SUPREME COURT OF QUEENSLAND

CITATION:	*Bestjet Travel Pty Ltd v The Australian Federation of Travel Agents Ltd* [2016] QSC 81
PARTIES:	**BESTJET TRAVEL PTY LTD (ACN 155 965 601)** (applicant) **v** **THE AUSTRALIAN FEDERATION OF TRAVEL AGENTS LTD (ACN 001 444 275)** (respondent)
FILE NO:	2998 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Queensland
DELIVERED ON:	12 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	31 March, 5 April 2016
JUDGE:	Applegarth J
ORDER:	**1. The application for an interlocutory injunction is refused.** **2. The costs of and incidental to the application for an interlocutory injunction are reserved.**
CATCHWORDS:	EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – PRIMA FACIE CASE - BALANCE OF CONVENIENCE – EFFECT ON THIRD PARTIES – UNDERTAKING AS TO DAMAGES – where the respondent, an industry body for travel agents, refused to renew the applicant's accreditation on grounds of an eligibility rule – where decision was based on a finding that a director of a company that had been placed into liquidation was a "close associate" of the applicant – where the applicant seeks to restrain respondent from acting on or publishing that decision – where applicant alleges the respondent breached rules of procedural fairness, breached contract in the form of the charter governing accreditation, engaged in oppressive conduct and seeks to enforce an unreasonable restraint of trade – whether applicant has a prima facie case – whether the balance of convenience, including the potential of an interlocutory injunction to

disadvantage third party competitors, favours the grant or refusal of interlocutory relief

Corporations Act 2001 (Cth), s 233, s 234(c)

AAP Telecommunications Pty Ltd v Telstra Corporation Ltd (1997) 38 IPR 650 cited
Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd (1979) 146 CLR 249 cited
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 cited
Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57 applied
Australian Football League v Carlton Football Club Ltd [1998] 2 VR 546 considered
Beecham Group v Bristol Laboratories Pty Ltd (1968) 118 CLR 618 applied
Buckley v Tutty (1971) 125 CLR 353 cited
Capital Networks Pty Ltd v .au Domain Administration Ltd [2004] FCA 1030 cited
Commonwealth of Australia v Sanofi [2015] FCAFC 172
Dickason v Edwards (1910) 10 CLR 243 cited
D'Souza v Royal Australian and New Zealand College of Psychiatrists (2005) 12 VR 42 cited
McCloy v New South Wales (2015) 325 ALR 15 cited
Miller v Jackson [1977] 2 QB 966 cited
Minister for Immigration and Citizenship Affairs v Li (2013) 249 CLR 332 considered
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611 cited
Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (1998) 195 CLR 1 cited
Protiviti Inc v Probiti Pty Ltd [2005] FCA 1114 cited
Re New South Wales Bar Association (2014) 315 ALR 146 followed
Seven Network Limited v News Limited [2007] FCA 1062 cited
Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health (1989) 89 ALR 366 cited
Warner-Lambert Co Llc v Apotex Pty Ltd (2014) 311 ALR 632 cited
Wood v Sutcliffe (1851) 2 Sim (NS) 163 cited

COUNSEL: K A Barlow QC with B O'Brien for the applicant
R J Anderson QC for the respondent

SOLICITORS: Tucker & Cowen for the applicant
Bennett & Philp Lawyers as town agents for Smythe Wozniak Lawyers for the respondent

[1] The applicant, Bestjet, operates an online travel agent business. The respondent, AFTA, is a peak industry body for thousands of travel agents in Australia. It is a company, limited by guarantee, and membership of it is voluntary. AFTA operates an accreditation scheme known as the AFTA Travel Accreditation Scheme ("ATAS"). The ATAS system of accreditation is a function of deregulation of the travel market. One aim of ATAS is to set minimum standards of behaviour to which all accredited agents are to be held. ATAS also establishes a process to assist consumers and accredited agents to resolve any complaints or disputes. ATAS commenced on 1 July 2014.

[2] Bestjet commenced its business in 2012. It obtained ATAS accreditation on 11 July 2014. On 30 April 2015 it applied to renew its accreditation. However, a series of decisions, culminating in an appeal decision dated 18 March 2016, has resulted in a decision to not renew Bestjet's accreditation. If this decision stands, then Bestjet will lose the benefits of accreditation and is likely to lose customers.

[3] The decision dated 18 March 2016 was communicated to Bestjet on Monday, 21 March 2016. Bestjet sought an urgent interim injunction. AFTA was given short notice of the urgent hearing which, in effect, was conducted on an ex parte basis. An interim injunction was granted. Bestjet now seeks an interlocutory injunction until the hearing and determination of this proceeding and directions for the progress of the matter. It seeks an order to restrain AFTA from acting on or publishing its decision to refuse to renew Bestjet's accreditation.

[4] Bestjet contends that AFTA's conduct leading to and including its impugned decision (including an alleged breach of natural justice in failing to give Bestjet a proper opportunity to be heard in an appeal process) constitutes a breach of contract, oppressive conduct, and an unlawful restraint of trade. AFTA contests these allegations and opposes the grant of an interlocutory injunction. The parties make competing arguments about whether or not the balance of convenience favours the granting of an interlocutory injunction in the kind of form proposed by Bestjet.

[5] The essential issue is whether Bestjet has established a "prima facie case" of sufficient merit to justify the grant of an interlocutory injunction. This issue requires consideration of the strength of its proposed causes of action and their probability of success at trial. It also requires consideration of the risk of doing an injustice by granting or withholding interlocutory relief. One factor is whether an award of damages in the event Bestjet succeeds at trial is likely to be an adequate remedy. Another is whether, in the event that Bestjet does not succeed at trial, the opportunity to seek an award of compensation pursuant to the usual undertaking as to damages is likely to be an adequate remedy for parties whose interests will be affected by the grant of interlocutory relief.

Background

[6] Bestjet's sole director, secretary and shareholder is Rachel James. Ms James is married to Michael James. He was a director of Strategic Airlines Pty Ltd and other related companies. It traded as Air Australia until its corporate collapse in early 2012. It collapsed with debts of almost $100 million. Mr James was banned by the Australian Securities and Investment Commission from managing a company for three years.

[7] The precise services which Mr James has provided to Bestjet from time to time are unclear. Ms James says that he was employed between 1 November 2013 and 2 December 2015 as a "Fares and Pricing Analyst", was responsible in that role for monitoring competitors' pricing, reported to Bestjet's general manager and "in that role" did not have any role in the management of Bestjet. She says that during the period from 1 November 2013 to 2 December 2015 Mr James did not have "a senior management position and did not have any role in the day to day management of Bestjet". However, there is some doubt about at least the last assertion because evidence placed before me by AFTA (not apparently disclosed to AFTA by Bestjet) indicates that at least in January 2014 Mr James was writing letters on Bestjet's behalf in his position as "Commercial Manager". A letter dated 15 January 2014, which has nothing to do with monitoring competitors' pricing or scheduling, was written to another travel group purporting to remove Bestjet from a particular "Umbrella Agreement".

[8] In more recent times, namely in January 2016, Mr James, as well as Ms James, were copied into email correspondence by a Bestjet employee about resolution of a consumer complaint. Again, this evidence was not placed before the AFTA Sub-committee which decided the appeal. Instead, Ms James' statutory declaration dated 7 March 2016 simply said that since ceasing his employment Mr James "has not been employed by or contracted to Bestjet in any capacity".

[9] Based upon the evidence before it (which did not include all of the information and documents requested by it) AFTA concluded on 18 March 2016 that Mr James was and is a "close associate" of Bestjet within the meaning of cl 2.5 of the Eligibility Criteria in the Charter. In that context, it found that Mr James may be able to exercise an influence over the conduct of Bestjet's business. It also concluded that Mr James may be in a position to have authority over Bestjet. As a result, Bestjet did not satisfy the applicable eligibility criteria.

[10] Shortly stated, the eligibility criteria require applicants for and participants in ATAS to at all times satisfy all of the eligibility criteria to become or remain an ATAS participant. One criterion is that an applicant must be a fit and proper person to become, and remain, a "Participant". Clause 2.5(d)(ii) of the Charter, as revised in June 2015, provides, in effect, that an applicant will not be a fit and proper person to be a participant if a "close associate" (as defined) who has authority or may be in a position to have authority over the applicant has been a director, or was concerned in the management, of a company which in the last ten years has had an administrator or liquidator appointed to it. There is no dispute that Mr James was the director of a company that had an administrator appointed to it in February 2012 and that Strategic Airlines went into liquidation on 23 March 2012, following a resolution that it be wound up.

[11] AFTA is governed by a constitution which relevantly provides that full members of AFTA must be accredited under ATAS. ATAS, which commenced on 1 July 2014, is governed by a charter made under the Constitution. As outlined below, the original Charter has been amended on two occasions in the last ten months.

[12] The commencement of ATAS followed the cessation of a licensing regime under various State laws. Bestjet formerly held a licence as a travel agent pursuant to the *Travel Agents*

Act 1988 (Qld) (now repealed) before ATAS was introduced. The ATAS accreditation year runs from 1 July to 30 June.

[13] On 11 July 2014, Bestjet obtained ATAS accreditation, which was due to expire on 30 June 2015. On 30 April 2015, Bestjet applied to renew its accreditation.

[14] The Charter contains a decision making and appeal process for applications for accreditation (including renewals), whereby:

(a) the ATAS compliance manager makes the initial decision as to whether an application for accreditation will be accepted (cl 2.2(c));

(b) the first avenue of appeal from the initial decision is to the ATAS general manager (cl 2.4(a)); and

(c) the final avenue of appeal is to a Sub-Committee of the board of directors of AFTA (cl 2.4(d)).

The appeal decision is "final and binding on the Participant" (cl 5.9(f)).

[15] On 17 July 2015, the Board of AFTA considered a recommendation to it by the Compliance Manager that it approve his proposed refusal to renew Bestjet's accreditation. The Board approved that proposal.

[16] On 3 August 2015 the Compliance Manager informed Bestjet that he had declined to renew its accreditation. On 2 September 2015, Bestjet appealed that decision to the General Manager. On 1 October 2015, the General Manager made a decision dismissing the appeal and declined to renew Bestjet's accreditation. On 16 October 2015, Bestjet appealed that decision to a Sub-Committee.

[17] Prior to the determination of that appeal, the Sub-Committee was reconstituted on two occasions following Bestjet's objections to its proposed membership on the basis of a reasonable apprehension of bias. For example, the first Sub-Committee to be appointed included directors who had attended the meeting in July 2015 where the board of directors of AFTA resolved to approve the Compliance Manager's recommendation to decline the application.

[18] On 26 February 2016, an appeal was heard by a two person Sub-Committee and adjourned to allow Bestjet to provide certain information and for Bestjet's counsel to make further submissions based on it.

[19] In response to the Sub-Committee's request for further information, Bestjet provided a statutory declaration of Ms James and further written submissions on 7 March and 11 March 2016 respectively. Bestjet did not provide some of the information, including documents, which the Sub-Committee requested in order to determine Bestjet's argument that Mr James could no longer be a close associate. Its further submissions stated that evidence about Mr James' former employment by Bestjet was irrelevant. Those

submissions addressed the additional evidence which it relied upon to the effect that Mr James ceased employment with Bestjet on 2 December 2015, and Ms James' evidence that since ceasing his employment "Mr James has not been employed by or contracted to Bestjet in any capacity". Her statutory declaration stated that decisions taken about Bestjet's management "are mine (and mine alone) and I am the one who is responsible for those decisions." In reliance on that evidence, Bestjet's written submissions were that Mr James is not a "close associate" of Bestjet and, even if he were, he did not have any authority over Bestjet.

[20] On 8 March 2016 AFTA's solicitors indicated that the Sub-Committee would reserve making a final decision on whether a further "in person meeting" was required and would advise after it had received written submissions from Bestjet's counsel. Bestjet's written submissions, prepared by its counsel and dated 10 March 2016, asked the Sub-Committee to relist the appeal for a further hearing at which Bestjet proposed to make further submissions based on its further written submissions. On 11 March 2016 Bestjet's solicitors enclosed those further submissions and stated: "We look forward to hearing from you as to the time for the resumed meeting with the Sub-Committee for the hearing of the appeal." Of course, the Sub-Committee had not said that there would be a resumed meeting, only that it would advise after it had received the written submissions.

[21] On Friday, 18 March 2016, Bestjet requested that AFTA provide details of the resumed hearing of the appeal. On Sunday, 20 March 2016 and in response to Bestjet's request, AFTA's solicitors advised that the Sub-Committee would not reconvene the hearing of the appeal. The Sub-Committee advised that it had found the further written submissions comprehensive and of assistance, and that it considered that it did not need to reconvene.

[22] On 21 March 2016:

(a) Bestjet was notified at 10.03am that the appeal had been dismissed and the application for renewal of its accreditation was declined;

(b) AFTA published a notice on its website about the decision;

(c) AFTA then asserted that Bestjet's membership of AFTA had terminated as a consequence of its lack of accreditation;

(d) Dalton J granted an interim injunction restraining AFTA from acting on and publishing information about the appeal decision.

Amendments to the Charter

[23] At the time that Bestjet applied for its accreditation in July 2014 and submitted the application for renewal of its accreditation in April 2015, revision 1 of the Charter published on 6 May 2014 was in force ("Revision 1 of the Charter").

[24] On 3 June 2015 (i.e. after Bestjet's application for renewal was submitted but before the decision was made) AFTA's Board resolved to amend Revision 1 of the Charter and to replace it with a revised version which was published on 9 June 2015 ("Revision 2 of the Charter").

[25] In late December 2015 the Board resolved to amend Revision 2 of the Charter and to replace it with a version which took effect on 1 January 2016 ("Revision 3 of the Charter").

[26] The relevant amendments to the Charter for the purposes of this matter concern the eligibility requirements in clause 2.5(d) for accreditation under ATAS. AFTA has contended that Bestjet does not meet the eligibility requirements in clause 2.5(d), as introduced by Revision 2. No other basis for ineligibility for accreditation has been raised.

The provisions applied in declining renewal of Bestjet's accreditation

[27] AFTA assessed Bestjet's application in accordance with Revision 2 of the Charter, rather than Revision 1 which was in force at the time the application was made.

[28] Relevantly, clause 2.5(d)(ii) of Revision 2 of the Charter provided:

> *"**2.5 Eligibility Criteria***
>
> *Applicants for and participants in **ATAS** must **at all times** satisfy **all** of the following eligibility criteria **to become, or remain, an ATAS Participant:***
>
> *....*
>
> *(d) **Business Compliance and Governance***
>
> *An applicant must be a fit and proper person to become, and remain, a Participant.*
>
> *Without limiting the generality of the preceding sentence, an applicant will not be a fit and proper person to be a Participant if: ...*
>
> *(ii) A director, shareholder (excluding shareholders of publicly listed companies) or senior manager or **close associate** who has authority or may be in a position to have authority over the applicant;*
>
> *a. Is an undischarged bankrupt at the time or during the immediately preceding period of [ten] years, has been a bankrupt;*
> *b. has been a director, or was concerned in the management, of a company which at any time during the immediately preceding period of [ten] years;*
> *c. has failed to meet its liabilities;*
> *d. has had a receiver or trustee appointed over any part of its assets or undertaking;*
> *e. has had an administrator, liquidator or provisional liquidator appointed in respect of it; ..."*[1]

[1] Through a formatting error in Revision 2, sub-paragraphs c, d and e should have been given different letters or numbers, and been indented.

[29] Clause 8 of Revision 2 of the Charter contains definitions of "close associate", "relevant financial interest", "relevant position" and "relevant power" as follows:

> *"**Close associate** – means a person is a close associate of an applicant for accreditation or of a participant (whether or not that applicant or participant is a corporation), if the person: holds or will hold any **relevant financial interest**, or may be in a position to exercise any **relevant power** or if in the opinion of **AFTA** may be able to exercise an influence over or with respect to the conduct of that business, or holds or will hold any **relevant position**, whether in his or her own right, or otherwise in the business of the applicant or participant.*
>
> *…*
>
> ***Relevant financial interest** – means any share in the capital of the business, or any entitlement to receive any income derived from the business.*
>
> ***Relevant position** – means the position of a director, manager, and any other executive position and secretary, however those positions are designated, and any such other positions determined by **AFTA.***
>
> ***Relevant power** – means any power, whether exercisable by voting or otherwise and whether exercisable alone or in association with others: to participate in the day to day management of the business."*

[30] It was accepted that the appeal was to be conducted by way of rehearing with the Sub-Committee being required to make its own decision about the application (as at the date of its decision) on the basis of the available material and having regard to any changed circumstances of Bestjet.

The reasons for the decision dated 18 March 2016

[31] As already noted, the Sub-Committee's decision dated 18 March 2016 concluded that Mr Michael James was a "close associate" within the meaning of that term, and may be in a position to have authority over Bestjet. As a result, Bestjet was not a fit and proper person to be accredited by reason of cl 2.5(d)(ii)(e).

[32] Since Bestjet's challenge to the decision, and the process by which it was reached, includes the contention that the decision was wrong, and is able to be challenged notwithstanding Bestjet's contractual agreement that a decision on appeal is "final and binding", it is appropriate to set out the relevant parts of the decision as an annexure to these reasons.

[33] Bestjet complains that Mr James' status as the husband of Bestjet's managing director and his past employment with Bestjet were crucial to the decision that he could exercise an influence over or with respect to the conduct of Bestjet's business. It relies upon the fact that the evidence before the Sub-Committee was that he had not been employed by or contracted to Bestjet in any capacity after 2 December 2015. Bestjet's argument to the Sub-Committee was that Mr James' past employment by Bestjet was irrelevant to the question of whether at the time of the Sub-Committee's hearing and decision in early

2016. The issue was whether, at that time, Mr James was a "close associate" of Bestjet and may have been in a position to have authority over it.

Bestjet's proposed causes of action

[34] Bestjet contends that in making the decision dated 18 March 2016, AFTA (through the Sub-Committee) breached the rules of natural justice and procedural fairness which cl 5.9(a) of the Charter requires it to observe. Bestjet submits that AFTA's conduct leading to and including the impugned decision constitutes a breach of contract, oppressive conduct and an unlawful restraint of trade. It places the alleged breach of natural justice at the forefront of its submissions and this apparently was the ground upon which an urgent interim injunction was granted.

Alleged breach of the rules of natural justice and procedural fairness

[35] Clause 5.9(a) of the Charter states that in considering an appeal the Sub-Committee must comply with the rules of natural justice and procedural fairness. Clause 5.9(d) states that the Participant is entitled to appear in person, or be represented by its agent, solicitor or counsel at the meeting at which the appeal will be considered.

[36] Bestjet contends that AFTA breached the rules of natural justice and procedural fairness on a number of grounds.

[37] First, the members of the Sub-Committee are said to have had conflicts because they were not entitled to be appointed to the Sub-Committee, as the companies that they represented were not themselves entitled to be members of AFTA. In my view, these allegations, if proven, relate to the constitution of the Sub-Committee on eligibility grounds rather than any suggestion that the members of the Sub-Committee were biased or not impartial. Bestjet does not advance, as a separate ground, that the decision was unauthorised because the Sub-Committee was invalidly constituted. Any investigation into whether the members of the Sub-Committee were ineligible to sit on the appeal would require investigation into facts, including the basis for the allegation and whether any irregularity in that regard is automatically fatal to the decision. I have not had the advantage of submissions about the constitution of the Board of AFTA, how its Sub-Committee may be constituted and the decision-making process by which ineligibility would be established. I am disinclined to conclude that there was a breach of the rules of natural justice or procedural fairness on this ground.

[38] Bestjet's second argument is that the Sub-Committee failed to give it an opportunity to be heard orally after the hearing was adjourned to enable Bestjet to provide additional evidence. The purpose of the adjournment was to allow Bestjet to provide additional evidence and further written submissions based upon that evidence. Depending upon what was in the further evidence and the submissions, there arguably was no requirement to convene another hearing. In my view, it is strongly arguable that the Sub-Committee, having provided Bestjet with the opportunity to be represented by counsel at the hearing, was not obliged to conduct a further hearing in person. It might have required any further evidence and any further submissions in support of Bestjet's position in reliance upon that further evidence to be in writing.

[39] In circumstances in which Bestjet indicated a desire to make further oral submissions based upon its further written submissions, it would have been sound practice for AFTA's Sub-Committee to advise Bestjet's solicitors that it did not intend to convene a further hearing in person and that any final submissions which sought to amplify its further submissions should be in writing. It is arguable that Bestjet thereby was deprived of the opportunity to make further submissions, based on its further written submissions. Bestjet has not indicated what those further submissions would have been. There is no indication that they would have been any more than an amplification of points made in writing.

[40] I am not persuaded that this second ground is particularly strong. Even if it be assumed for the purpose of argument that there was a breach of procedural fairness in not allowing Bestjet an opportunity to be heard orally at a further meeting, a court might well, in the exercise of its discretion, decline to grant relief or award only nominal damages absent evidence that the lost opportunity to state orally what had been stated in writing was likely to have made a difference to the decision.

[41] Bestjet's third point is that AFTA failed to advise it that the Sub-Committee had already made its decision when it responded to Bestjet's request on 20 March 2016. However, by then the decision had already been made. The real issue is the one which I have already addressed, namely whether the Sub-Committee was obliged, before making its decision, to tell Bestjet that it did not intend to convene another meeting to enable Bestjet's counsel to make further oral submissions based on its further written submissions. At best for Bestjet, if AFTA had done so, Bestjet might have provided some further written submissions by way of amplification or persuaded the Sub-Committee to convene another meeting at which the same essential points would have been made.

[42] Next, Bestjet complains that AFTA delayed in notifying it of the decision made on 18 March 2016 until 21 March 2016. However, there is no evidence about the time of day at which the Sub-Committee finalised its decision. It may not have been possible for the members of the Sub-Committee to formally "sign off" on the decision until late on Friday, 18 March 2016. The decision was notified to Bestjet's solicitors early on Monday, 21 March 2016. The delay was not inordinate or unreasonable and, of course, the decision had already been reached.

[43] Bestjet next submits that there was a breach of natural justice or an absence of procedural fairness because AFTA allegedly failed to forewarn Bestjet and invite its response in relation to matters that were material to the Sub-Committee's reasons. Bestjet points to the following matters:

> "(a) that Michael James' previous employment with [Bestjet] put him in a position where he could presently have influence over or with respect to the conduct of [Bestjet's] business;
>
> (b) that Michael James held a 'relevant financial interest' (as at the date of the [appeal decision]) within the meaning of that term in clause 8 of Revision 2 of the Charter because:
>
> (i) he was previously paid as an employee when he was employed by [Bestjet];

(ii) in [Bestjet's] financial statements for the 2014/2015 financial year, his name was listed next to a 'loan';

(c) that Michael James may have been employed when [Bestjet] commenced its business and, if so, his status as an employee in a small 'start-up' business placed him in a position to influence Bestjet's business;

(d) that the position of Schedule and Pricing Analyst was a significant role in Bestjet's business;

(e) that ties of love and affection between Rachel James and Michael James meant that Michael James may be able to exercise an influence over or with respect to the conduct of Bestjet's business;

(f) the relevance and application of *Otta International Pty Ltd v Asia Pacific Carbon Pte Ltd* [2015] NSWSC 1818."

I shall deal with these matters in turn.

[44] The Sub-Committee explained that Mr James' previous employment with Bestjet was relevant to it. This is, after all, why it asked Bestjet to provide evidence and information about aspects of his past employment. Bestjet's response was to provide only some information in response to this request and to say that evidence about Mr James' former employment was irrelevant. Bestjet was forewarned of the fact that the Sub-Committee regarded Mr James' previous employment as material.

[45] The Sub-Committee referred to Mr James' financial interest when he was an employee of Bestjet. It did not describe his financial interest in this regard as constituting a "relevant financial interest" within the meaning of cl 8 of the Charter at the time of its appeal decision. It accepted that on his resignation as an employee, Mr James no longer had an entitlement to income from the business. The Sub-Committee was interested in ascertaining more information about his role and responsibilities as an employee. The payslips and contractual documents it requested were relevant to the role which he played and therefore the influence he previously had as an employee, and any continuing influence he might exert as a past employee.

[46] The Sub-Committee also had regard to the fact that documents provided to it, including balance sheets (presumably supplied by Bestjet), recorded Mr James as listed in the long-term liabilities section of the balance sheets. This was information which Bestjet apparently placed before the Sub-Committee and which it knew was before the Sub-Committee. It was not secret, adverse information which the Sub-Committee had not disclosed to Bestjet. Bestjet does not contest that Mr James' position as a lender meant that he had a financial interest in Bestjet's business. This does not mean that he had a "relevant financial interest" within the meaning of the Charter. The Sub-Committee did not say that he did. Incidentally, Mr James became bankrupt on his own petition on 13 September 2013, and I was not told whether he remains a bankrupt and whether the assets which vested in a trustee in bankruptcy under s 58 of the *Bankruptcy Act* 1966 (Cth) include the loan. In any case, the fact of the loan was not in dispute. The Sub-Committee arguably was not obliged to specifically tell Bestjet that it intended to

rely upon this uncontentious piece of evidence, along with all of the other evidence, in reaching a conclusion about Mr James' relationship with Bestjet. The evidence might be taken into account by the Sub-Committee in reaching an opinion about whether Mr James "may be able to exercise an influence over or with respect to the conduct" of Bestjet's business.

[47] As to remaining matters pointed to by Bestjet, it was on notice of the fact that the Sub-Committee was interested in the role which Mr James had played in Bestjet, including the duties of a Scheduling and Pricing Analyst, and the influence he had in a fledgling business.

[48] The close personal relationship between Rachel James and Michael James clearly was a matter which arose for consideration in determining whether he was in a position to influence the conduct of the business of which she was sole director and sole shareholder. I am not persuaded that AFTA needed to do more to inform Bestjet that the relationship was an issue because it might be such as to allow Mr James to exert an influence over or with respect to the conduct of Bestjet's business.

[49] For present purposes, it is sufficient to conclude that I do not consider that any of the points raised by Bestjet about a failure to forewarn and invite Bestjet's response in relation to these matters gives rise to a "prima facie case" for a breach of natural justice or procedural fairness. I use the term "prima facie case" in the sense described by Gummow and Hayne JJ in *Australian Broadcasting Corporation v O'Neill*[2] and by the High Court in *Beecham Group v Bristol Laboratories Pty Ltd*.[3]

[50] Bestjet also submits that the Sub-Committee failed to take into account a relevant consideration, namely that Mr James was no longer employed by Bestjet. The Sub-Committee referred to this fact and seemingly took it into account.

Alleged breach of contract

[51] Bestjet submits that the Constitution and the Charter each takes effect as a contract between Bestjet (as a member of AFTA) and AFTA. It submits that AFTA breached its contract as follows:

> "(a) breach of clauses 2.2 and 2.5 of Revision 1 or Revision 2 of the Charter in failing properly to assess the application against the eligibility criteria where the criteria for ineligibility in clause 2.5(d) did not apply to Bestjet;
>
> (b) breach of clause 3.5(a) of the Charter in making amendments to Revisions 2 and 3 of the Charter that were not necessary to ensure the effective operation of ATAS;
>
> (c) breach of clauses 5.8(f), 5.9(a), (c) and (d) of the Charter, being breaches of the rules of natural justice and procedural fairness."

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2 (2006) 227 CLR 57 at 82 [65].
3 (1968) 118 CLR 618 at 622-623.

[52] I have already dealt with the alleged breach of the rules of natural justice and procedural fairness.

[53] The first ground of alleged breach of contract advances the argument that Mr James was not a "close associate" at the relevant time because he did not have any influence over Bestjet. Also, the contention is that he did not have any authority, and was not in a position to have authority, over Bestjet. The foreshadowed claim for breach of contract has something of the character of an application for merit review of the Sub-Committee's decision.

[54] On the material before me, it is possible that the Sub-Committee reached a wrong conclusion. However, that is not the end of the matter because the parties agreed that an appeal decision is "final and binding". Clause 5.9(f) of the Charter so provided. Such a clause does not insulate a decision from challenge. It does not prevent a party to a contract suing for breach of contract in certain circumstances. Such a clause is not effective to preclude a court from applying a general principle of law.[4] As Hayne JA stated in *Australian Football League v Carlton Football Club Ltd*,[5] a provision that the decision of a domestic tribunal shall be "final and binding" is not effective to preclude challenges to a decision that is "absurd", "unreasonable" in that no reasonable person could come to it or one for which there is no evidence.

[55] As a matter of contractual interpretation, a decision which is reached without complying with the rules of natural justice and procedural fairness would not be the kind of decision which cl 5.9(f) makes "final and binding on the Participant". By analogy with decisions which are amenable to judicial review, a decision which is "absurd", "perverse" or "unreasonable" in the sense discussed in *Minister for Immigration and Citizenship Affairs v Li* ("*Li*")[6] would not be one which the parties' contract, on its proper interpretation, authorised the Sub-Committee to make. Reasonableness (in the narrow sense discussed in the administrative law cases) is a condition which is implied, in the absence of a contrary intent, from the grant of a public power to make a decision. A similar requirement of reasonableness would be implied as a matter of contractual interpretation. The Charter would not be construed as authorising, for example, the making of a perverse decision. However, any scope to impugn the decision on the grounds that it is "unreasonable" does not permit a general review into reasonableness. For example, it does not permit an argument that a finding was against the weight of the evidence.

[56] The term "unreasonable" was used by O'Connor J in *Dickason v Edwards*[7] to refer to a challenge to a conclusion of a domestic tribunal on the ground that "no reasonable man could come to the conclusion". If the conclusion was neither absurd nor unreasonable in this sense, then the Court would not interfere, even though its own opinion on the matter might be quite different.[8] Isaacs J stated that if a finding was arrived at in accordance with the rules, without any departure from the principles of natural justice and *bona fide*,

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4 *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 at 568.
5 Ibid.
6 (2013) 249 CLR 332.
7 (1910) 10 CLR 243 at 254.
8 At 254-255.

then the Court would not review it "so long as the finding is one which the Court finds it impossible to designate as one at which no reasonable man could honestly arrive".[9]

[57] Chief Justice French observed in *Li*:

> "The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision-maker."[10]

[58] I am not concerned with the requirement of reasonableness in the context of the exercise of a discretionary power by a public official. As in *Dickason v Edwards*[11] and *Australian Football League v Carlton Football Club*,[12] I am concerned with a challenge to the findings of a "private body" in relation to the application of rules of an association. Still, the observations made in *Li* about the concept of reasonableness in that different context provide guidance in a challenge to the "reasonableness" of a decision made by a body, which a party agrees is "final and binding". It may be possible to challenge the decision on the grounds that it was one which was not rationally open to the decision-maker. This reflects the general principle that "if a decision on a competent matter is so unreasonable that no reasonable authority could ever come to it, then the courts may interfere".[13] However, to prove a case of that kind requires something overwhelming.[14]

[59] In *Minister for Immigration and Multicultural Affairs v Eshetu*, Gleeson CJ and McHugh J stated:

> "Someone who disagrees strongly with someone else's process of reasoning on an issue of fact may express such disagreement by describing the reasoning as 'illogical' or 'unreasonable', or even 'so unreasonable that no reasonable person could adopt it'. If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequence."[15]

[60] In *Li* the joint judgment of Hayne, Kiefel and Bell JJ ruled that a legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably,[16] and explored the meaning of reasonableness. There was said to be an area within the "bounds of legal reasonableness" in which there is a genuinely free discretion.[17] Their Honours concluded, in the context of the review of the exercise of statutory discretion, that unreasonableness may be an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power. They observed:

> "Even where some reasons have been provided … it may nevertheless not be possible for a court to comprehend how the decision was arrived at.

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9 At 258.
10 *Li* at 351 [30].
11 Supra.
12 Supra.
13 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230.
14 At 230.
15 (1999) 197 CLR 611 at 626 [40].
16 At 362 [63].
17 At 363 [66].

> Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification."[18]

[61] Senior counsel for Bestjet in oral submissions invited me to conclude that the Sub-Committee's decision was open to challenge on the ground that it was not "legally reasonable". I am prepared to assume, for the purposes of argument, that the decision of the Sub-Committee may be challenged on that ground, which captures the limited grounds identified by Hayne JA in *Australian Football League v Carlton Football Club*. However, I am not persuaded that Bestjet has a prima facie case in this regard.

[62] As the Sub-Committee's reasons record, it was interested in ascertaining whether Mr James' previous employment and involvement in Bestjet, and any continuing involvement by him in some informal capacity, along with other matters, might enable him to exercise an influence over or with respect to the conduct of Bestjet's business. If the Sub-Committee was of the opinion that Mr James may be able to exercise such an influence, then he was a "close associate". The Sub-Committee's written request of Bestjet as to whether, since ceasing his employment, Mr James had been informally engaged as a consultant or agent in any capacity was not answered. The response in Ms James' statutory declaration was that since ceasing his employment, Mr James had not been "employed by or contracted" to Bestjet in any capacity.

[63] It was not unreasonable, let alone irrational, for the Sub-Committee to inquire into Mr James' past involvement in Bestjet. It had to decide the matter by reference to the circumstances which prevailed at the time of its decision, after Mr James had terminated his employment. However, there is nothing illogical in the proposition that a past employee, in some circumstances, may have an ability to influence the conduct of a former employer. One might take the hypothetical example of an individual who worked for a substantial period for a small catering business immediately after it was established, during which it expanded. He left on good terms, having played a role in the business' expansion. The ex-employee might remain on good terms with his former work colleagues, including the managing director of the catering business. That person's experience, insights and judgment may be highly valued by his former employer, despite the cessation of employment. The ability of that former employee to influence the conduct of the business would be enhanced if the managing director, with whom he remained on good terms, was the sole director and sole shareholder of the business. It may be enhanced even more if the former employee, as a lender to the business, had a notable financial interest in it.

[64] The Sub-Committee concluded, on the evidence available to it, that Mr James had not worked in Bestjet's business in a "frontline" selling position. He performed the role of an analyst. It was open to the Sub-Committee to conclude that this was a significant role and put Mr James in a position that he may influence the conduct of the business.

[65] The Sub-Committee's reasons did not rest simply on the fact that Mr James was apparently a valued employee when he worked as an analyst, and seemingly ceased his employment on good terms. The person who was the managing director and sole shareholder of the business was a person with whom Mr James had a close personal

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[18] At 367 [76].

relationship. As it happened, she was his wife. The Sub-Committee was in a position to conclude, on the evidence before it, that Mr James' knowledge of the business from his time as an employee placed him in a position where he may be able to exercise an influence over or with respect to the conduct of Bestjet's business. It was open to the Sub-Committee to form that opinion, even if that opinion might not be shared by others.

[66] Having regard to all of the matters considered by it, the Sub-Committee might form the opinion that Mr James may be able to exercise an influence over or with respect to Bestjet's business. I am not persuaded that such an opinion was one that no reasonable person in the Sub-Committee's position could adopt. The Sub-Committee's opinion about influence was neither perverse nor absurd. It was not unreasonable in the sense that term is used in discussing the bounds of "legal reasonableness".

[67] The question of whether Mr James may be in a position to have authority over Bestjet raised a related but different issue to the question of influence. However, the Sub-Committee cannot be said to have reached a decision on either the question of influence or the question of authority which lacked an evident and intelligible justification. Bestjet has not established a prima facie case for breach of contract in relation to the eligibility criteria.

[68] The next alleged breach of contract relates to amendments to the Charter and the contention that they were not necessary to ensure the effective operation of ATAS. Clause 3.5(a) of the Charter provides that:

> "The **AFTA Board** may, from time to time, approve changes to **ATAS** (including to the **Charter** and **Code**) where such changes are necessary to ensure the scheme's effective operation."

[69] Bestjet submits that:

(a) the amendments to Revisions 2 and 3 were not necessary to ensure ATAS' effective operation. The amendments unreasonably restrict the participants who may be accredited under ATAS and have the potential to operate harshly and exclude applicants who are fit and proper persons; and

(b) the amendments have the potential to cause significant disruption to the accreditation scheme and a significant impact on the travel industry in Australia, in circumstances in which the accreditation scheme under ATAS has effectively replaced the former licensing regime for travel agents.

[70] Bestjet give the following examples of how the amendments to cl 2.5 might operate. It submits that they would disqualify:

> "(a) a person who has held a single share in a company that went into liquidation despite that person not being involved in the management of the company;
>
> (b) a company if a director, shareholder, senior manager or "close associate" (being an employee or a relative, spouse or partner of an official) of that company is the subject of a "pending charge" for a

matter determined by the compliance manager or general manager of ATAS to be relevant;

(c) a company if any employee of that company had been involved in another company or business that had been placed into liquidation;

(d) a company if a relative, spouse or partner of any "official" of that company had been involved in a company that had been placed into liquidation;

(e) prominent travel companies operating in Australia (including at least one company with a director on the board of directors of AFTA), where a director of those companies has been a director of a company that has had a liquidator appointed in the last 10 years within the meaning of clause 2.5(d)(ii) of Revisions 2 and 3 of the Charter."

[71] In Bestjet's submission, the amendments are so broad as to be oppressive, illogical, unreasonable and to render difficulties in the operation of the accreditation scheme.

[72] The material before me indicates that the relevant revisions in 2015 were primarily concerned with the collapse of another agency named CTS. It and another ATAS member went into liquidation. The amendments that took effect on 1 January 2016 are said by AFTA's Chief Executive to have been in response to a 12 month review of the ATAS scheme undertaken by an external reviewer, whose findings were released to the public.

[73] I confine myself to the parts of the amendments which are relevant to the decision under challenge. For instance, the example given by Bestjet in (a) above is not presently relevant. Ms James is not alleged to have been a director of a company that went into liquidation or to have managed such a company. Mr James is not alleged to be a shareholder in Bestjet. If he held a share in the capital of Bestjet, then he would be a "close associate" of Bestjet because he held a "relevant financial interest" in it.

[74] A "close associate" will only trigger ineligibility if the close associate is in a position of authority, and falls within cl 2.5(d)(ii)(a) or (b). Being a shareholder in a company which is an applicant for accreditation or a Participant is not enough.

[75] A person who held a single share in a company that went into liquidation may or may not be a close associate. The shareholding in a failed company does not engage cl 2.5(ii)(b). Having been a director or concerned in its management does.

[76] Example (b) relates to cl 2.5(d)(vi), which concerns a Participant who is subject to a pending charge of fraud or dishonesty or an indictable offence. As to (c) and (d), being an employee is not enough, nor is being a relative, spouse or partner of an official. As for (e), a director of a Participant will be within cl 2.5(d)(ii) if the element of authority is proven. Someone who is not a director, shareholder or senior manager of the Participant, and who was a director of a company that went into liquidation, will only trigger a disqualification under cl 2.5(d)(ii) if his or her status as a "close associate" and the element of authority are proven.

[77] The changes effected by Revision 2 did not disqualify a Participant simply because of the existence of a "close associate". The "close associate" had to have authority or to be in a position to have authority over the applicant.

[78] On the present application there was no argument about the respects in which a court, in deciding a breach of contract claim of the kind foreshadowed, would substitute its own views for those of the AFTA Board about whether certain changes are "necessary" to ensure the scheme's effective operation. At the very least, a court would not lightly displace a Board's view. It is unnecessary for present purposes to canvas different contexts, including public law contexts, in which the term "necessary" has been considered,[19] and the circumstances in which a court will give weight to, or even defer to, assessments made by others about whether something is necessary.

[79] My immediate concern is the amendments effected by Revision 2, which are the revisions that were applied in reaching the current decision. There is evidence before me that the revisions were necessitated by the collapse of two agencies.

[80] The objectives of the scheme include maintaining high standards of service delivery by ensuring ATAS participants meet certain requirements. It would be open to a Board of AFTA to conclude that this objective made necessary a qualification criterion which excludes a Participant who has a "close associate" who has authority over the applicant, if that close associate is a bankrupt or, for example, was a director of a company that went into liquidation.

[81] There is no evidence that the amendments, so far, have caused significant disruption to the accreditation scheme.

[82] For present purposes, I do not accept that Bestjet has a strong basis to argue that the amendments could not be regarded as necessary to ensure the scheme's effective operation.[20] I am not persuaded that Bestjet has a prima facie case that the making of the amendments amounted to a breach of contract.

[83] As I understand it, Revision 3 only will apply if Bestjet makes a further application for the period commencing 1 July 2016. There was no contention that Revision 3 should have been applied by the Sub-Committee. The urgency of the present application has not permitted arguments to be developed about the necessity for the amendments made by Revision 3, and there is little evidence about the findings of the external reviewer whose 12 month review prompted those amendments. Presently, the concerns expressed by Bestjet about the possible application of Revision 3 to it are hypothetical. However, if they are real and if Bestjet has a prima facie case of breach of contract in relation to the amendments which gave rise to Revision 3, then those arguments and the evidence in relation to them can be developed. Presently, it is sufficient to observe that I do not consider that Bestjet has a prima facie case to obtain a declaration that the parts of the revisions to cl 2.5(d)(ii) effected by Revision 2 which were applied to it are void.

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[19] See, for example, *McCloy v New South Wales* (2015) 325 ALR 15 at 19 [2], 36 [81] – [82].

[20] I confine myself to the parts of the amendments which were relevant to the decision under challenge. For instance, the example given by Bestjet in (a) above is not presently relevant.

Oppression

[84] Two issues arise in relation to Bestjet's foreshadowed claim for relief against conduct of AFTA which is alleged to be oppressive to, unfairly prejudicial to or unfairly discriminatory against Bestjet or contrary to the interests of the members of AFTA. The first is a question of Bestjet's standing to claim relief under s 233 of the *Corporations Act* 2001 (Cth). The second is the merit of Bestjet's foreshadowed oppression claim. As to the latter, Bestjet submits that examples of the relevant conduct which would entitle it, as a member of a company limited by guarantee, to seek relief include:

> "(a) selectively applying the eligibility criteria to Bestjet to cancel its accreditation and membership and not applying those criteria to other members of AFTA …;
>
> (b) amending the Charter where such amendments were not necessary and were made at times that permitted AFTA to discriminate against Bestjet to make it ineligible for accreditation;
>
> (c) retrospectively applying the eligibility requirements outlined in Revision 2 of the Charter in circumstances in which the Application was submitted when Revision 1 of the Charter was in force;
>
> (d) failing to accord Bestjet natural justice and procedural fairness throughout the decision making and appeal process;
>
> (e) relying on the marital status of the director of Bestjet (in breach of the *Sex Discrimination Act 1984* (Cth)) as relevant to (and in fact determinative of) Bestjet's eligibility for accreditation; and
>
> (f) failing properly to apply the eligibility criteria for accreditation."

I have addressed (b), (d) and (f) to some extent.

[85] As to (a), there is evidence before me concerning individuals who are directors of companies which are AFTA members, and that each individual once was a director of a company that entered into administration or liquidation. The allegation of selectivity will involve inquiry into whether and when AFTA became aware of the issue of the relevant member's qualification and what it did or did not do as a result. I cannot, on the material before me, reach any view about the issue of the selective application of criteria.

[86] As to (c), the Sub-Committee gave sound reasons as to why the eligibility requirements in Revision 2, rather than Revision 1, were applied to Bestjet's application. Revision 2 came into effect in June 2015 and it was appropriate for it to be applied to any pending application.

[87] As to (e) and the allegation of a breach of the *Sex Discrimination Act* 1984 (Cth), it is not apparent that there was unlawful discrimination on the ground of Ms James' marital status. Instead, her marital status, along with other evidence, was considered. It was not so much her marital status as the (presumed) existence of love and affection between

Ms James and her husband. The issue was not argued to any extent before me. However, I apprehend that AFTA will argue that if Mr and Mrs James had not been married but had a close relationship of love and affection, the same decision would have been made. It was not the simple fact that Mr James was married to Mrs James. The Sub-Committee stated that if the only evidence was of the marriage then this would not make Mr James a close associate prior to or since his resignation. Instead, it was Mr James' identity, background and ability to have an influence over or with respect to the conduct of Bestjet's business which was in issue. His close personal relationship with Ms James, not his marital status as such, was relevant, along with other evidence, to the question of his influence.

[88] On the material before me Bestjet would not appear to have a prima facie case for relief under s 233. Some of its points are, however, arguable.

[89] It is strictly unnecessary to consider the separate issue raised by AFTA about Bestjet's standing. In short, the argument is that Bestjet's membership expired by effluxion of time and that an annual application for renewal was required, with a holding over period in the event of applications and appeals under cl 2.3(c) of the Charter.

[90] In my view, Bestjet has a reasonable argument that it has standing because the application "relates to the circumstances in which [it] ceased to be a member".[21] On one view, the relevant application was for renewal of membership which, unless the renewal was refused, continued. Even if the relevant application was treated as akin to an application for an annual membership, Bestjet ceased to be a member because of both the effluxion of time and the initial refusal to renew. However, it was assured from time to time whilst its appeals were pending that it would be treated as if its accreditation was continuing until the appeals were finally determined. This accorded with the holding over effect of cl 2.3(c). Until the final appeal was determined it was treated as a member. The foreshadowed challenge to the appeal decision and what preceded it arguably related to the circumstances under which Bestjet ceased to be a member of AFTA, so as to give it standing.

[91] In summary, assuming Bestjet's standing to seek relief under s 233, it has not established a prima facie case for relief under that section.

Alleged unreasonable restraint of trade

[92] Since July 2014 and in the absence of the former licensing regime, AFTA has operated the ATAS accreditation scheme for travel intermediaries in Australia including online travel agents such as Bestjet. AFTA promotes ATAS accreditation to consumers as indicative of a reliable and ethical travel intermediary.

[93] Bestjet has advertised, promoted and marketed itself as having ATAS accreditation since July 2014. ATAS accreditation is important to Bestjet's trade because it signifies to Bestjet's customers, suppliers and distributors that it:

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[21] *Corporations Act* 2001 (Cth) s 234(c).

(a) is solvent;

(b) holds public liability and professional indemnity insurance;

(c) agrees to comply with the ATAS Code of Conduct;

(d) maintains high standards of service delivery; and

(e) is part of an accreditation scheme that has accredited other prominent travel businesses in Australia.

[94] Bestjet submits that AFTA's decision to not renew its accreditation and membership constitutes an unreasonable restraint on Bestjet's trade because Bestjet is unable to advertise, promote or market itself as having ATAS accreditation or as being a member of AFTA. Ms James' evidence is that this is likely to cause loss of business and income, disrupt Bestjet's marketing message and diminish its reputation in the industry.

[95] Bestjet points to authority to the effect that decisions of domestic tribunals that interfere with a person's economic interest may be challenged on the basis that they constitute an unreasonable or unlawful restraint of trade.[22] Once a plaintiff in such an action establishes that there has been an interference and restraint of its trade, the defendant bears the onus of establishing such restraint is reasonable.[23]

[96] I am prepared to accept, for the purposes of argument, that restrictive rules of an industry-body such as AFTA may be challenged on the grounds that they constitute an unreasonable restraint of trade. It is unnecessary on an application for interlocutory relief to venture an opinion about the "frontiers of the restraint of trade doctrine".[24] Eligibility rules of industry bodies and trade unions are arguably a restraint on trade if membership is a precondition to carry on a certain trade or calling. Not every rule, let alone every ruling of a domestic tribunal, which prejudices a party's economic interest is invalidated as an unlawful restraint of trade.

[97] Bestjet seeks to apply, by way of analogy, authorities which have considered rules of an organisation or decisions made under such rules in the case of sportsmen and professionals. Many cases have concerned a restriction on the liberty of a person to engage in remunerative work. In that context, the restriction need not amount to a total inhibition on activity for there to be a restraint.[25] In *D'Souza*, the plaintiff was not prevented from practising as a psychiatrist. However, the fact that he was not a Fellow of the college placed a substantial restraint upon his engaging in practice as a psychiatrist.

[98] Bestjet's argument, by analogy, is that the withdrawal of accreditation in this case places a substantial restraint on Bestjet deriving income which depends upon it having ATAS accreditation and being a member of AFTA. The competing argument is that the practical

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22 *Buckley v Tutty* (1971) 125 CLR 353.

23 *Buckley v Tutty* (1971) 125 CLR 353 at 377; *Seven Network Limited v News Limited* [2007] FCA 1062 at [3276].

24 As to which see Heydon *The Restraint of Trade Doctrine* 3rd ed (2008) Chapter 3.

25 *Re New South Wales Bar Association* (2014) 315 ALR 146, 156 [52], 157 [56]; referring to *D'Souza v Royal Australian and New Zealand College of Psychiatrists* (2005) 12 VR 42 at 67 [222].

effect is not large and does not truly amount to a restraint of trade so as to engage the doctrine which renders restraints of trade contrary to public policy and invalid, unless they are proven to be reasonable. A restraint which inhibits, to some extent, a company from maintaining or increasing its income might be said to be of a different character.

[99] In determining the present application I am prepared to assume that Bestjet has an argument that the relevant provisions, or decisions made under them, constitute a restraint of trade. Their reasonableness is another matter. This is a matter which was not argued to any great extent before me. It raises issues of potential complexity. It seems that in an era of deregulation and following the end of a licencing regime under State legislation, ATAS is intended to provide some of the protections formerly given to consumers by a licencing regime. Such a regime may be said to be in the public interest.

[100] Provisions which permit AFTA to disqualify certain participants from gaining accreditation might be argued to be reasonable and in the public interest. Provisions which disqualify an applicant or a Participant which has a "close associate" who is able to exert influence and authority over such an entity might be regarded as reasonable and serve the public interest if the close associate managed or directed a company that went into liquidation. Rules which guard against bad management and corporate collapses in the travel industry serve consumers and the public interest. The view may be taken that not every Phoenix should be allowed to fly.

[101] As noted, presently I am concerned with certain parts of Revision 2 and the Sub-Committee's decision, based upon them, not the revision which took effect in January 2016. AFTA has reasonable arguments that neither Revision 2 nor the decision of the Sub-Committee in applying it, constitutes a restraint of trade as distinct from something which prevents a business from maximising its income. If it constitutes a restraint of trade then AFTA has reasonable grounds to argue that the restraint is reasonable and in the public interest.

Conclusion: has Bestjet established a prima facie case?

[102] I am not persuaded that Bestjet has established a prima facie case as that term is used in the context of the discretion to grant an interlocutory injunction.[26] None of its foreshadowed causes of action has a high probability of success.

Balance of convenience

[103] Bestjet argues that the refusal of an interlocutory injunction would have a significant effect on its business. As noted, not being able to promote itself as accredited and as being a member of AFTA would disrupt its "marketing message". Bestjet says that its competitors could obtain a competitive advantage. Ms James is concerned that Bestjet would suffer damage to its reputation and the loss of the trust of airlines. She also is concerned that Bestjet's competitors might promote Bestjet's loss of accreditation for competitive advantage. The Chief Executive of AFTA considers that Bestjet is not at a disadvantage to its competitors merely by virtue of it not being able to advertise itself as

[26] *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, particularly at [65] – [72].

holding ATAS accreditation. He has produced a list of 21 of the leading online travel agency operators who are accessible to Australian consumers. Only four are ATAS accredited (if one includes Bestjet).

[104] The fact that some of Bestjet's well-known competitors, and many other less-known competitors, are not members of AFTA and do not rely upon ATAS accreditation does not mean that ATAS accreditation is not a commercial advantage. As Ms James explains in her affidavit, from the perspective of a travel agent, ATAS accreditation is an important marketing advantage, and travel agents with ATAS accreditation prominently advertise that fact. ATAS accreditation is promoted by AFTA throughout Australia, as a protection for travellers dealing with travel agents on the basis that accreditation is a "clear indicator of quality and reliability". To be accredited, agents must meet a set of strict criteria and professional standards. So much appears in a leaflet that is printed and distributed by AFTA, which promotes ATAS accreditation and encourages consumers to "always look for the ATAS symbol when booking travel".

[105] I shall proceed on the basis of Ms James' evidence that ATAS accreditation is important to Bestjet and gives it a competitive advantage.

[106] Bestjet submits that damages would be an inadequate remedy in circumstances in which:

(a) loss of reputation, disruption of Bestjet's marketing message and the competitive advantage obtained by competitors could not be adequately quantified or compensated;

(b) it would be difficult, if not impossible, to quantify the loss of business income directly caused by AFTA acting on (and publishing) its decision.

[107] In response to this submission, AFTA submits that any loss of business in the event of Bestjet not being able to promote itself as ATAS accredited when it was entitled to accreditation would relate only to the period of a few months until 30 June 2016 when it would have been required to apply to renew its membership. Any loss during such a period is submitted to be capable of assessment since it is not unusual for courts to determine a business loss. AFTA submits that damages are an adequate remedy.

[108] Bestjet submits that an interlocutory injunction which restrains AFTA from acting on and publishing its decisions would simply preserve "the status quo" by maintaining Bestjet's accreditation and membership until the determination of the proceeding. It submits that the likely injury that Bestjet will suffer from a refusal of an interlocutory injunction far outweighs any injury likely to be suffered by AFTA. However, in a case such as this, one is not concerned simply with injury likely to be suffered by the respondent if an interlocutory injunction is ordered. Issues arise about the effect of an interlocutory injunction on other parties. In this case, these include competitors of Bestjet to whom business will directly flow if an interlocutory injunction is not ordered.

[109] The usual undertaking as to damages which Bestjet has given, and offers to renew, is to pay compensation, in an amount to be assessed by the Court, to any person (whether or not a party to the proceeding) affected by the operation of the interlocutory injunction. In

an appropriate case, the Court may require an undertaking as to damages in favour of a person who is not a party to the proceeding where interests may be affected by the order.[27]

[110] In deciding whether or not to grant a permanent injunction a court may take account of the rights or interests of third person or the public in general.[28] The weight to be given to third party interests varies according to the circumstances.[29] Similar considerations concerning the interests of third parties and the public interest may arise in deciding whether to grant or withhold interlocutory relief. As Dr Spry observes in *Equitable Remedies*:

> "Indeed, possible hardship to third persons may, if sufficiently direct, in some circumstances be given greater weight than hardship to the defendant, to the extent that the third persons in question are not wrongdoers."[30]

[111] Courts of equity will not ordinarily and without special necessity interfere by injunction "where the injunction will have the effect of very materially injuring the rights of third persons not before the court".[31] More generally, a court of equity "must have regard not only to the dry strict rights of the Plaintiff and Defendant, but also to surrounding circumstances, to the rights or interests of other persons which may be more or less involved".[32]

[112] As noted, the weight to be given to third party interests depends on the circumstances. Sometimes the detriment that might be caused to third parties or to the public generally if an injunction were refused is taken into account. This is likely to happen if the detriment is direct and not speculative. Any disadvantage that might be caused to third persons or the public generally will be weighed along with the effect on the parties of granting or withholding relief.[33] Depending on the circumstances, the interests of third parties may not be decisive. In some cases they may not rate a mention. For example, if a plaintiff stands to lose customers because the defendant is using its business name and infringing its trademark, the focus will be on the loss of business caused to the plaintiff by the defendant confusing consumers into thinking that the defendant's business is one and the same as the plaintiff's.[34] The focus will not be on the interests of consumers or third party competitors.

[113] In some cases, where a regulator denies a licence to a party which will be unable to carry on its business at all, or unable to do so under a certain name, the interests of the plaintiff will weigh heavily, particularly if there is doubt about the plaintiff being able to sue the

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27 *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1989) 89 ALR 366 at 371; see also the form of the usual undertaking as to damages for orders made under Chapter 8, Part 2 of the *Uniform Civil Procedure Rules* 1999 (Qld), as stated in r 264.

28 Spry, *Equitable Remedies* (2014) 9th ed at 416 ("Spry").

29 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 41 [65] - 42 [66] ("*Patrick Stevedores*").

30 Spry at 491, fn 20.

31 *Miller v Jackson* [1977] 2 QB 966 at 988 citing an earlier edition of Dr Spry's work, and see *Patrick Stevedores* at 42.

32 *Wood v Sutcliffe* (1851) 2 Sim (NS) 163 at 165-166; 61 ER 303 at 303-304 cited in *Patrick Stevedores* at 42 [65].

33 Spry at 490-491.

34 See, for example, *Protiviti Inc v Probiti Pty Ltd* [2005] FCA 1114 at [26] – [29].

regulator for damages.[35] Different weight may need to be accorded to the interests of parties and third parties where the defendant is able to be sued for damages and to pay them. In such a case, the plaintiff's threatened loss is the loss of a competitive advantage it enjoys over third parties and the granting of an injunction will prevent business flowing to third parties who, unlike the defendant, are not alleged to have infringed the plaintiff's legal rights. The weight to be given to the plaintiff's interests in being able to continue to have that competitive advantage at the expense of third party competitors depends on the circumstances. For example, a loss of that competitive advantage until trial may not threaten its continuing in business. It may cause it to suffer a loss of business it cannot easily ascertain or quantify. It may be able to monitor and measure the loss of custom caused by the loss of a competitive advantage.

[114] Bestjet seeks an interlocutory injunction restraining AFTA from acting on, publishing or informing any person of its decision to refuse to renew Bestjet's accreditation, and from asserting that it has terminated or cancelled Bestjet's membership. An injunction in those terms would be too wide. It would extend to preventing AFTA from correctly informing a party who made legitimate inquiries of it as to the truth of Bestjet's current membership status. It could not even respond to a member of the public that its purported termination of Bestjet's accreditation is the subject of litigation. I shall assume that any interlocutory restraint could be suitably narrowed to enable AFTA to respond to inquiries truthfully.

[115] Notably, Bestjet does not offer any undertaking to qualify the representations which it makes to the world about its accreditation. Bestjet promotes itself as "Proud to be ATAS travel accredited". In this regard, its continued marketing of this fact is potentially misleading and deceptive, or likely to mislead or deceive.

[116] No-one would reasonably expect Bestjet to advertise the fact that it has lost its ATAS accreditation. Still, its ability to hold itself out as being ATAS accredited and to restrain AFTA from publicly stating otherwise raises issues about the interests of consumers, and Bestjet obtaining an unfair advantage over competitors, including competitors who are ATAS accredited.

[117] This has implications for the balance of convenience. If an interlocutory injunction is awarded and if, as it apparently intends, Bestjet continues to promote itself as being ATAS accredited, then consumers could be understandably aggrieved about being misled, particularly if they experience poor service or even lose money after having paid for services on the assumption that Bestjet is ATAS accredited. Consumer dissatisfaction may be directed at AFTA, but it may be deflected by the fact that AFTA was subject to an interlocutory injunction.

[118] More importantly, so far as the balance of convenience is concerned, the competitive advantage which Bestjet enjoys by being able to promote its ATAS accreditation must be at the expense of other operators.

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[35] See the example of what Bestjet's submissions described as the "quasi-public regulator" in *Capital Networks Pty Ltd v .au Domain Administration Ltd* [2004] FCA 1030, which threatened to suspend the applicant's accreditation and registration of a domain name.

[119] If an interlocutory injunction is granted which prohibits AFTA from acting on the decision and informing the general public that Bestjet's accreditation was not renewed, and if Bestjet continues to promote its AFTA accreditation, then Bestjet will enjoy a reputational and financial advantage over other operators by the grant of interlocutory relief. It will obtain business it otherwise would not have obtained. Other operators will probably suffer, collectively, a corresponding financial disadvantage. Their interests will be adversely affected by the grant of interlocutory relief.

[120] If an interlocutory injunction of the kind sought by Bestjet is not granted and it is not able to promote an ATAS accreditation until the determination of the proceeding (lest it mislead or deceive consumers and others), then Bestjet will have to compete on that basis with other travel agents who have ATAS accreditation, including the few accredited online travel agents in the Australian market. It also will have to compete, without ATAS accreditation, with other online travel agents who do not have ATAS accreditation. Bestjet probably will suffer a loss of custom as a result. It will be difficult for it to quantify the loss of business income caused to it by AFTA acting on the decision.

[121] However, just as Bestjet submits that, without an interlocutory injunction, "the competitive advantage obtained by competitors could not be adequately quantified or compensated", a similar and possibly more complex issue arises about the adequacy of an undertaking by Bestjet to compensate non-parties, including competitors, who are affected by an interlocutory injunction. How could those operators adequately prove the collective loss of business which they suffered as a result of the competitive advantage obtained by Bestjet as a result of the interlocutory injunction? How could an individual operator adequately prove what additional business it would have obtained if an interlocutory injunction had not been granted? Bestjet's gain would not be at the financial loss of one or only a few potential competitors. It would be difficult, if not impossible, for an operator to quantify the loss of business income caused to it by the interlocutory injunction.[36]

[122] Each operator would be put to the difficulty of proving a past hypothetical fact about the number of inquiries it would have received from persons who would not have been prepared to use Bestjet because it did not have ATAS accreditation. The Court, in assessing damages in respect of any operator which embarked upon the difficult task of proving its loss, would need to consider the position the claimant and other operators would have been in if Bestjet had not been able to promote its ATAS accreditation until the determination of the proceeding. Claimants would face the task of proving the business which Bestjet gained as a result of advertising its accreditation, between 21 March 2016 and the date the interlocutory injunction ended. More precisely, each would have to prove what share of that business would have flowed to it. Access to Besjet's records following orders for disclosure may not prove much. The claimant or claimants might have to inquire of Bestjet customers, if they bothered to respond, what role Bestjet's accreditation played in the customer's decision to use Bestjet some time earlier. The cost and uncertainty of proving a damages case would be substantial. Many affected third parties might be deterred by the cost of the task, and their loss would go uncompensated. Even if they persisted, it would not be a collective claim: each claimant

[36] As to proof of damages pursuant to an undertaking see *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1979) 146 CLR 249; *Commonwealth of Australia v Sanofi* [2015] FCAFC 172 at [71] – [74].

on the undertaking as to damages would have to prove its loss. Its market share in a certain defined market may be an uncertain guide to the share of the Bestjet business which would have flowed to it. Proof of any uptake in business after the interlocutory injunction ceased would be a guide, at best, since it would relate to a different time and quite possibly a different economic and competitive environment.

[123] The complexity and cost of proving a claim for damages on the undertaking would be substantial. The potential injustice to operators who suffer a loss of custom because Bestjet obtains a commercial advantage it does not deserve is significant. Operators who suffer a loss of business will not be able or willing to prove it. The business loss caused to a potentially large number of third parties who decline to claim because of the complexity and cost of doing so would go uncompensated. The losses of actual claimants could not be properly assessed and compensated.

[124] The inability to properly assess, or the great difficulty in assessing, the losses of third parties leads me to conclude that a potential award of compensation pursuant to an undertaking as to damages would be an inadequate remedy in the circumstances. This is a consideration which weighs against the granting of the interlocutory relief sought by Bestjet.

[125] On the other hand, Bestjet may experience difficulty in quantifying the loss of business income and other losses which will be caused by AFTA acting on its decision. However, at least Bestjet would be in a position to monitor a diminution in inquiries and keep appropriate records to enable it to compare inquiries and sales between different periods, and to attribute any fall to the loss of its AFTA accreditation. Proof and quantification of its loss would be difficult, but not impossible. The task of competitors proving and quantifying their losses would be more difficult and more complex.

[126] If Bestjet suffered, contrary to AFTA's prediction, a substantial financial loss because of AFTA's conduct and its decision to not renew Bestjet's accreditation, then Bestjet would have a motivation to sue to recover damages. Its claim for damages would be a claim by one claimant, unlike the multiplicity of potential claims on the undertaking as to damages.

[127] On balance, whilst damages may not be a completely adequate remedy for Bestjet if interlocutory relief is withheld and Bestjet succeeds at trial, if Bestjet does not succeed at trial then other parties affected by the interlocutory order will encounter great difficulty in being compensated pursuant to an undertaking as to damages. There is a real prospect of Bestjet retaining the financial benefit of an accreditation to which it is not entitled, and innocent third parties suffering a corresponding loss.

[128] Bestjet seeks to contrast its position as being one involving a threat to its reputation and loss of business income with the position of a third party, whose only threatened loss is submitted to be a "purely speculative" loss of the opportunity to "poach" Bestjet's customers. However, this is not a case in which the refusal of an interlocutory injunction would allow competitors of Bestjet to "poach" customers. Bestjet would lose, and competitors would gain, business simply as a function of Bestjet's loss of accreditation.

The case is unlike one in which a defendant makes false representations to gain customers.[37]

[129] Whilst to some extent Bestjet's case is about a threat to its reputation, it is about its reputation in one respect: its reputation as being accredited by AFTA. Its potential reputational loss is not about the personal distress which an individual claimant might suffer. It is about purely financial loss. The posited reputational loss would not be based on an imputation that it lost its accreditation because of poor service or insolvency. The loss of accreditation does not prevent it from trading, and it is not said that the absence of an interlocutory order would halt its business or force it to trade at a loss. It is possible to trade without accreditation by AFTA, as many of Bestjet's competitors do. Ultimately, the loss of accreditation is about the loss of a commercial advantage to which, if the impugned decision stands, Bestjet is not entitled.

[130] Bestjet's loss of that commercial advantage, if an interlocutory injunction is not granted, and its financial consequences, will be real and direct. But so too must be the financial advantage which its competitors will have if interlocutory relief is refused. The loss of the opportunity for competitors to gain the business which Bestjet says it will lose is real, and it has direct financial consequences for competitors.

[131] Bestjet submits that some of its competitors are represented on the AFTA Board. But this is in the nature of such an industry body, and there is no suggestion that the two individuals who constituted the Sub-Committee operate agencies which closely compete with Bestjet as an online travel agency.

[132] The public interest may be a factor in weighing the balance of convenience. In this case, the granting of an interlocutory injunction may harm the interest of consumers and the public interest by allowing Bestjet to falsely represent that it has accreditation for 2015/2016 when that accreditation was refused. But it was not refused on grounds of insolvency or poor consumer service. Consumers will be misled about Bestjet's actual current accreditation status, and be misled into believing that AFTA accepts Bestjet as a member. There is a public interest in regulators, including de facto regulators of an industry like AFTA, not being impeded in implementing decisions which are intended to serve the public interest, and announcing decisions which have been made. There also is a public interest in regulators and similar bodies not making decisions which are unauthorised.

[133] Leaving aside these broader public interests, and the interest of AFTA in truthfully and accurately informing its members and the public about the accreditation of travel agencies, the issue is whether Bestjet should enjoy, until the determination of the proceeding, the commercial advantage which promoting itself as ATAS accredited gives it. Should it have that commercial advantage at the financial expense of competitors?

[134] The more Ms James' evidence emphasises the commercial advantage Bestjet enjoys as a result of accreditation, and the loss of business it will suffer as a result of the decision to not renew its accreditation, the more the financial loss to its competitors of not obtaining that business looms large.

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[37] c.f. *AAP Telecommunications Pty Ltd v Telstra Corporation Ltd* (1997) 38 IPR 650 at 656-657.

[135] In summary, an important issue is whether the loss which Bestjet's competitors will experience as a result of an interlocutory injunction can be adequately compensated by the undertaking as to damages made in their favour. I do not consider it can be. There are many potential claimants. Proof of the loss suffered by them collectively and individually will be difficult, if not impossible, and very costly. Real losses are likely to go uncompensated. The loss to each competitor may not be crippling and in some cases may not be very large, but the loss is real and direct. The appropriate comparison is not between Bestjet's expected loss if interlocutory relief is refused and one competitor's loss if it is granted. It is the collective loss occasioned to directly affected competitors. Whilst Bestjet's prospective claim for damages may be difficult to prove, it is capable of proof by reference to evidence which is likely to be available to it about inquiries and sales. Its foreshadowed claim for damages is against one defendant. The risk of an injustice to it because, as it transpires, damages would not be an adequate remedy is significant. However, the risk of injustice to third parties of not being compensated adequately, or at all, for business they would gain if an interlocutory injunction were refused is greater.

[136] Considered in isolation, and without regard to Bestjet's prospects of success at trial, I consider that the risk of irreparable harm to parties affected by the granting of interlocutory relief of the kind Bestjet seeks outweighs the risk of irreparable harm to Bestjet if that interlocutory relief is refused.

[137] Whether an applicant for interlocutory injunction has made out a *prima facie* case and whether the balance of convenience favours the grant or refusal of interlocutory relief are related questions.[38] If Bestjet had good prospects of success, then the balance of convenience might be different. However, I do not consider that its prospects of success on its foreshadowed causes of action are sufficiently strong to tilt the balance of convenience in its favour.

Conclusion

[138] Bestjet has not shown a sufficient likelihood of success to justify in the circumstances the kind of interlocutory injunction which it seeks. It has not established a "prima facie case" of sufficient merit to justify the grant of an interlocutory injunction.

[139] I am not persuaded that Bestjet's prospects of success on any of the causes of action it foreshadows have a sufficient likelihood of success to justify in the circumstances orders which restrain AFTA from acting on its decision and informing interested parties, including consumers, of its decision.

[140] I decline to grant the interlocutory injunction sought by Bestjet. I will make directions for the proceeding to progress with suitable expedition.

[141] Finally, I should mention that it is not part of the Court's function to control what parties say about their success or relative success in granting or opposing interlocutory relief. After the interim injunction was ordered against AFTA, Bestjet issued a media release about that fact. No doubt, that was to protect its reputation because the decision had been

[38] *Warner-Lambert Co Llc v Apotex Pty Ltd* (2014) 311 ALR 632 at [70].

publicised by AFTA to some extent. Just as it would be wrong to interpret the interim injunction as constituting a vindication of Bestjet's claims in the proceeding, it would be wrong for anyone to claim that my refusal to grant an interlocutory injunction represents a vindication of AFTA's position. The parties' rights will be determined at a final hearing if they are not resolved by agreement before then. My decision, like many other decisions when a court decides to either grant or withhold an interlocutory injunction, does not involve a determination of which party is correct. It amounts to a decision about which course is most appropriate to avoid the risk of doing an injustice in circumstances in which the parties' rights remain to be determined.

ANNEXURE

6 Issue Three: Bestjet says there is no basis for finding Mr James was a "close associate" and had or may have authority over Bestjet

6.1 We must consider whether Bestjet meets the eligibility requirement set out in clause 2.5(d) of the 2015 Charter and specifically whether Mr James was a "close associate" as defined by the 2015 Charter.[39]

6.2 Clause 2.5 of the 2015 Charter relevantly provides:

> **2.5. Eligibility Criteria**
>
> Applicants for and participants in **ATAS** must **at all times** satisfy **all** of the following eligibility criteria to become, or remain, an ATAS Participant:
>
> **(a) Meet the ATAS definition of a 'Travel Intermediary'**
>
> For the purposes of **ATAS**, a 'Travel Intermediary' is an **entity**, domiciled, registered or incorporated in Australia, which sells a **travel product** on behalf of a **travel supplier**.
>
> A 'Travel Intermediary' includes, but is not limited to, a travel agent, travel management company, aggregator, distributor, online travel agent, inbound tour operator, wholesaler and a consolidator.
>
> Foreign companies may also become **ATAS** accredited if they are registered under the Corporations Act 2001 (Cth), have obtained an Australian Registered Body Number (ARBN) or Australian Business Number (ABN), and they sell travel products on behalf of a travel supplier.
>
> **(b) ATAS Acceptance, release and indemnity deed poll (Deed Poll)**
>
> …
>
> **(c) Consumer protection and engagement**
>
> …
>
> **(d) Business Compliance and Governance**
>
> An applicant must be a fit and proper person to become, and remain, a Participant.
>
> Without limiting the generality of the preceding sentence, an applicant will not be a fit and proper person to be a Participant if:
>
> (i) The applicant is not solvent;
>
> (ii) A director, shareholder (excluding shareholders of publicly listed companies) or senior manager or **close associate** who has authority or may be in a position to have authority over the applicant:

[39] AFTA Documents pages 112 – 115 and Supplementary Bundle pages 88 - 91

a. Is an undischarged bankrupt at the time or during the immediately preceding period of [ten] years, has been a bankrupt;

b. has been a director, or was concerned in the management, of a company which at any time during the immediately preceding period of [ten] years;

c. has failed to meet its liabilities;

d. has had a receiver or trustee appointed over any part of its assets or undertaking; or

e. has had an administrator, liquidator or provisional liquidator appointed in respect of it;

(iii) has been determined to be ineligible to be a participant in the **Travel Compensation Fund** or

(iv) has had its licence as a travel agent suspended or been disqualified from holding such a license

(v) during the immediately preceding period of [ten] years, has been convicted of an offence involving fraud or dishonesty;

(vi) is the subject of a pending charge in relation to alleged offence involving fraud, dishonesty or an indictable offence, or

(vii) The ATAS Compliance Manager may also consider any findings made by a law enforcement agency, for example, in a matter involving the applicant, to determine if they remain fit and proper to be accredited under **ATAS**. This includes findings relating to conduct that would be characterised as a breach of the **ATAS Charter** or **Code**.

An applicant must provide a copy of its latest financial statements and such other information as may be requested.

An applicant must have an Australian Business Number (ABN) or an Australian Registered Body Number (ABRN).

(e) **Commercial Safeguards**

…

(f) **Workforce Development**

…

(g) **Customer Dispute Resolution and Complaints Handling**

…

(h) **Payment of Fee**

…

(i) **Criteria 9 (start-up businesses only)**

6.3 The following expressions are defined in Part 8 of the 2015 Charter[40] as follows:

Close associate – means a person is a close associate of an applicant for accreditation or of a participant (whether or not that applicant or participant is a corporation), if the

[40] AFTA Documents pages 116 – 117.

person: holds or will hold any **relevant financial interest**, or may be in a position to exercise any **relevant power** or if in the opinion of **AFTA** may be able to exercise an influence over or with respect to the conduct of that business, or holds or will hold any **relevant position**, whether in his or her own right, or otherwise in the business of the applicant or participant.

Relevant financial interest - means any share in the capital of the business, or any entitlement to receive any income derived from the business.

Relevant position - means the positon of a director, manager, and any other executive position and secretary, however those positions are designated, and any such other positions as determined by AFTA.

Relevant power – means any power, whether exercisable by voting or otherwise and whether exercisable alone or in association with others; to participate in the day to day management of the business.

6.4 With respect to the application of the eligibility criteria in clause 2.5(d), there may be three options open to us. First, we could assess Bestjet's application as at 1 July 2015 when the relevant accreditation period commenced. This would mean considering whether Bestjet satisfied the eligibility criteria at that time. Secondly, we could assess Bestjet's application as at 1 October 2015 being the date of the General Manager's decision. Alternatively, we could consider Bestjet's eligibility as at 26 February 2016 being the date on which the Sub-Committee met (notwithstanding the 2016 Charter applies). We understood Mr Barlow QC's submissions argued that we should consider the present circumstances, including any changed circumstances.

6.5 We accept Mr Barlow QC's submission of 26 February 2016 (paragraph 25) and of 10 March 2016 (paragraph 8) that we should determine whether Bestjet meets the eligibility criteria for renewal of its accreditation at present and based on the available material.

6.6 We also agree with Mr Barlow's submission of 26 February 2016 (paragraph 24) that the Sub-Committee must form its own view. For this reason, there is no need for us to consider whether the General Manager's or the Compliance Manager's decisions were correct or incorrect. The Sub Committee's role is to determine whether Bestjet meets the requirements of clause 2.5 of the 2015 Charter at the present time. We accept Mr Barlow's submission that we should take into account any changed circumstances for Bestjet. We are considering Bestjet's application afresh.

6.7 Given our task, we do not agree with paragraph 26 of Mr Barlow QC's submissions of 26 February 2016. This point might be relevant if there was a contest between Bestjet and AFTA or Bestjet and the General Manager or if we were required to resolve a dispute between two parties. This is not our role. We are not asked to resolve competing claims. The appeal is not adversarial. As we have noted above, neither AFTA nor the General Manager participated in the meeting on 26 February 2016. AFTA was not represented before the Sub-Committee. The relevant provisions of the

2015 Charter do not confer an express right for AFTA to respond to Bestjet's written or oral submissions or the new material provided by Bestjet. Having regard to the matter we have to determine, we do not agree there is an onus on AFTA. The approach misconceives our role. Rather, we consider the purpose of the appeal is provide Bestjet with the opportunity to demonstrate that it meets the eligibility criteria. The 2014 Charter and the 2015 Charter imposed the onus on a participant to remain eligible. If there is any "onus of proof" the onus must be on the entity or person seeking to renew its accreditation.

6.8 We have also considered paragraphs 27 – 30 of Mr Barlow QC's submissions of 26 February 2016. We have carefully considered and note the matters raised in those paragraphs.

6.9 We do not agree with paragraph 58 of Mr Barlow's submission that we have any role in determining whether Mr James is in breach of the Corporations Act and may be liable to prosecution for being involved in the management of a corporation, while disqualified from doing so. Mr James is not a party to the appeal. Mr James was not represented and he provided no evidence. We have no powers to make such findings. This matter forms no part of our role.

Consideration

6.10 The Compliance Manager's decision of 3 August 2015 records that Mr Michael James was a director of, and was concerned with the management of, Strategic Airlines Pty Limited at the time it was placed into administration on 17 February 2012 and at the time it went into liquidation on 23 March 2012. This occurred within the preceding 10 years.[41] We do not understand this matter is in dispute. This evidence satisfies clause 2.5(d)(ii)(b) and (e) of the 2015 Charter.

6.11 Bestjet provided a resignation letter from Mr James dated 2 December 2015.[42] We have considered the letter. Bestjet submits that because Mr James resigned there can be no finding that he is a close associate. It is not clear whether the submission is a concession that Mr James was a close associate prior to his resignation.

6.12 The resignation letter alone did not persuade us that Mr James is no longer a close associate. Given Bestjet raises and now seeks to rely on changed circumstances, we considered that Bestjet was in the best position to explain why Mr James' circumstances changed, what changes have been made and whether Mr James has no involvement in any other capacity. To ensure Bestjet had every opportunity to provide any information or evidence relevant to Mr James' changed circumstances, at the conclusion of the meeting and after Bestjet had presented its evidence and submissions, we asked Bestjet provide the following information:

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41 AFTA Documents pages 123 - 124
42 Supplementary Bundle page 283.

(1). Evidence from Bestjet as to whether Mr James' resignation letter dated 2 December 2015 was accepted;

(2). A statement setting out the final payments made by Bestjet to Mr James on the cessation of his employment;

(3). A copy of Bestjet's contract of employment with Mr James which presumably also identifies the date Mr James' employment commenced;

(4). A sample of Bestjet's pay slips for Mr James covering the period of his employment;

(5). A copy of Mr James' job description/position description with respect to any role/s held during his employment with Bestjet. The Sub-Committee members seek an explanation of Mr James' role as Scheduling and Pricing Analyst. The Sub-Committee members indicated that this is not a position or role commonly used in a travel agency business, so request clarification as to the nature of the role;

(6). Information as to whom Mr James reported to during his employment with Bestjet;

(7). Information as to whether any employees of Bestjet reported to Mr James, and in what capacity;

(8). Information as to whether Bestjet engaged Mr James (formally or informally) as an adviser, independent contractor, consultant or agent in any capacity at any time after 2 December 2015;

(9). During the period of Mr James' employment evidence as to how Mr James' represented or described his role/position to Bestjet's customers, contractors, suppliers (that is third parties).

6.13 We considered these documents would enable us to make a fair and full assessment of Bestjet's claim that Mr James could no longer be a close associate. We wanted to give Bestjet the opportunity to support the written and oral submissions made it on its behalf with evidence. The evidence was relevant to the current circumstances and events that postdate the General Manager's consideration of the application.

6.14 On 7 March 2016, Bestjet's lawyers provided us with a statutory declaration of Rachel James. We have considered the statutory declaration. Ms James has addressed some but not all of the matters identified above. Ms James also provided evidence about matters we did not request: see paragraph 6 of the statutory declaration.

6.15 On 7 March 2016, Bestjet's lawyers contended that six of our requests were irrelevant and/or sought confidential information. We do not agree. Mr Barlow QC agreed during the course of the meeting on 26 February 2016 that we could inform ourselves as we considered fit. Our request for these documents arose only after we heard and

considered Mr Barlow QC's submissions and after he accepted that it was open to the Sub-Committee to inform itself.

6.16 We accept that we have no power to compel Bestjet to produce any documents or evidence. Bestjet has declined to provide the evidence it was best placed to provide. We are disappointed Bestjet has taken this approach because we wanted to ensure Bestjet had the opportunity to provide the evidence demonstrate that it satisfied the eligibility criteria at the present time.

Close associate

6.17 We find Mr James was and is a close associate of Bestjet for the following reasons.

6.18 Mr James held a relevant financial interest as an employee of Bestjet because any remuneration was an entitlement to receive income derived from the business. Bestjet has refused to provide payslips it provided to Mr James. The payslips would evidence the income[43] derived by Mr James from Bestjet's business. We note that Bestjet's lawyers say they have seen a copy of a final pay-slip for James, so we infer that he was paid for work performed for Bestjet and was paid by Bestjet. We accept that on his resignation, Mr James no longer has an entitlement to income derived from the business.

6.19 In the Statement of Facts and Contentions at paragraphs 24 – 26,[44] it is stated that when making the application to renew its accreditation, Bestjet provided a profit and loss statement for the period 1 July 2014 to 22 April 2015. In the documents provided to us, there are also Balance Sheets dated 29 April 2015 and 30 June 2015. In these documents Mr James is listed in the long term liabilities section of the Balance Sheets.[45] The loan would indicate Mr James has had a notable financial interest in Bestjet's business.

6.20 We accept that on Mr James' resignation as an employee means that he may longer be in a position to participate in the day to day management of the business but we specifically asked whether Bestjet engaged Mr James (formally or informally) as an adviser, independent contractor, consultant or agent in any capacity at any time after 2 December 2015. Bestjet's lawyers responded on 7 March 2016 by referring to Ms James' statutory declaration. Ms James said "*since ceasing his employment, Mr James has not been employed by or contracted to Bestjet in any capacity*". We accept this evidence. However, we note that Ms James did not answer our request with respect to whether Mr James held any formal or informal role as a consultant or adviser.

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43 *Fair Work Act* 2009 (Cth) – s 536(2) and *Fair Work Regulations* 2009 (Cth) – regulation 3.46
44 AFTA Documents page 2
45 AFTA Documents pages 31, 257, 259 and 265.

6.21 We requested a copy of Mr James' contract of employment. Bestjet has declined to provide a copy of the employment contract but we have inferred that one exists based on Bestjet's lawyer's letter dated 7 March 2016 at paragraph 3. We do not accept the submission that the contract is irrelevant. If Mr James held an executive position, or a role in which he participated in day to day management or a role in which he may be able to exercise an influence over or with respect to the conduct of Bestjet's business, it was relevant for us to consider whether his resignation was sufficient to displace such a conclusion.

6.22 We have had regard to the following available evidence:

a. Mr James was an employee of Bestjet at some point in time. The available information tells us very little about Mr James' role and responsibilities as an employee.

b. On 19 August 2014, the Compliance Manager wrote to Bestjet about an article appearing in the financial section of news.com.au.[46] Ms James' response did not address Mr James' role as an employee.[47] We note the media report said Bestjet had a staff of 10 people.

c. In its initial application for accreditation, Bestjet stated it employed 7 persons of which 3 were in frontline travel selling positions.[48] There were 4 persons engaged who were not engaged in frontline travel selling positions. Mr James was not specifically identified as one of the employees and the available evidence does not disclose whether Mr James was one of the 4 persons engaged in duties other than front line selling. We have inferred from Mr James' job title he was not involved in front line selling.

d. In its application for renewal of accreditation, Bestjet stated it employed 11 persons of which 7 persons were in frontline travel selling positions. Again, Mr James was not specifically identified as one of the employees and again the available evidence does not disclose whether Mr James was one of the 4 persons engaged in duties other than front line selling.

e. The Compliance Manager's decision records Mr James was an employee of the Bestjet as at 3 August 2015.[49] This appears not to have been contested.

f. In Bestjet's lawyer's submissions dated 2 September 2015, it was claimed that Bestjet has 15 employees and 10 contractors.[50] If this is so, then there appears to have been some significant changes in Bestjet's business since April 2015.

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[46] AFTA Documents pages 46 and 49 - 52
[47] AFTA Documents page 47
[48] AFTA Documents pages 13, 39
[49] AFTA Documents pages 123 - 124
[50] AFTA Documents page 248 [51]

> There is no explanation as to the roles of the 15 employees and whether it includes additional frontline travel selling positions. Previously, there had been no mention of contractors. There is nothing in the material which explains the role of the contractors, the status of the contractors and the roles performed by the contractors.

6.23 At paragraph 55 of Mr Barlow's submissions dated 26 February 2016, he said there was no evidence to infer that Mr James had any power to participate in the day to day management of Bestjet's business, nor that he had or may have authority of Bestjet. We do not agree with the submission for the following reasons:

(a) If Mr James was employed at the commencement of Bestjet's business when it was a small start-up of the business, then Mr James' employment placed him in a position to influence the development and direction of the business. Bestjet has one address for its place of business. Over the period 2014 - 2015 Bestjet employed a small number of staff to run its business. The number of employees involved in Bestjet's business has remained small and we consider that an inference may be drawn that Mr James' involvement in a small business placed him in a position of influence;

(b) Mr James' role was described as Schedule & Pricing Analyst. This is not a role which is commonly used in a travel agency business but rather is a role more usually associated with the operations of an airline to monitor an airline's business revenue management systems. Such a role requires the analyst to undertake analysis of competitors, to monitor forward bookings, yields, class mix and develop pricing strategies. Ms James says Mr James was responsible for monitoring competitors' pricing. For a start-up online business, we consider this is a significant role and put Mr James in a position that he may influence the conduct of the business. Ms James says that Mr James reported to a "General Manager" who is not identified by name;[51]

(c) Bestjet has not provided any evidence as about the responsibilities of the other 3 employees and whether they had roles that rendered Mr James in a position to have no influence over the conduct of the business.

6.24 As to the relevance of Ms James and Mr James' relationship, we agree that the fact they are married to each other is not of itself evidence that Mr James may be in a position to exercise any relevant power or may be able to exercise an influence over or with respect to the conduct of that business. If the only evidence was of the marriage, then we agree that would not make Mr James a close associate prior to or since his resignation.

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[51] Ms James' Statutory Declaration paragraph 3(b)

6.25 We make it clear that we do not consider the fact of their marriage to be determinative. It is a fact that must be considered in context. The context here is:

(a) Ms James was and is the sole director of Bestjet;

(b) Ms James was and is the managing director of Bestjet;[52]

(c) Ms James owns the whole of the issued share capital of Bestjet;[53]

(d) Ms James operates a business with a small number of staff, which included her husband;

(e) Ms James says that decisions taken about Bestjet's management are her decisions and hers alone;[54] and

(f) Ms James says she is responsible for those decisions.[55] We take this evidence to mean that Ms James does not confer authority on any other staff with relevant experience to assist her with the day to day management of the Bestjet business.

6.26 We have carefully considered the available evidence about size and the decision making of Bestjet's business. This is the context in which Ms James relationship with Mr James is relevant. It is whether the manner in which the business is conducted puts Mr James in a position to exercise any relevant power or may be able to exercise an influence over or with respect to the conduct of Bestjet's business. Having regard to all of these matters discussed above and Mr James' knowledge of the business from his time as an employee, we find that Mr James may presently influence over or with respect to the conduct of Bestjet's business.

6.27 As the judge observed in *Otta International Pty Ltd v Asia Pacific Carbon Pte Ltd* [2015] NSWSC 1818 at [18] it is common that the ties of love and affection between wife and husband may incline a spouse to act in a certain way by reason of the relationship, irrespective of the interests of that party. This is different to suggesting that the husband-wife relationship means that the husband exercised undue influence or suborns his wife's free will. We think paragraph 57 of Mr Barlow QC's submissions overstates the concern. There is nothing in the material which points to there being a presumption of undue influence over a husband over a wife. Indeed, the question is not whether Mr James exercised undue influence over his wife but only whether he *may* be able to exercise an influence over or with respect to the conduct of the *business*.

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52 AFTA Documents pages 123 - 124
53 AFTA Documents pages 123 - 124
54 Ms James' Statutory Declaration paragraph 6
55 Ms James' Statutory Declaration paragraph 6

6.28 We have also had regard to Mr Barlow QC's submissions dated 10 March 2016 at paragraph 15 which raises for the first time a new allegation that if the Sub-Committee were to consider Mr James' status as Ms James' husband as a reason for concluding that Mr James is or may be able to exercise influence over or with respect to the conduct of Bestjet's business such a consideration would constitute discrimination against Ms James and Bestjet on the basis of Ms James' marital status. It is now alleged that in so doing the Sub-Committee would breach both the *Anti-Discrimination Act* 1977 (NSW) and *Sex Discrimination Act* 1984 (Cth). This is a serious allegation to make about the Sub-Committee, particularly as no allegation of this kind was raised with respect to the Compliance Manager and General Manager's decisions. Mr Barlow's submissions did not develop this argument. In any event, the issue is not Ms James' status as being married or single or divorced etc. The contention appears to be based on alleged discrimination arising because of the identity of Ms James' spouse. This is a different thing to her marital status. Spouse identity discrimination is not a ground under the two acts cited.[56] We are not making any findings about Ms James' status. We are concerned about whether Bestjet meets the eligibility criteria, not Ms James as a person in her own right does.

Authority or may be in a position to have authority over Bestjet

6.29 We accept the submission that clause 2.5(ii) speaks to a close associate who has authority or may be in position to have authority over the applicant.

6.30 The meaning of authority requires us to consider whether Mr James has or *may* be in a position to influence decisions because of his knowledge or expertise or to give orders or directions, or make decisions about Bestjet's business.

6.31 For the reasons discussed above, we consider the available evidence supports a finding that Mr James may be in a position to have authority over Bestjet.

7 Conclusion

7.1 The Sub-Committee has decided that based on the available material Bestjet does not satisfy the applicable eligibility criteria for the purpose of the 2015 Charter.

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[56] *Boehringer Ingelheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13 at 21; cited in *Waterhouse v Bell (1991) 41 IR 435.*