents may raise other concerns that can be the subject of objections to orders being made for access to the documents. This objection is disallowed.

**Category 9**

***Any and all reports, emails, letters, memo's, messages, audio-visual or audio recordings of conversations, file notes, including handwritten or typed relating to the applicant's bank accounts, or the applicant's transactions with respondent's customers, dated from August 2017 to December 2019. To include but not limited to:***

- ***a. Request for account applications***
- ***b. Reviews of request for account applications***
- ***c. Customer onboarding due diligence reports***
- ***d. Ongoing Customer Due Diligence OCDD and Enhanced Customer Due Diligence ECDD Reports as part of AML/CTF program***
- ***e. Any and all types of records of flagged transactions***

[23] Applicant's reply summary to respondent's subpoena objections, page 9

***f. Any and all types of investigations including for cryptocurrency fraud***

***g. Any and all recordings of phone conversations between respondent's representatives, or with other financial institutions regarding transactions with Allan Flynn to or from, including but not limited to:***

***a) the applicant's and respondent's client, Araceli Marosvary, from October to December 2019, and***

***b) Peoples Choice Credit Union from 28 October to 1 November 2019***

69. These documents relate to the applicant and are generally of a kind that may have been disclosed as part of the discovery process in another forum.

70. The applicant seeks these documents for a variety of reasons, but primary because he believes that they will provide "direct evidence" of the discrimination. He also believes the documents go to credibility and whether the respondent's actions were in 'good faith'. It is not immediately clear how the documents would go to good faith, or why that would be relevant, but the correspondence in relation to the closure of the applicant's accounts, as well as flagged transactions may well be relevant to showing the true reason for the closure of his accounts.

71. I am concerned that the words "relating to" are too broad as many extraneous documents could have some relationship to the application, even if only by applying in a general sense to him. Still, a common sense interpretation of the wording is that it captures documents that are about the applicant's accounts only.

72. Subcategory (g) is too broad and could presumably take a considerable amount of time and expense for the respondent to review all such communications and determine whether they "relate" to the applicant. This is oppressive. Subcategory (g) is set aside as oppressive.

**Category 10**

***Recordings of phone conversations between Allan Flynn [mobile number redacted] and respondent's representatives:***

***a. Savannah Sobh on or about 12 July 2019; and***

***b. Savannah Sobh between 31 July and 2nd August 2019; and***

***c. Augusto Izzo on 22 July 2019***

73. The applicant alleges that the substance of the conversations indicates that the respondent knew and understood the purposes of the accounts was for

cryptocurrency exchange. ANZ has suggested that the recordings of these conversations don't exist, and if that is the case the documents do not need to be produced. The objection is disallowed.

**Category 11**

***List of any and all assets owned by the Respondent either directly or indirectly, in the majority or as a "significant shareholder" of or in the minority, including digital currency and/or businesses involved in the provision of digital currency services from 2017 to 2020, including but not limited to:***

***a. Cryptocurrency,***

***b. Registered or licenced digital currency exchanges,***

***c. Financial institutions providing digital currency services.***

74. The applicant seeks these documents to establish the 'real' reason for the unfavourable treatment, being that the respondent may have some form of commercial interest in rival businesses that has motivated it to act as it did. The respondent's reasons for the unfavourable treatment are a fact in issue in the proceeding, so there is a legitimate forensic purpose in obtaining the documents where they have the potential to evidence a real conflict.

75. However, the category, as worded, is simply too wide and is oppressive. The inclusion of direct, indirect, majority, significant and minority shareholding and "significant shareholder"[24] is also confusing. Is the applicant seeking a list of every assets in which the respondent has a 'indirect interest', no matter how minor, that may be involved in cryptocurrency? This would require a degree of discretion and judgement on the respondent's part that is unreasonably oppressive.

76. The Tribunal is not able to rewrite the subpoena in a way that ensures clarity. Again, the applicant may seek a further subpoena that more clearly identifies what documents are sought and the way in which they can be identified. He will need to consider the identification and particularisation of the documents that he is seeking.

[24] Noting that this term has no defined legal meaning in Australia.

**Category 12**

***Any and all pending or closed applications and/or submissions by or on behalf of the respondent to authorities to operate, custody or deal in cryptocurrency.***

77. The applicant says that the respondent is itself investing in "distributed ledger" technology and providing services to other entities.

78. It appears that these documents go to credit or perhaps to supporting the applicant's contention that the respondent has an ulterior or anti-competitive motive for closing his accounts. The principles in relation to credit are set out above. On the case as pleaded by the applicant, it is on the cards that these are relevant. The objection is dismissed.

**Category 13**

***Any and all printed or digitally published directives or guidance to the respondent's staff regarding private purpose of digital currency.***

79. The applicant agrees that this category should be set aside.

**Category 14**

***Any and all submissions, proposals and/or comments made by the respondent either independently or as part of a roundtable or industry group to Australian policy makers regarding the conceiving, drafting and/or implementation of regulation of digital currency prior to the enaction of the Amendment Act***

80. In relation to this ground, the applicant says:

> *If these documents show the respondent favoured one policy in its comments and recommendations and then implemented a different one that would demonstrate inconsistency and unreasonableness and could be used to impeach them.*[25]

81. Again, this would appear to go to credibility, although in this case the link is tenuous. The respondent's position in relation to a proposed policy, and the submissions it made in relation to that policy, does not appear to have any adjectival relevance to the proceedings, which primarily concern how the legislation as enacted, has been applied by the respondent to the applicant. The category is set aside.

[25] Applicant's reply summary to respondent's subpoena objections, page 11

**Category 15**

***Any and all Respondent's correspondence to/and from and/or submissions or statements of the ACCC regarding their 2015/2016 inquiry include bank conduct against digital currency businesses.***

82. The applicant says that these documents are relevant to:

    (a) determine if the respondent's discrimination against the applicant was part of a wider pattern of discrimination, thus providing 'similar fact evidence';

    (b) determine if the discrimination was reasonable; and

    (c) ascertain the respondent's actions against him were in good faith compliance with the HR Act and Rules.

83. It is my understanding that the 2015/2016 inquiry into the arrangements between banks and digital currency businesses raised some issues similar to those in the current proceedings. However, the focus of the enquiry under the Discrimination Act is whether the applicant was treated unfavourably because of a protected attribute, not the broader policy implications of the digital currency regulation. There is no need for a comparator or a broader analysis. Similar fact evidence would be unlikely to assist with that question, at least at the liability stage. No legitimate forensic purpose has been identified. The category is set aside.

**Category 16**

***Any and all reviews, recommendations, and/or policy guidance from the Respondent's human rights officer or representative party including external human rights consultants concerning discrimination in the area of withholding or services from those with the protected attribute of "profession, trade, occupation or calling"***

84. The applicant cites three bases for these documents:

    (a) Determine if the respondent's policy applied against him was in accordance with its human rights policy.

    (b) Determine if the discrimination was reasonable.

    (c) Ascertain the respondent's actions against him were in good faith compliance with the HR Act and Rules.

85. The first and last categories are not relevant to the matter before the Tribunal, at least at the liability stage. The only question is whether these documents would be relevant to the defence of 'reasonableness'. The advice of the respondent's

human right's officer or department may be relevant to questions of reasonableness, particularly if alternatives were considered. The absence of any time limitation is potentially oppressive, but the scope of the category is likely to be limited by the fact that the ground of profession, trade, occupation or calling exists only in the ACT. There may well be grounds upon which the respondent may claim privilege once the documents are produced, but that is not an issue at this stage of the proceedings. The objection is dismissed.

**Category 17**

***Any and all reports, reviews and/or recommendations by the Respondent's human rights officer or other representatives, or external human rights consultants addressing alleged discrimination by the respondent against digital currency businesses including but not limited to:***

***a. That described in the Australian Small Business and Family Enterprise Office Ombudsmans ASBFEO Covid-19 Recovery Plan May 2020***

***b. Those described in the media;***

***c. Those at the subject of the 2015/1016 ACCC inquiry into alleged discrimination against digital currency business.***

86. The applicant agreed to set aside this category.

……..
Presidential Member H Robinson

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| **Date(s) of hearing** | 3 March 2021 |
| **Applicant:** | In person |
| **Counsel for the Respondent:** | Mr N Harrington |
| **Solicitors for the Respondent:** | Ms K Blundo, Minter Ellison |