

# Explanatory Paper

## TPB(EP) 02/2010

### Fit and proper person

This is a Tax Practitioners Board (TPB) Explanatory Paper (TPB(EP)). This TPB(EP) is intended as information only. It provides a detailed explanation of the TPB's interpretation of the fitness and propriety requirements in the *Tax Agent Services Act 2009* (TASA), translating these provisions into practical principles that can be applied by the profession.

This TPB(EP) is designed to assist tax practitioners, the relevant institutions, professional associations, potential registrants and the wider community to understand the factors that provide the basis for the TPB's approach to the application of the TASA.

The principles, explanations and examples in this paper do not constitute legal advice and do not create additional legal obligations beyond those that are contained in the TASA.

#### Document history

The TPB released this TPB(EP) in the form of an information sheet as an exposure draft on 7 April 2010. The TPB invited comments and submissions in relation to the information contained in it. The closing date for submissions was 6 June 2010. The TPB considered the submissions made and published the TPB(EP) on 16 December 2010.

The TPB has made the following updates to the TPB(EP) since its release:

- On 9 March 2017 the TPB updated this TPB(EP) to incorporate a reference to tax (financial) advisers, and to update the currency and accuracy of the TPB(EP).
- On 9 January 2024, the TPB updated this TPB(EP) to reflect changes made to the objects clause in the TASA.
- On 1 July 2024 the TPB updated this TPB(EP) to include an additional administrative sanction that it can impose on tax practitioners for a breach of the Code of Professional Conduct.

Issued: 16 December 2010

Last modified: 1 July 2024

# Fit and proper person

## Purpose of explanatory paper

1. This TPB(EP) is designed to provide explanation of the general principles and matters that relate to the concept of fitness and propriety to be a registered tax agent, BAS agent or tax (financial) adviser (collectively referred to as 'tax practitioners'). These may be relevant to the TPB's determination of an application for registration or renewal of registration, or to decisions to take certain actions under the *Tax Agent Services Act 2009* (TASA).
2. Unless an individual is a fit and proper person, they cannot be registered as a tax practitioner.
3. An individual must be fit and proper in order to obtain original registration as a tax practitioner and for the purposes of renewing registration or maintaining continued registration under the TASA. For a company or partnership practitioner, the 'fit and proper person' requirement applies to each individual director (in the case of a company) or each individual partner and director of any company partner (in the case of a partnership), regardless of whether those individuals are registered with the TPB.
4. In this regard, the principles discussed in this paper are relevant to both an individual's fitness and propriety when applying for registration and to a decision by the TPB to terminate a tax practitioner's registration under the TASA. Following from this, all general references in this TPB(EP) to registration of tax practitioners, except where otherwise provided, are intended to encompass both original and continued registration.
5. Therefore, these principles are likely to impact on all decisions that involve fitness and propriety under the TASA. This is because the TASA regime is designed to ensure that only persons who are 'fit and proper' and meet additional requirements can be registered, and remain registered, as tax practitioners under the TASA.
6. This TPB(EP) does not have the force of law and provides information and general guidance only. Therefore, it is not intended to determine or exhaust the positions or actions which may be taken by the TPB in particular cases.
7. Rather, this TPB(EP) provides a decision-making tool that the TPB may refer to when evaluating the 'fit and proper' requirement under the TASA. Tax practitioners may also refer to this TPB(EP) when applying for registration or when considering whether they continue to meet the 'fit and proper' registration requirement.
8. The principles and matters outlined in this TPB(EP) indicate the range of considerations that need to be balanced by the TPB in making an ultimate determination on fitness and propriety. They are not designed to provide a blueprint or formula that governs whether a person will be fit and proper in any given case. Rather, a finding on fitness and propriety will depend on a weighing of these considerations in the context of the particular facts and circumstances of the relevant case.

9. Appendix 1 contains a list of key cases supporting the principles discussed in this TPB(EP) and provides a brief summary of the facts illustrating the application of these principles.

## Professional conduct of tax practitioners

10. The term 'professional conduct' refers to the way in which tax practitioners act while in their professional capacity. When providing services, it is expected that tax practitioners will display an appropriate, professional standard of behaviour beyond that which is expected of someone who is not acting in a professional capacity.
11. The TPB has a range of options available to it under the TASA in making findings about the conduct of tax practitioners. The options open to the TPB include:
- imposing sanctions for breach of the Code of Professional Conduct (Code)
  - applying for a civil penalty for breach of the civil penalty provisions
  - terminating a tax practitioner's registration on the basis that they are no longer a fit and proper person to be registered as a tax practitioner.
12. It is possible that matters impacting on the fitness and propriety of a tax practitioner may also be relevant to a finding under the Code or under one of the civil penalty provisions. In light of this, an overview of these areas is provided below. However, the main purpose of this paper is to consider in detail the fitness and propriety requirements contained in the TASA and the considerations that bear upon fitness and propriety.

## Code of Professional Conduct

13. The Code establishes a set of ethical and professional standards to be observed by tax practitioners. These provisions apply only to conduct which occurs after commencement of the TASA on 1 March 2010 for tax and BAS agents, and after 1 July 2014 for tax (financial) advisers.
14. The TPB may commence investigations to determine whether there has, in fact, been a breach of the Code.<sup>1</sup> If the TPB is satisfied, following an investigation, that there has been a breach of the Code, it may impose one or more of the following administrative sanctions:<sup>2</sup>
- a written caution
  - an order requiring the tax practitioner to take one or more actions including, but not limited to, the following:<sup>3</sup>
    - completing a course of education or training specified in the order by the TPB

---

<sup>1</sup> Section 60-95 of the TASA

<sup>2</sup> Section 30-15 of the TASA

<sup>3</sup> Section 30-20 of the TASA

- providing services (for which the tax practitioner is registered) only under the supervision of another tax practitioner that has been specified in the order
- providing only those services specified in the order
- notify clients about the Board's finding that that they breached the Code
- suspension of registration
- termination of registration
- a period within which a terminated tax practitioner may not re-apply for registration.

## Civil penalty provisions

15. While the Code applies only to registered tax practitioners, the civil penalty provisions apply to unregistered persons or entities in addition to registered tax practitioners.<sup>4</sup>
16. If there is a breach of any of these civil penalty provisions, the TPB has the option of applying to the Federal Court of Australia (Federal Court) for a civil penalty order against the person or entity that breached the provisions.<sup>5</sup>
17. The TPB also has the option of applying to the Federal Court for an injunction to restrain or enforce conduct where it makes a finding that certain conduct by a person or entity would breach a civil penalty provision.<sup>6</sup> An injunction is a court order that requires a person/entity to do, or refrain from doing, a particular action. If a person/entity fails to comply with the terms of an injunction as specified in the court order, the person/entity may be guilty of contempt of court.
18. The TPB may apply for an injunction as an alternative to seeking a civil penalty (in the case of a permanent injunction) or in combination with a civil penalty application (in the case of an interim injunction). An interim injunction will generally operate until the Federal Court makes its final determination.

## Termination of registration

19. The TPB may terminate the registration of a tax practitioner if the TPB is satisfied that a tax practitioner no longer meets the 'fit and proper person' requirement for registration.<sup>7</sup>
20. In determining whether a tax practitioner is a fit and proper person, the TPB can examine the practitioner's previous conduct. The TPB may consider actions or omissions that occurred prior to 1 March 2010 (or in the case of tax (financial) advisers, 1 July 2014) to the extent that the behaviour is relevant to the tax practitioner's present fitness and propriety.

---

<sup>4</sup> Division 50 of the TASA

<sup>5</sup> Subdivision 50-C of the TASA

<sup>6</sup> Section 70-5 of the TASA

<sup>7</sup> Section 40-5 of the TASA

21. The relevant considerations in determining whether an individual is a fit and proper person to be a tax practitioner is the subject of this paper.

## Fit and proper – Overview

22. Section 20-15 of the TASA set out criteria that the TPB must consider in determining whether it is satisfied that an individual is a fit and proper person for the purposes of registration as a tax practitioner.
23. This 'fit and proper' requirement applies to each individual tax practitioner, each director (in the case of a company tax practitioner) and each individual partner and director of any company partner (in the case of a partnership tax practitioner).
24. Section 20-15 of the TASA provides:

*'In deciding whether it is satisfied that an individual is a fit and proper person, the Board must have regard to:*

- (a) whether the individual is of good fame, integrity and character, and*
- (b) without limiting paragraph (a)*
  - (i) whether an event described in section 20-45 has occurred during the previous five years, and*
  - (ii) whether the individual had the status of an undischarged bankrupt at any time during the previous five years, and*
  - (iii) whether the individual served a term of imprisonment, in whole or in part, at any time during the previous five years'*

25. Section 20-45 of the TASA provides:

*The following events may affect your continued registration as a registered tax agent, BAS agent or tax (financial) adviser:*

- (a) you are convicted of a serious taxation offence*
- (b) you are convicted of an offence involving fraud or dishonesty*
- (c) you are penalised for being a promoter of a tax exploitation scheme*
- (d) you are penalised for implementing a scheme that has been promoted on the basis of conformity with a product ruling in a way that is materially different from that described in the product ruling*
- (e) you become an undischarged bankrupt or go into external administration*
- (f) you are sentenced to a term of imprisonment.*

26. A 'serious taxation offence' under section 20-45 is, in brief, one of a number of offences specified in the *Criminal Code* (if it relates to a tax liability) or a taxation offence that is punishable by a fine exceeding 40 penalty units or imprisonment (or both).
27. The term 'an offence involving fraud or dishonesty' takes its ordinary meaning and is determined by reference to community standards. For example, the *Criminal Code* (which is an Act or legislation of Parliament) defines 'dishonest' as dishonest according to the standards of ordinary people in circumstances where the defendant is aware of these standards.
28. An individual is considered to have been 'penalised for being a promoter of a tax exploitation scheme' if they have been ordered to pay a civil penalty for engaging in conduct that results in the entity (or another entity) being a promoter of a tax exploitation scheme as defined in Division 290 of Schedule 1 to the *Taxation Administration Act 1953*.
29. An individual is considered to have been 'penalised for implementing a scheme' within the terms in section 20-45 of the TASA if they have been ordered to pay a civil penalty for engaging in such conduct as defined in Division 290 of Schedule 1 to the *Taxation Administration Act 1953*.
30. An individual 'become(s) an undischarged bankrupt' if they have been declared bankrupt under the *Bankruptcy Act 1966* and have not been discharged from the bankruptcy. A company 'go(es) into external administration' if it goes into external administration as defined in the *Corporations Act 2001*. This generally means that its directors are required to relinquish direction of its affairs to a receiver, administrator, provisional liquidator or liquidator.
31. An individual is 'sentenced to a term of imprisonment' if a sentence is imposed on the individual and that sentence includes a term of imprisonment. To be 'sentenced' to a term of imprisonment, an individual need not have actually served any part of the term of imprisonment, provided that a court has imposed a sentence on the individual.
32. The TPB must consider an event described in section 20-45 if it occurred within the previous five years for the purpose of deciding whether an individual is fit and proper for registration, even if the event occurred in respect of a tax (financial) adviser prior to 1 July 2014.

## Obligation to notify of a change of circumstances

33. Under section 30-35 of the TASA, an individual is obliged to notify the TPB if, amongst other matters, they no longer meet one of the requirements for tax practitioner registration (e.g. the 'fit and proper' requirement).
34. Corresponding obligations to notify the TPB are imposed on partnerships and companies registered under the TASA. A partnership which is registered as a tax practitioner must notify the TPB in writing whenever it ceases to meet one of the tax practitioner registration requirements – e.g. if an individual partner or director of a company partner is no longer a fit and proper person.

35. Similarly, a company which is registered as a tax practitioner must notify the TPB in writing whenever it ceases to meet one of the tax practitioner registration requirements – e.g. if one of the directors is no longer a fit and proper person.
36. An individual, partnership or company that breaches section 30-35 also commits a breach of section 8C of the *Taxation Administration Act 1953* (failure to comply with a requirement under a taxation law) and subsection 30-10(2) of the Code in the TASA (which requires registered tax practitioners to comply with the taxation laws in the conduct of their personal affairs).
37. This TPB(EP) provides guidance on principles relevant to the TPB's determination of fitness and propriety. However, the onus remains on an individual, partnership or company registered tax practitioner to evaluate whether, in all the circumstances of a particular case and having regard to the principles outlined in this TPB(EP), the tax practitioner, each partner or each director is no longer a fit and proper person or of good fame, integrity and character.
38. To comply with its obligation to notify, a registered partnership or company tax practitioner will need to ensure that it implements and maintains appropriate systems and procedures as part of its internal governance framework for detecting and dealing with conduct issues regarding a partner or director.
39. This obligation to notify is not intended to impose a general requirement that a partnership or company agent actually detect all conduct issues relating to its partners or directors. Rather, the partnership or company tax practitioner will be considered to have satisfied this obligation if it implements, as part of its existing arrangements, appropriate systems for its circumstances that are designed to manage and respond to any conduct issues that may arise and through these processes actually does notify the TPB as required.
40. In addition, the TPB recommends that, to comply with its obligations, a partnership or company that is uncertain of whether the conduct of a partner or director may adversely affect the fitness and propriety of that person should disclose the relevant matters to the TPB.
41. A determination by the TPB of whether a registered individual, partnership or company tax practitioner has satisfied their obligation to notify under section 30-35 of the TASA will be made with regard to all the relevant circumstances of the given case and in accordance with the law.

## Case principles on fitness and propriety

42. Cases decided under Part VIIA of the *Income Tax Assessment Act 1936* (ITAA 1936) established a number of principles concerning how a determination of fitness and propriety should be reached and what considerations and conduct were relevant to such a determination.

43. The now-repealed provisions in Part VIIA of the ITAA 1936 generally required that, in the case of original and re-registration applications, individual applicants and original nominees of partnership and company applicants were 'fit and proper person(s) to prepare income tax returns and transact business on behalf of taxpayers in income tax matters.'
44. Further, the registration of tax agents could be suspended or cancelled upon finding that individual agents or nominees of agents did not meet the above 'fit and proper' requirement. Further, the absence of good fame, integrity and character automatically rendered a person not fit and proper for registration under that Act.
45. Under the TASA, an applicant is not eligible for tax practitioner registration (or renewal of registration) unless they can satisfy the TPB that they, or a partner or director where relevant, are a 'fit and proper' person. Further, the TPB is able to terminate the registration of a tax practitioner upon finding that one of the tax practitioner registration requirements (including the fit and proper requirement) is no longer satisfied.
46. Consequently, the considerations and conduct relevant to determining fitness and propriety under Part VIIA of the ITAA 1936 have been considered to be equally applicable to determining fitness and propriety under the TASA.<sup>8</sup>
47. While there is no single consideration that will be determinative of the fitness and propriety of a tax practitioner in every situation, the cases previously under Part VIIA of the ITAA 1936 and now under the TASA highlight some fundamental concepts and specific conduct that have informed the approach taken by tribunals and courts in determining fitness and propriety.
48. This TPB(EP) considers these under the following headings:
  - a) Fundamental concepts in assessing fitness and propriety
  - b) Standards and functions of the profession
  - c) Management of personal income tax obligations
  - d) Relationship with the TPB, the Commissioner of Taxation (Commissioner) and clients
  - e) Conduct of the applicant/ practitioner in circumstances of misconduct or wrongdoing
  - f) Previous conduct issues
  - g) Further considerations.
49. While the cases referred to only considered fitness and propriety in relation to tax and BAS agents, the principles they establish are equally relevant to determining the fitness and propriety of tax (financial) advisers as required under the TASA.

---

<sup>8</sup> For example, see *Delis v Tax Practitioners Board* [2016] FCA 570 affirming *Delis and Tax Practitioners Board* [2015] AATA 820



50. Appendix 1 to this TPB(EP) contains a list of key cases supporting these principles and provides a brief summary of the facts illustrating the application of these principles.
51. In relation to conduct impacting on fitness and propriety, this TPB(EP) refers to a range of concepts, including 'misconduct,' 'improper conduct,' 'unprofessional conduct' and 'wrongdoing.' References to these terms are generic and intended to cover any conduct that may be relevant to a determination on fitness and propriety, whether or not the conduct constitutes a minor or serious breach of the standards expected of a tax practitioner in the conduct of their practice.
52. Conduct that impacts on fitness and propriety may also be relevant in determining whether a registered tax practitioner has complied with the Code under section 30-10 of the TASA. A full discussion of the application of the Code is contained in the separate Explanatory Paper 'Section 30-10 of the *Tax Agent Services Act 2009*: Code of Professional Conduct'.
53. This conduct may also be relevant in determining whether any of the civil penalty provisions apply. For further information, refer to the section of this TPB(EP) titled 'Professional conduct of tax agents and BAS agents'.

## Fundamental concepts in assessing fitness and propriety

### Determining fitness and propriety

54. There is no general, universally applicable formula for determining whether a person is a fit and proper person for the purpose of registration as a tax practitioner.
55. A determination on whether a person is a fit and proper person requires the TPB to make a value judgment in the context of the activities in which the person is or will be engaged considering all the circumstances of a given case.<sup>9</sup>
56. Therefore, a determination on whether a person is fit and proper is not made by applying a single, standard test or rule, but rather, by balancing a range of considerations that may be seen to be relevant to fitness and propriety generally. Whether or not the considerations present in a given case result in a finding that a person is not fit and proper for registration will depend on a range of considerations, including (but not limited to) the nature and degree of the misconduct or improper conduct, any prior conduct or experience of the tax practitioner and any relevant surrounding circumstances.
57. The principles contained in this TPB(EP) indicate how various considerations and specific conduct have been considered in reaching this determination.

---

<sup>9</sup> *Re Comino and Tax Agents' Board of New South Wales* [2009] AATA 766

## Primacy of the public interest

58. Maintaining the public interest and trust is integral to the functioning of the tax agent, BAS agent and tax (financial) adviser professions.<sup>10</sup>
59. This is reinforced in the wording of the object of the TASA, which is to support public trust and confidence in the integrity of the tax profession and the tax system by ensuring that tax agent services are provided to the community in accordance with appropriate standards of professional and ethical conduct.<sup>11</sup>
60. The principal purpose underlying the provisions applying to tax practitioner registration is to protect the public and maintain public confidence in the tax agent, BAS agent and tax (financial) adviser professions and not to penalise or punish misconduct or improper or unprofessional conduct.<sup>12</sup>
61. This ultimate objective is achieved through ensuring that only those individuals that possess the requisite knowledge, ability, good fame, integrity and character are registered as tax practitioners.<sup>13</sup>
62. Consequently, individuals presenting an unacceptable risk to the public in the role of a tax practitioner should not be registered and, if previously registered, should be removed from the register.<sup>14</sup>
63. Consistent with the public protection rationale, a tax practitioner who has committed previous misconduct or improper or unprofessional conduct must satisfy the TPB as part of its determination on fitness and propriety that the conduct was merely temporary or isolated and is unlikely to recur in the future. Here the focus of the TPB's determination is not limited to prior conduct, but extends to the likelihood of future misconduct or improper conduct.<sup>15</sup>

---

<sup>10</sup> *Re Sargent and Tax Agents' Board of Victoria* [2009] AATA 219

<sup>11</sup> Section 2-5 of the TASA.

<sup>12</sup> *Re Carbery and Associates Pty Ltd and Tax Agents' Board of Queensland* [2001] AATA 107; *Re Jones and Tax Agents' Board of New South Wales* [2002] AATA 1246; *Re Budai and Tax Agents' Board of New South Wales* [2002] AATA 1154; *Re Sargent and Tax Agents' Board of Victoria* [2009] AATA 219

<sup>13</sup> *Kolya and Tax Practitioners Board* [2011] AATA 804; *Re Su and Tax Agents' Board of South Australia* [1982] AATA 127; *Re Carbery and Associates Pty Ltd and Tax Agents' Board of Queensland* [2001] AATA 107; *Re McKay and Tax Agents' Board of Tasmania* [1994] AATA 113; *Burnett and Tax Practitioners Board* [2014] AATA 687; *Gylman and Tax Practitioners Board* [2015] AATA 1012

<sup>14</sup> *Re Scott and Tax Agents' Board of Queensland* [2001] AATA 435

<sup>15</sup> *Re Budai and Tax Agents' Board of New South Wales* [2002] AATA 1154; *Re Kerin and Tax Agents' Board of South Australia* [2009] AATA 974; *Toohey v Tax Agents' Board of Victoria (No 2)* [2008] FCA 1796; *Phillip Same Accountants and Tax Practitioners Board* [2010] AATA 439; *Three Wickets Pty Ltd and Tax Practitioners Board* [2016] AATA 786; *G J Brown & Co Pty Ltd and Tax Practitioners Board* [2016] AATA 740; *Burnett and Tax Practitioners Board* [2014] AATA 687

## Special circumstances

64. Under Part VIIA of the ITAA 1936, in certain situations, any special circumstances in relation to a tax agent were required to be taken into account when determining whether an individual was a fit and proper person.<sup>16</sup>
65. While there is no longer a specific requirement that the special circumstances of an individual be taken into account, the TPB may continue to treat the particular circumstances of the individual as a relevant consideration in determining fitness and propriety. The circumstances that may be considered for this purpose include those both prior to and after the commencement of the TASA.
66. While the particular circumstances of a tax practitioner may be relevant to a determination of whether an individual is a fit and proper person, the TPB must weigh the public interest in the tax practitioner continuing in practice against the public interest in protecting clients from a recurrence of the relevant conduct.<sup>17</sup>
67. Considerations of the personal circumstances of an individual cannot override this primary consideration which must not be considered in isolation from the public interest in ensuring proper and competent provision of tax agent services (including BAS services and tax (financial) advice services) to the public.<sup>18</sup>

## Scope of what may be considered

68. Beyond the words of section 20-15 of the TASA, there is no statutory definition of the expression 'fit and proper person'.
69. While the TPB must consider the matters contained in section 20-15 of the TASA in determining whether an individual is a fit and proper person, these matters do not limit the generality of the expression or restrict the matters that the TPB may consider in determining fitness and propriety.<sup>19</sup>

---

<sup>16</sup> Subsection 251BC(3) of the ITAA 1936

<sup>17</sup> *Kolya and Tax Practitioners Board* [2011] AATA 804; *Re Sargent and Tax Agents' Board of Victoria* [2009] AATA 219; *SHTX and Tax Practitioners Board* [2016] AATA 451; *SRBP and Tax Practitioners Board* [2016] AATA 456

<sup>18</sup> *Re Toohey and Tax Agents' Board of Victoria* [2009] AATA 142

<sup>19</sup> *Re Carbery and Tax Agents' Board of Queensland* [2001] AATA 107; *Re Kerin and Tax Agents' Board of South Australia* [2009] AATA 974

# Standards and functions of the profession

## Functions of the profession

70. The function of a tax practitioner is to provide tax agent services.<sup>20</sup>
71. The role of a tax practitioner in providing these services across a wide range of business, professions, occupations and clients is not to be taken lightly. It is a task that requires such attributes as competence, good fame, integrity and character in dealing with the Commissioner, the TPB and clients.<sup>21</sup>
72. The conduct of a tax practitioner should be such that the TPB, the Commissioner, clients and the public can have confidence that the practitioner will perform their function competently and with integrity.<sup>22</sup>

## Conduct indicative of a lack of fitness and propriety

73. Conduct falling short of this standard may indicate that an individual is not a fit and proper person.<sup>23</sup> The significance of the conduct will vary depending on, among other things, the type of conduct, whether it is part of a pattern of behaviour and when the conduct occurred.
74. Certain offences are so inconsistent with performing the role of a tax practitioner that conviction for these offences will render a person not fit and proper to be registered.<sup>24</sup> Tax evasion is considered to be an offence of this nature because a conviction for tax evasion is wholly inconsistent with the role of providing tax agent services competently and with integrity.<sup>25</sup>

---

<sup>20</sup> 'Tax agent service' is defined under section 90-5 of the TASA and includes a 'BAS service' and 'tax (financial) advice service'.

<sup>21</sup> *Re Su and Tax Agents' Board of South Australia* [1982] AATA 127; *Re Carbery and Associates Pty Ltd and Tax Agents' Board of Queensland* [2001] AATA 107; *Re McKay and Tax Agents' Board of Tasmania* [1994] AATA 113. The relevance of assessing competence, honesty and integrity as it relates to fitness and propriety in the role of a tax practitioner also accords with the view taken by Australian Prudential Regulation Authority (APRA) on the requirement for the responsible persons in regulated institutions to be fit and proper for that role and how to assess this fitness and propriety. See Prudential Standard APS 520 Fit and Proper July 2008 at [18].

<sup>22</sup> *Re Su and Tax Agents' Board of South Australia* [1982] AATA 127; *Re Terrence Richard Denton and Tax Agents' Board, South Australia* [1983] AATA 21; *Tung and Tax Practitioners Board* [2012] AATA 615

<sup>23</sup> *Re Fitzgibbon and Tax Agents' Board of Queensland* [1993] AATA 474

<sup>24</sup> As above; *Frost Taxation Pty Ltd and Tax Agents' Board of South Australia* [2005] AATA 393

<sup>25</sup> As above; *Gylman and Tax Practitioners Board* [2015] AATA 1012

75. In general, conduct (including convictions) involving fraud and/or dishonesty may bear greater weight in the determination of fitness and propriety for tax practitioner registration than other considerations. Such conduct is particularly relevant to 'good fame, integrity and character' in a profession that invariably requires the maintenance of client trust and confidence and often involves the handling of client moneys and the payment of taxes.<sup>26</sup> A failure to exercise diligence in ascertaining clients' affairs, and a failure to take appropriate steps to ensure client confidentiality and the integrity of the taxation system are behaviours that are also indicative that a tax practitioner is not a fit and proper person to be registered under the TASA.<sup>27</sup>
76. Conversely, while particular acts or omissions may not be enough when viewed separately to warrant a sanction under the TASA, it is possible for multiple less serious matters, if sufficient in number, to provide a basis for the TPB to determine that a practitioner does not meet the fit and proper requirement.<sup>28</sup>

## Persistent misconduct or improper conduct

77. It will be more difficult for an applicant or practitioner to satisfy the fitness and propriety requirements where they have committed misconduct or improper or unprofessional conduct extending over several years.<sup>29</sup>

## Management of personal income tax obligations

78. As a tax practitioner is responsible for providing tax agent services (including BAS services and tax (financial) advice services) on behalf of other entities, non-compliance by a tax practitioner with their personal taxation obligations may be considered relevant in determining whether the tax practitioner is a fit and proper person.<sup>30</sup>
79. The personal taxation obligations of a tax practitioner include, but are not limited to, the tax practitioner's timely lodgement of personal income tax returns and activity statements, payment of superannuation guarantee contributions and PAYG withholding and instalment payments.

---

<sup>26</sup> *Re Jones and Tax Agents' Board of New South Wales* [2002] AATA 1246; *Frost Taxation Pty Ltd and Tax Agents' Board of South Australia* [2005] AATA 393; *Gylman and Tax Practitioners Board* [2015] AATA 1012; *Hourani and Tax Practitioners Board* [2012] AATA 518

<sup>27</sup> *Li and Tax Practitioners Board* [2014] AATA 299; *Tung and Tax Practitioners Board* [2012] AATA 615

<sup>28</sup> *Su v Tax Agents' Board of South Australia* [1982] AATA 127; *Fortune Corporation Pty Ltd and Anor and Tax Practitioners Board* [2012] AATA 11

<sup>29</sup> *Re Jones and Tax Agents' Board of New South Wales* [2002] AATA 1246; *Grosfeld and Tax Practitioners Board* [2014] AATA 100

<sup>30</sup> *Re Carbery and Associates Pty Ltd and Tax Agents' Board of Queensland* [2001] AATA 107; *Kelly and Tax Practitioners Board* [2015] AATA 712

80. In considering a tax practitioner's management of his or her personal income tax obligations, individual circumstances will need to be considered.<sup>31</sup> A pattern of behaviour or conduct in this regard may be relevant.<sup>32</sup>
81. A failure to accurately complete tax returns and notices and to comply with other requirements of the Commissioner or the TPB may indicate a lack of competence, good fame, integrity and character, such that the individual concerned cannot be relied upon to adequately provide tax agent services.<sup>33</sup>
82. Subsequent (and belated) compliance with tax laws, when faced with adverse administrative and legal action, does not necessarily demonstrate fitness and propriety in the face of past misconduct.<sup>34</sup>
83. A tax practitioner's inability to comply with the practitioner's own taxation affairs could subsequently cast doubt over the competence with which the practitioner provides tax agent services to clients.
84. On the basis of the above, a tax practitioner who fails to comply with the practitioner's own taxation obligations will not be considered a person of sufficient competence, good fame, integrity and character or sufficiently fit and proper to be registered as a tax practitioner.<sup>35</sup>

## Relationship with clients, the TPB and the Commissioner

### Relationship with clients

85. A failure by a tax practitioner to discharge their responsibilities on behalf of clients could reflect adversely on the tax practitioner's fitness and propriety for registration where it amounts to unsatisfactory or unreasonable failure in the tax practitioner's circumstances and all the surrounding circumstances of the case.

---

<sup>31</sup> *Kelly and Tax Practitioners Board* [2015] AATA 71

<sup>32</sup> *Delis and Tax Practitioners Board* [2015] AATA 820; *Kelly and Tax Practitioners Board* [2015] AATA 712

<sup>33</sup> *Su v Tax Agents' Board of South Australia* [1982] AATA 127; *Pappalardo v Tax Agents' Board of Victoria* [2003] AATA 990; *Grosfeld and Tax Practitioners Board* [2014] AATA 100

<sup>34</sup> *Delis and Tax Practitioners Board* [2015] AATA 820

<sup>35</sup> As above; *Re Comino and Tax Agents' Board of New South Wales* [2009] AATA 766

86. Such a failure will generally be viewed more seriously than a failure by the tax practitioner to discharge their own tax responsibilities where it involves exploitation of the clients' dependence and trust.<sup>36</sup> The severity of such conduct is likely to be greater where the clients involved are in a position of particular vulnerability.<sup>37</sup>
87. Specific examples of failure to properly maintain client relationships that may in the circumstances reflect adversely on fitness and propriety for registration include, but are not limited to:
- lacking the requisite knowledge and skills to provide services to a professional and competent standard
  - failure to prepare or lodge client returns in a timely fashion
  - failure to respond to client telephone calls and correspondence
  - failure to otherwise make oneself available to attend to client matters or to notify clients of any change to contact details
  - failure to pass on correspondence from the Commissioner to clients
  - provision of misleading information to clients in relation to the filing of returns with the Commissioner
  - imposition of blame on clients or staff for delays caused by the agent in filing returns
  - provision of money to clients to influence them against complaining to any official body
  - provision or receipt of other inducements to influence against complaining to any official body.<sup>38</sup>
88. Importantly however, while the TPB may take into account complaints against a tax practitioner or individual in determining fitness and propriety for registration under the TASA,<sup>39</sup> the absence of any complaints may not bear much relevance when considered in conjunction with other relevant facts and circumstances.<sup>40</sup>

---

<sup>36</sup> *Hourani and Tax Practitioners Board* [2012] AATA 518

<sup>37</sup> As above

<sup>38</sup> *Re an Applicant and Secretary, Tax Agents' Board of Victoria* [1987] AATA 117; *Re Cowlshaw and Ors and Tax Agents' Board of Queensland* [1999] AATA 412; *Kolya and Tax Practitioners Board* [2011] AATA 804; *Pappalardo v Tax Agents' Board of Victoria* [2003] AATA 990; 2003 ATC 2207 and *Re Carbery and Associates Pty Ltd and Tax Agents' Board of Queensland* [2001] AATA 107; *Grosfeld and Tax Practitioners Board* [2014] AATA 100; *Carter and Tax Practitioners Board (Taxation)* [2017] AATA 528

<sup>39</sup> For example, see *Jones and Tax Agents' Board of New South Wales* [2002] AATA 1246

<sup>40</sup> *Kerin and Tax Agents' Board of South Australia* [2009] AATA 974

## Relationship with the TPB

89. In general, a lack of cooperation with the TPB and failure to deal with the TPB appropriately may also reflect adversely on a tax practitioner's fitness and propriety for registration. This is because it could demonstrate a lack of appreciation of the significance of completely and promptly responding to requests from regulatory authorities, and noting also that there is a legal obligation on registered tax practitioners in the Code to respond to requests and directions from the TPB in a timely, responsible and reasonable manner.<sup>41</sup>
90. A tax practitioner may be found not fit and proper in circumstances where, for example, they repeatedly neglect or delay in responding to telephone calls, correspondence and directions to provide assistance or substantiation in relation to queries or fails to attend interviews when required.<sup>42</sup>
91. Additionally, displays of disrespect and contempt for the TPB and the TPB's officers in a tax practitioner's dealings with the TPB, ATO, courts or tribunals is also considered to be conduct that is not consistent with the requirements and duties of a tax practitioner.<sup>43</sup>
92. A failure to advise the TPB of any change to contact details is a factor that may further indicate a lack of competence, good fame, integrity and character and therefore fitness, to perform the functions of a registered tax practitioner.
93. Furthermore, the making of false or misleading statements by a practitioner to the TPB (whether on an application form or otherwise in the course of providing information) could be sufficient for a finding that the agent does not possess the competence, good fame, integrity and character, and therefore the fitness and propriety, for registration.<sup>44</sup>

## Relationship with Commissioner

94. Failure to deal with the Commissioner appropriately could also reflect adversely on a tax practitioner's fitness and propriety as the tax practitioner is required to be of such competence, good fame, integrity and character that others may entrust their taxation affairs to that person's care. This includes unauthorised access to ATO systems.<sup>45</sup>

---

<sup>41</sup> *Pappalardo v Tax Agents' Board of Victoria* [2003] AATA 990; 2003 ATC 2207; *Re Ray and Tax Agents' Board of Queensland* [2005] AATA 657; *Grosfeld and Tax Practitioners Board* [2014] AATA 100

<sup>42</sup> *Re Cowlshaw and Ors and Tax Agents' Board of Queensland* [1999] AATA 412; *Re Carbery and Associates Pty Ltd and Tax Agents' Board of Queensland* [2001] AATA 107; *Jones and Tax Agents' Board of New South Wales* [2002] AATA 1246; *Pappalardo v Tax Agents' Board of Victoria* [2003] AATA 990; 2003 ATC 2207; *Frost Taxation Pty Ltd and Tax Agents' Board of South Australia* [2005] AATA 393

<sup>43</sup> *Re Carbery and Associates Pty Ltd and Tax Agents' Board of Queensland* [2001] AATA 107

<sup>44</sup> *Kolya and Tax Practitioners Board* [2011] AATA 804; *Su and Tax Agents' Board of South Australia* [1982] AATA 127; *Re Fitzgibbon and Tax Agents' Board of Queensland* [1993] AATA 474; *Re Carbery and Associates Pty Ltd and Tax Agents' Board of Queensland* [2001] AATA 107; *Re Bouffiere and Tax Agents' Board of New South Wales* [2007] AATA 1978

<sup>45</sup> *Burnett and Tax Practitioners Board* [2014] AATA 687; *Su and Tax Agents' Board of South Australia* [1982] AATA 127



95. Failing to comply with the taxation laws, including failing to respond to formal notices and directions from the Commissioner, may reduce the confidence that the TPB may have in the tax practitioner to provide tax agent services to clients in an honest, competent and accurate manner.<sup>46</sup>

## Conduct of the applicant or tax practitioner in circumstances of misconduct or wrongdoing

96. Applying the principles in the cases to the TASA, a tax practitioner who engages in misconduct or wrongdoing may still be considered fit and proper where the tax practitioner displays remorse, contrition and an awareness of the significance and consequences of the misconduct or wrongdoing, such that the TPB and the Commissioner can have confidence in the practitioner's continued ability to honestly and competently discharge the functions of the profession.<sup>47</sup>
97. Following from this, a tax practitioner's level of frankness and cooperation with regulators including the TPB and with judicial decision makers when confronted with the tax practitioner's misconduct or improper or unprofessional conduct (such as in tendering admissions to allegations) will be relevant to the view taken of the tax practitioner's fitness and propriety for registration under the TASA.<sup>48</sup> On that basis, a tax practitioner's refusal to accept responsibility for such conduct will bear on the issue of whether the practitioner is a fit and proper person to be registered.<sup>49</sup>
98. For example, the provision of false or misleading evidence before bodies such as the TPB in the course of an investigation into a tax practitioner's conduct of tax agent services is likely to reflect adversely on the tax practitioner's fitness and propriety. This is because it raises doubts about the tax practitioner's competence, good fame, integrity and character and weighs against perceptions of the practitioner's ability to act in accordance with the tax practitioner's professional obligations in the future.<sup>50</sup>
99. By the same rationale, any delay or failure by a tax practitioner to comply with the taxation laws during the period of a stay granted by the Administrative Appeals Tribunal (Tribunal) or while the practitioner's case is being considered by the Tribunal or Federal Court may indicate a lack of appreciation of the significance of any conduct issues and therefore call into question the practitioner's fitness and propriety for registration.<sup>51</sup>

---

<sup>46</sup> *Stasos v Tax Agents' Board of New South Wales* [1990] AATA 346

<sup>47</sup> *Burnett and Tax Practitioners Board* [2014] AATA 687; *Stasos v Tax Agents' Board of New South Wales* [1990] AATA 346; *Frost Taxation Pty Ltd and Tax Agents' Board of South Australia* [2005] AATA 393; *Hourani and Tax Practitioners Board* [2012] AATA 518

<sup>48</sup> *Budai and Tax Agents Board of New South Wales* [2002] AATA 1154; *Hourani and Tax Practitioners Board* [2012] AATA 518

<sup>49</sup> *Re Carbery and Associates Pty Ltd and Tax Agents' Board of Queensland* [2001] AATA 107; *Pappalardo v Tax Agents' Board of Victoria* [2003] AATA 990; 2003 ATC 2207 *Three Wickets Pty Ltd and Tax Practitioners Board* [2016] AATA 786

<sup>50</sup> *Re Carbery and Associates Pty Ltd and Tax Agents' Board of Queensland* [2001] AATA 107; *Pappalardo v Tax Agents' Board of Victoria* [2003] AATA 990; 2003 ATC 2207; *Hourani and Tax Practitioners Board* [2012] AATA 518

<sup>51</sup> *Toohy and Tax Agents' Board* [2009] AATA 142

100. Furthermore, in the context of a fraudulent misappropriation of client money, whether or not a practitioner has repaid the misappropriated amount may be relevant to the issue of the likelihood of such conduct recurring, and hence to the fitness and propriety of the practitioner generally.<sup>52</sup>

## Previous conduct issues

101. In determining whether an applicant or tax practitioner charged with previous misconduct or improper or unprofessional conduct that impacts adversely on their fitness and propriety should be registered under the TASA, the TPB will have regard to a range of issues such as public confidence and protection.<sup>53</sup>

## Further considerations

### Onus of proof

102. The onus of proof in establishing fitness and propriety rests with the tax practitioner. It is up to the tax practitioner to establish, and the TPB must be reasonably satisfied, that on the balance of probabilities and having regard to the seriousness of the matters raised that the tax practitioner or relevant individual is a fit and proper person.<sup>54</sup>

### Liability of directors, partners and directors of company partners

103. If it is determined that a director in a company tax practitioner is not a fit and proper person, the company will no longer, while the director remains in that position, satisfy the registration criteria as each individual director of a company tax practitioner must be a fit and proper person.<sup>55</sup>

104. If it is determined that an individual partner or a director of a company partner in a partnership tax practitioner is not a fit and proper person, the partnership, while the partner or director remains in place, will no longer satisfy the registration criteria as each individual partner or director of a company partner in a partnership tax practitioner must be a fit and proper person.<sup>56</sup>

---

<sup>52</sup> *Jones and Tax Agents' Board of New South Wales* [2002] AATA 1246

<sup>53</sup> *Budai and Tax Agents' Board of New South Wales* [2002] AATA 1154; *Jones and Tax Agents' Board of New South Wales* [2002] AATA 1246; *Sargent and Tax Agents' Board of Victoria* [2009] AATA 219

<sup>54</sup> *Jack v Tax Agents' Board of New South Wales* [1997] AATA 678

<sup>55</sup> Subsection 20-5(3) of the TASA

<sup>56</sup> Subsection 20-5(2) of the TASA; *Three Wickets Pty Ltd and Tax Practitioners Board* [2016] AATA 786

105. An individual director or partner is not liable for the specific conduct of an offending director or partner. However, if that person knows of the misconduct or improper or unprofessional conduct of the director or partner and fails to take any steps to address the issues caused by the director or partner, this failure may well be considered to reflect adversely on their own fitness and propriety.<sup>57</sup>

## Mitigating conduct

106. Generally, to the extent that sustained failure and delay in providing tax agent services would reflect on fitness and propriety, the practitioner may still be considered a fit and proper person if they undertake steps to address the difficulties such as communication with the Commissioner pertaining to the difficulties being experienced.<sup>58</sup>

## Conduct not connected to registration as a tax practitioner

107. Observations made about a tax practitioner's conduct in the practice of another profession are relevant to whether the practitioner is fit and proper to obtain or maintain registration under the TASA.<sup>59</sup>

108. A tax practitioner may fail to satisfy the fit and proper requirement on the basis of behaviour (for example, inappropriate behaviour towards current or former clients or staff) that constitute breaches of conventions such that it would be detrimental to any professional body to accommodate the practitioner as a member. This is so even if the practitioner's professional integrity is not in question.<sup>60</sup>

109. Consistent with the above, conduct need not occur directly in the course of professional practice to constitute misconduct or improper conduct for the purposes of assessing fitness and propriety for tax practitioner registration. Such conduct will impact adversely on fitness and propriety where it is "sufficiently closely connected with such practice," undermines the reputation or standards of the profession or demonstrates the presence of qualities (such as dishonesty or deception) that are inconsistent with the standards and expectations to practice as a registered practitioner.<sup>61</sup>

---

<sup>57</sup> *Re Cowlshaw and Ors and Tax Agents' Board of Queensland* [1999] AATA 412

<sup>58</sup> *Toohey and Tax Agents' Board* [2009] AATA 142

<sup>59</sup> *Kerin and Tax Agents' Board of South Australia* [2009] AATA 974; Also see *Frost Taxation Pty Ltd and Tax Agents' Board of South Australia* [2005] AATA 393; *Grosfeld and Tax Practitioners Board* [2014] AATA 100; *Gylman and Tax Practitioners Board* [2015] AATA 1012

<sup>60</sup> *Jack v Tax Agents' Board of New South Wales* [1997] AATA 678

<sup>61</sup> *Kerin and Tax Agents' Board of South Australia* [2009] AATA 974; Also see *Sargent and Tax Agents' Board of Victoria* [2009] AATA 219

# Appendix 1 – Case examples

## Su and Tax Agents' Board of South Australia [1982] AATA 127

### Summary

Fitness and propriety of registered tax agent considered in relation to:

- convictions and fines relating to considerable delays and failure to lodge personal income tax returns
- failure to remit group tax instalments in his capacity as an employer
- failure to furnish return of company of which he was director
- failure to disclose convictions in annual notices to the board.

**Keywords:** fit and proper; cancellation of registration; convictions; personal income tax affairs; relationship with the Board and Commissioner.

### Outline of relevant facts

This case concerned a decision by a state board to cancel the agent's registration on the basis that the agent was not a fit and proper person. The agent conducted a large practice that, due to difficulties encountered, had to be scaled back. The applicant was convicted on two separate occasions of failing to lodge personal income tax returns and failing to remit withholding tax deductions collected from employees.

In addition to his convictions for failing to remit withholding tax, the agent was also late in remitting withholding tax on several occasions. In the annual returns lodged with the Board, the agent failed to disclose the previous convictions. The agent was struck off the register of liquidators and fined in relation to his role in liquidating a private company. The board determined to cancel the agent's registration on the basis of this conduct.

The Tribunal substituted its own decision to cancel for different reasons to those of the board.

### Relevant principle/s established or confirmed by the case

- While particular acts or omissions by a tax agent may not be enough, viewed separately, to warrant removal from the register, it is possible for multiple less serious matters, if sufficient in number, to provide a basis for a board to determine that a tax agent was not fit and proper.
- In addition, the failure of a tax agent to comply with their own taxation obligations is relevant to fitness and propriety as it may result in adverse treatment of the clients of that agent and the Commissioner will have reduced confidence in the competence with which those returns were prepared.

- Certain offences are so inconsistent with performing the role of a tax agent that conviction for these offences will render a person not fit and proper to be a registered tax agent. The Tribunal highlighted offences involving tax evasion to be an example of such an offence.
- In relation to the failure to accurately complete the annual returns to the board, someone incapable of accurately completing a simple yet important notice “is not a person of sufficient competence and integrity to hold the privilege of acting for clients in the preparation and lodgment of their income tax returns.”

## Stasos v Tax Agents’ Board of New South Wales [1990] ATA 346

### Summary

Fitness and propriety of registered tax agent considered in relation to:

- evasion of tax through understatement of income derived from tax agent practice and failure to claim tax deductions for clients in respect of tax return preparation fees
- relevance of vulnerability of clients who had relied on agent
- whether agent had corrected behaviour through subsequent lapse of time.

**Keywords:** *fit and proper; cancellation of registration; tax evasion; understatement of income; failure to claim deductions; relationship with the Commissioner; vulnerability and dependence of clients; lapse of time.*

### Outline of relevant facts

This case concerned a decision by a state board to cancel the agent’s registration on the basis that the agent was not a fit and proper person. The agent ran a tax agent practice, largely made up of migrant clients that primarily paid his professional fees in cash. The agent engaged in tax evasion through failing to disclose the income earned from his tax agent business to the Commissioner. This was partly achieved through failing to claim a deduction on behalf of his clients for professional fees paid to him for preparing their income tax returns. The agent originally denied the allegations to this effect put to him by taxation officers only to later confirm what they had told him was, in fact, true.

The Tribunal affirmed the board’s decision that the agent was not a fit and proper person on the basis that he had breached his responsibilities as a tax agent by failing to declare income and, more importantly, by failing to claim a deduction on behalf of clients to secure an advantage for himself. The Tribunal also determined that insufficient time had elapsed to determine whether the agent had truly corrected his behaviour. The agent appealed to the Federal Court.

The Federal Court found no error of law in the decision of the Tribunal and made further comment on this matter.

### Relevant principle/s established or confirmed by the case

- Failure to claim deductions on behalf of clients was a more serious breach of a tax agent's responsibilities than failure to declare a tax agent's own income.
- The severity of this conduct is greater where the clients involved are in a position of particular vulnerability. In this particular case, the affected clients were largely migrant clients from different ethnic backgrounds that had placed trust in the tax agent to assist them in complying with their income tax obligations.
- This type of misconduct or improper or unprofessional conduct is sufficient to support a finding that, at the time of such conduct, the person was not a fit and proper person to be a tax agent.
- A person is not fit and proper, even if a period of time has elapsed between the conduct complained of and the hearing of a matter, if they fail to demonstrate contrition and an understanding of the misconduct or wrongdoing.
- An agent must maintain relationships with the Board and the Commissioner such that these departments may have confidence in their ability to undertake their role truthfully, accurately and competently.

## Re Cowlshaw and Ors and Tax Agents' Board of Queensland [1999] AATA 412

### Summary

Fitness and propriety of registered tax agents considered in relation to:

- the excessive claiming of deductions on behalf of clients
- failure to respond to ATO telephone calls and correspondences
- failure to act on substantiation requests by the ATO despite being granted extensions of time
- failure to respond to board correspondence
- failure to file clients' income tax returns
- failure to pass on ATO correspondences to clients
- shifting of blame for delays by agents on to clients
- staff and client complaints regarding failure to pass on refunds.

**Keywords:** fit and proper; excessive claiming of deductions; failure to respond to Board and ATO correspondences; relationship with the Board and Commissioner; failure and delay in filing clients' income tax returns; misrepresentations to clients; failure to pass on ATO correspondences; failure to pass on tax refunds; shifting of blame onto clients and staff.

## Outline of relevant facts

This case concerned a decision of a state board to suspend the registration of the tax agents on the basis that they were not fit and proper persons to be registered. The Commissioner had commenced investigating the returns lodged by the tax agents on the basis that deduction claims made in these returns were higher than would otherwise have been expected for that type of return. The Commissioner placed the tax agents on a tax agents' program and required them to provide substantiation of a specific number of claims for deductions. The tax agents failed to cooperate with the Commissioner through repeatedly failing to respond to telephone calls, correspondence and directions to provide substantiation of claims for deductions in client returns.

In addition, the tax agents had failed to file client returns, failed to respond to client correspondence, had lied to clients about the status of their returns, failed to pass on correspondence from the Commissioner to their clients and failed to respond to correspondence from the board. One of the tax agents had given money to his clients to "keep his clients quiet, to stop them from complaining to any official body." The tax agents also attempted to blame clients and staff for the delay in filing their returns and responding to Commissioner requests for information.

The Tribunal varied the board's decision to extend the suspension periods applied to the tax agents.

## Relevant principle/s established or confirmed by the case

- A lack of cooperation with the Commissioner's officers and failure to treat the board with proper respect is a serious breach of the proper conduct of a tax agent business.
- The following conduct issues may be considered such that an agent engaged in this conduct will not be a fit and proper person to prepare income tax returns or transact business on behalf of taxpayers in income tax matters:
  - failing to file tax returns within a reasonable time or in some cases at all
  - failing to respond to telephone calls and correspondence
  - failing to pass on correspondence from the Commissioner to clients
  - misleading clients by informing them that returns had been filed with the Commissioner when they had not
  - blaming clients for delays
  - blaming staff for delays
  - providing money to clients to keep them quiet and to stop them from complaining to any official body.

- While an individual director or partner is not liable for the specific conduct of an offending director or partner, if that person knows of the misconduct or improper conduct or wrongdoing of the director or partner and fails to take any steps to address the issues caused by the other director or partner, then the Board will consider that this failure will reflect adversely on the fitness and propriety of the other directors or partners.

## Re Carbery and Associates Pty Ltd and Tax Agents' Board of Queensland [2001] AATA 107

### Summary

Fitness and propriety of applicant for tax agent re-registration considered in relation to:

- convictions for failure to lodge personal income tax returns
- failure to respond to board correspondence
- failure to advise clients of new contact details
- failure to disclose conviction on re-registration application
- client complaints
- relevance of personal circumstances.

**Keywords:** *fit and proper; application for re-registration; personal income tax affairs; failure to respond to Board correspondences; relationship with the Board and Commissioner; failure to advise of contact details; client complaints; personal issues.*

### Outline of relevant facts

The case concerned a decision of a state board to refuse an application for re-registration on the basis that the nominee of the applicant was not a fit and proper person and that the executive officer was not of good fame, integrity and character. The board's decision was based on convictions for failing to lodge income tax returns, false statements made to the board, failure to respond to board correspondence, failure to file client returns and the number of client complaints concerning the applicant.

Medical evidence indicated that the failure to respond and other relevant conduct could be partly explained by medical conditions of the applicant, particularly depression.

At the hearing, the applicant produced certain evidence purporting to show that returns had been lodged with the Commissioner. The veracity of this evidence was highly suspect and was inconsistent with previous statements made by the applicant.

The Tribunal affirmed the board's decision to refuse the application for re-registration.



## Relevant principle/s established or confirmed by the case

- The matters that may be considered in determining fitness and propriety include those matters set out in section 251BC. Generally, that section sets out a range of factors that disqualify a person from satisfying the fit and proper requirement under the ITAA 1936, which include that they are not of good fame, integrity and character or have been convicted of a serious taxation offence during the previous 5 years. However, this section does not limit the range of other factors that may be considered by a decision-maker in determining whether an agent or other individual is a fit and proper person.
- The failure to comply with the basic requirements of the Commissioner in the conduct of an agent's personal taxation affairs is a "gross dereliction of a fundamental duty" made more serious by the fact that the agent is themselves responsible for the management of their client's compliance with these requirements.
- Making false or misleading statements to the board, failing to provide written explanations on request from the board and tendering false evidence before the Tribunal are matters that raise serious doubts about the honesty or integrity of an agent.
- The role of a tax agent in preparing income tax returns across a wide range of business, professions, occupations and income sources is not to be taken lightly. It is a task that requires such attributes as competence, good fame, integrity and character in dealing with the Commissioner, the relevant board and clients.
- Unless a person can be considered competent in all these attributes, then the person will not be considered a fit and proper person to prepare income tax returns and to transact business on behalf of taxpayers in income tax matters.
- While special circumstances are relevant in determining an application for re-registration, the key principle behind imposing a sanction is the protection of the public rather than the punishment of the practitioner. Considerations of personal circumstances cannot override this primary consideration.

## Frost Taxation Pty Ltd and Tax Agents' Board of South Australia [2005] AATA 393

### Summary

Fitness and propriety of registered tax agent considered in relation to:

- preparation of false accounts and giving of financial advice resulting in Supreme Court proceedings
- false declarations as to non-existence of trust account, audit of trust account and reports on such audit
- disciplinary proceedings before Society of Certified Practising Accountants
- conduct in relation to bankruptcy issues
- lack of contrition.

**Keywords:** fit and proper; cancellation of registration; false declarations; disciplinary proceedings, relationship with the Board; dishonesty; lack of contrition.

## Outline of relevant facts

This case regarded a review of a decision of a state board to refuse the company applicant's registration on the basis that its original nominee was not a fit and proper person, in particular, that he was not of good fame, integrity and character as required under the ITAA 1936.

The board's finding in respect of the nominee related to a number of factual matters. These included evidence and findings made in Supreme Court proceedings regarding the nominee's conduct in the manipulation of accounts and giving of financial advice in the course of his practice as an accountant, his consequential bankruptcy, the failure to keep proper records and making of false declarations in respect of his maintenance of a trust account and disciplinary proceedings before the Society of Certified Practising Accountants.

In relation to his bankruptcy, the board further considered the nominee's delay in notifying the board of his status, his failure to notify the Trustee in bankruptcy of his ownership of a property, his personal use of rent moneys derived from the property and his application for and use of a credit card.

The Tribunal affirmed the board's decision to refuse the application for registration on the basis of the conduct of the nominee.

## Relevant principle/s established or confirmed by the case

- It is not sufficient, when determining fitness and propriety with regard to past misconduct or wrongdoing, that the applicant merely express remorse and contrition. The applicant must establish that they appreciate the significance of the misconduct or wrongdoing and have rehabilitated themselves such that they will not repeat it or further depart from the standards required of them in the future.
- Misconduct or improper conduct that involves intent and dishonesty provides strong grounds for a finding that the applicant is not of good fame, integrity and character for the purposes of tax agent registration.

## Sargent and Tax Agents' Board of Victoria [2009] AATA 219

### Summary

Fitness and propriety of registered tax agent considered in relation to:

- conviction and imprisonment for matters unrelated to registration as a tax agent
- public protection rationale of legislation
- standards and reputation of profession
- agent's insight into significance of misconduct or wrongdoing.

**Keywords:** *fit and proper; cancellation of registration; misconduct or wrongdoing arising outside of professional practice; public protection rationale; standards and reputation of profession; insight into significance of conduct*

## Outline of relevant facts

*Sargent* involved an application for review of a decision of a state board to cancel a tax agent's registration. In reaching its decision, the board considered the issues of fitness and propriety (with regard to the applicant's good fame, integrity and character) and misconduct as grounds for cancellation under Part VIIA of the ITAA 1936.

The cancellation decision was based on the conviction of the tax agent on a number of criminal charges involving stalking and child pornography, for which the applicant was sentenced to a term of imprisonment and ordered to pay a fine, in addition to complying with further orders. At the date of the Tribunal hearing, the tax agent had paid the fine and completed the term, along with a majority of the orders.

The Tribunal affirmed the board's decision to cancel the tax agent's registration.

## Relevant principle/s established or confirmed by the case

- When assessing fitness and propriety in the context of a decision to suspend or cancel a tax agent's registration, the primary purpose is to protect the public from future misconduct or improper conduct, rather than to punish or exact retribution from the tax agent.
- In considering whether a person is fit and proper, a board may have regard to conduct not directly connected with their practice as a tax agent.
- Akin to the legal profession, public interest and trust are integral to the functioning of the tax agent profession.
- Where fitness and propriety or misconduct or improper conduct is an issue, the board must weigh the public interest in the tax agent continuing in practice against the public interest in protecting clients from repetition of the relevant conduct.
- A consideration relevant to the balancing exercise is whether the tax agent displays insight and remorse into the significance of their conduct.
- However, a tax agent who displays insight and remorse and is deemed unlikely by the board to repeat their prior behaviour may still fail to satisfy the 'fit and proper' requirement for registration. Such a result may follow where, for example, an offence committed is particularly serious, the behaviour has brought the tax agent profession into disrepute and the tax agent has only begun to address their obligations in respect of maintaining the reputation and standards of the profession.

# Kerin and Tax Agents' Board of South Australia [2009] AATA 974

## Summary

Fitness and propriety of applicant for tax agent re-registration considered in relation to:

- complaints and proceedings relating to convictions for matters unrelated to registration as a tax agent
- complaints laid against applicant in capacity as a legal practitioner
- whether applicant had corrected behaviour through subsequent lapse of time.

**Keywords:** fit and proper; misconduct or wrongdoing arising outside of professional practice; disciplinary proceedings; public protection rationale; standards and reputation of profession; standards of other professions; dishonesty; lapse of time

## Outline of relevant facts

This case involved an application to the Tribunal for review of a decision by a state board to refuse the applicant's re-registration on the basis that he was not a fit and proper person to remain registered, in particular, that he was not of good fame, integrity and character under Part VIIA of the ITAA 1936.

The board's finding related to complaints and proceedings instituted against or involving the applicant during the period of his tax agent registration. These matters included convictions for knowingly making a false statement to a Customs officer, importing prohibited firearm parts and for importing Tier 2 goods without approval. The matters further included:

- a complaint laid against the applicant by the Legal Practitioners Complaints Committee involving findings of unprofessional conduct in relation to the convictions
- appeals by the Legal Practitioners Conduct Board and the applicant regarding a fine imposed for unprofessional conduct in connection with the conduct of a mortgage practice
- applications by the Law Society of South Australia and the Legal Practitioners Conduct Board to have the applicant removed from the roll of legal practitioners.

The Tribunal affirmed the board's decision to refuse re-registration.

## Relevant principle/s established or confirmed by the case

- Whilst a lack of good fame, integrity and character disqualifies an applicant from satisfying the fit and proper requirement, the range of circumstances by which a board can determine fitness and propriety in a given case is not limited to considerations of that nature.
- The content of the fit and proper requirement may vary slightly with regard to the vocation of the person. However, the factors relevant to fitness and propriety are not restricted to the provisions of the relevant Act and encompass all considerations that properly relate to the requirements of the vocation.

- Conduct need not occur directly in the course of professional practice to constitute professional misconduct. Such conduct will amount to professional misconduct where it is “so connected to such practice” or demonstrates the presence of qualities (such as dishonesty or deception) that are inconsistent with fitness and propriety to practice as a registered tax agent.
- To be considered fit and proper for tax agent registration, the applicant must establish that past adverse conduct was merely temporary or isolated and unlikely to recur in the future.
- The absence of any complaints from the Commissioner may not bear much relevance to the determination of fitness and propriety when considered in conjunction with other relevant facts and circumstances.
- Whilst there may be slight variances in the fitness and propriety requirements as between various professions, the standards applicable are largely uniform across all professions. Accordingly, observations made about the applicant’s conduct in the practice of another profession are equally relevant to whether they are fit and proper to obtain/maintain tax agent registration.

## Li and Tax Practitioners Board [2014] AATA 299

### Summary

Fitness and propriety of registered tax agent considered in relation to:

- breaching client confidentiality
- lack of competence
- failure to take reasonable care in establishing clients’ circumstances
- unwitting involvement in fraud by third parties
- failure to accept the significance of wrongdoing
- public protection rationale of legislation.

**Keywords:** *fit and proper; third party fraud; failure to make enquiries; incompetence; negligence; client confidentiality; insight into significance of conduct; public protection rationale*

### Outline of relevant facts

This case involved an application to the Tribunal for review of the Board’s decision to terminate a tax agent’s registration and impose a period of three years within which the tax agent could not reapply for registration, and reject the tax agent’s application for renewal of registration.

These decisions were made by the Board following an investigation into the tax agent's unwitting involvement in fraud by third parties, which resulted in the tax file numbers (TFN) of over 450 taxpayers being compromised. The Board found that the tax agent had breached subsections 3010(6), 30-10(7) and 30-10(9) of the Code in the TASA for breaching client confidentiality, failing to ensure that the tax agent services he provided were provided competently and failing to take reasonable care to ascertain clients' state of affairs relevant to the tax agent services that he provided, and ultimately that the tax agent was not a fit and proper person, based on the following circumstances (which were not disputed):

- the tax agent was approached by two intermediaries who he had not previously met and who did not advise how they became aware of the tax agent's practice
- the intermediaries held themselves out to be representatives of well-known recruitment agencies, and claimed to have been engaged by a number of clients to arrange for the lodgment of their tax returns
- the tax agent did not enter into letters of engagement with the intermediaries nor did he receive authorisation from the taxpayers, nor did he contact or speak directly to any of the taxpayers
- the majority of the taxpayers had high levels of tax withheld relative to their income, and were seemingly entitled to refunds. Many of the taxpayers claimed deductions of about \$300 and when the tax agent queried the level of tax withheld he was advised that many of the taxpayers were overseas residents and/or students
- as part of the tax agent's process for preparing and lodging returns, he printed out pages of the unsigned returns on recycled paper (that is, the reverse side of copy or original draft returns for other clients which were, in some cases, signed and/or included TFN details for the other clients) and handed these copies to the intermediaries for them to have signed by the relevant taxpayer
- once the signed copies were returned by the intermediaries, the tax agent lodged the returns with the ATO without using the ATO portal to check information and did not use the pre-filling function to assist with lodging the returns
- of the 454 returns lodged, 60 returns were stopped by the ATO for review, and the tax agent was aware the returns were not processed
- the 454 taxpayers did not authorise the two intermediaries to arrange for tax returns to be prepared and lodged on their behalf
- the intermediaries were perpetuating a scam to fraudulently obtain refunds from the ATO, and the PAYE summaries provided to the tax agent by the intermediaries were falsified, and the nominated employer, occupation and bank details were incorrect
- ATO review of the tax agent's internal records showed that there were about 400 returns lodged by the tax agent where the salary, wages and tax instalment deductions did not match those recorded on the payment summary details as reported to the ATO by the respective taxpayers' employers

- there were different bank accounts nominated for the majority of the taxpayers but in some instances the same bank accounts were nominated for multiple unrelated taxpayers
- the ATO found that 454 TFNs had been compromised as a result of the scam.

The Tribunal affirmed the Board's decisions to terminate the agent's registration, reject his application for renewal of registration and disqualify the agent from reapplying for registration for a period of three years.

#### **Relevant principle/s established or confirmed by the case**

- To be considered a fit and proper person to handle the affairs of a client, a tax practitioner should be of such competence and integrity that others may entrust their taxation affairs to the tax practitioner's care. The tax practitioner should have the reputation and ability that officers of the ATO may proceed upon the footing that returns lodged by the tax practitioner have been prepared honestly and competently.
- A person who has shown to be other than a fit and proper person to be registered must satisfy the Board (or Tribunal) considering the person's application for registration or termination of registration as the case may be, that he or she appreciates the significance of their wrongdoing, that he or she regrets the wrongdoing and that the person has rehabilitated themselves such that it is unlikely that there will be any lapse in the future standards required of them.
- A tax practitioner's willful blindness to fraudulent schemes will be likely to reflect adversely on the practitioner's fitness and propriety to be registered.
- A tax practitioner's personal hardship caused by termination or rejection of renewal of registration must be balanced against public protection.

## **Grosfeld and Tax Practitioners Board [2014] AATA 100**

### **Summary**

Fitness and propriety of registered tax agent considered in relation to:

- multiple breaches of the Code, including:
  - failure to comply with taxation laws in the conduct of the agent's personal affairs
  - failure to ensure that tax agent services are provided competently
  - failure to maintain professional indemnity insurance that meets the Board's requirements
  - failure to respond to requests and directions from the Board in a timely, responsible and reasonable manner
- agent's insight into significance of misconduct or wrongdoing
- agent's conduct in capacity as executor of an estate.

**Keywords:** *fit and proper; failure to respond to requests from the Board, failure to comply with personal taxation obligations, failure to provide clients with a means of contact, competence, findings of unrelated proceedings, professional indemnity insurance.*

### **Outline of relevant facts**

This case involved an application to the Tribunal for review of the Board's decision to reject the tax agent's application for renewal of registration.

This decision was made by the Board following an investigation into the tax agent's conduct, in which the Board found that the tax agent had breached the following subsections of the Code in the TASA:

- 30-10(2) (for failing to comply with taxation laws in the conduct of the agent's personal affairs)
- 30-10(7) (for failing to ensure that tax agent services are provided competently)
- 30-10(13) (for failing to maintain professional indemnity (PI) insurance that meets the Board's requirements)
- 30-10(14) (for failing to respond to requests and directions from the Board in a timely, responsible and reasonable manner).

These breaches, as well as findings made by the Supreme Court in relation to the tax agent's conduct as an executor of an estate, ultimately resulted in the Board's finding that the tax agent was not a fit and proper person. In finding that he was not fit and proper, the Board had particular regard to the following circumstances:

- the Board received complaints from 14 of the agent's clients between March and December 2012 relating to his failures (despite repeated requests) to:
  - communicate for extended periods
  - complete tax agent services ie. delays in lodging client tax returns
  - return and forward taxation documents/records
- the tax agent was late in lodging his:
  - personal income tax returns for the 2009 to 2012 financial years
  - BAS, for the quarters ending 31 December 2009 to 30 September 2012
- the tax agent did not have PI insurance at all relevant times during his registration
- the tax agent delayed in responding to the Board and his responses were inadequate
- the tax agent was involved in Supreme Court proceedings where adverse findings were made against him in respect of his role as executor of a deceased estate and trustee for an education trust of that estate
- the tax agent contended the above failings were aberrations, arising from his financial and business difficulties caused by the global financial crisis in 2007.



The Tribunal affirmed the Board's decision to reject the agent's application for renewal of registration as a tax agent.

#### **Relevant principle/s established or confirmed by the case**

- A person who has shown to be other than a fit and proper person to be registered must satisfy the Board (or Tribunal) considering the person's application for registration or termination of registration as the case may be, that he/she appreciates the significance of their wrongdoing, that he/she regrets the wrongdoing and that the person has rehabilitated themselves such that it is unlikely that there will be any lapse in the future from the standards required of them.
- A finding that a tax practitioner is not a fit and proper person to act in another capacity, in this instance, as an executor or as a trustee of an estate, is highly relevant, as this relates to the management of financial affairs in discharging duties, and requires that duties be carried out with integrity, trust and competence, which are similar to the obligations of a registered tax practitioner.

## **Gylman and Tax Practitioners Board [2015] AATA 1012**

### **Summary**

Fitness and propriety of registered tax agent considered in relation to findings made by the ATO in relation to the agent's conduct as a trustee of a self-managed superannuation fund (SMSF).

Keywords: fit and proper; findings of unrelated proceedings; misuse of position; unauthorised acquisition of funds.

### **Outline of relevant facts**

This case involved an application to the Tribunal for review of the Board's decision to reject a tax agent's application for renewal of registration.

On 16 February 2015, the agent applied to the Board for renewal of registration as a tax agent. The Board rejected the agent's renewal application on the basis that it was not satisfied that the agent was a fit and proper person, having regard to the following circumstances:

- the ATO disqualified the agent under the Superannuation Industry and Supervision Act 1993 (SIS Act) on the basis that she had contravened the SIS Act and was not a fit and proper person to be a "trustee, investment manager and custodian." Relevantly, the agent had operated a SMSF to facilitate the improper early release of superannuation funds and had conducted "an artificial scheme ... to undermine the legislation"
- the SMSF's account statements disclosed that about \$1.6 million had been deposited into the SMSF's account over a period of several years including significant amounts of rollover superannuation benefits from numerous individuals who were not members of the SMSF

- over a period of several years, almost all of the deposits were withdrawn and nearly \$1 million of the money withdrawn was by way of transfer into the agent's personal bank account
- the SMSF's tax returns for the relevant years disclosed only four members, no profits, and no assets or investments other than \$48,200 of "overseas residential property"
- the SMSF's tax returns disclosed that the agent was the auditor of the SMSF despite also being a trustee of the SMSF
- the ATO issued the agent with amended tax assessments and penalty assessments on the basis that it considered the net deposits into her personal account to be assessable income
- the agent contended that funds withdrawn were used for investment for the SMSF or permissible compassionate returns of the member funds, but provided no evidence or records (to the Board or Tribunal) to explain the transactions in the SMSF's bank account or to demonstrate that the funds withdrawn had been invested.

The Tribunal affirmed the Board's decision to reject the agent's application for renewal of registration.

#### **Relevant principle/s established or confirmed by the case**

- In considering whether a person is fit and proper, a board may have regard to conduct not directly connected with their practice as a tax practitioner.
- A person is a fit and proper person to handle the affairs of a client if he is a person of good reputation, has a proper knowledge of taxation laws, is able to prepare income tax returns competently and is able to deal competently with any queries which may be raised by officers of the ATO. A tax practitioner should be a person of such competence and integrity that others may entrust their taxation affairs to their care. Tax practitioners should be of such reputation and ability that officers of the ATO may proceed upon the footing that the taxation returns lodged by them have been prepared honestly and competently.

## **Tung and Tax Practitioners Board [2012] AATA 615**

### **Summary**

Fitness and propriety of registered tax agent considered in relation to:

- multiple breaches of the Code, including:
  - failure to act honestly and with integrity
  - failure to ensure that tax agent services are provided competently
  - failure to maintain knowledge and skills relevant to the tax agent services provided

- failure to take reasonable care in ascertaining a client's state of affairs
- agent's insight into significance of misconduct or wrongdoing
- agent's unwitting involvement in fraud by third parties.

**Keywords:** *fit and proper; third party fraud; failure to make enquiries; incompetence; negligence; client confidentiality; insight into significance of conduct; public protection rationale*

### **Outline of relevant facts**

This case involved an application to the Tribunal for review of the Board's decisions to terminate a tax agent's registration and to impose a period of three years in which the agent may not re-apply for registration.

These decisions were made by the Board following an investigation into the tax agent's conduct, in which the Board found that the tax agent had breached the following subsections of the Code in the TASA:

- 30-10(1) (for failing to act honestly and with integrity)
- 30-10(7) (for failing to ensure that tax agent services are provided competently)
- 30-10(8) (for failing to maintain knowledge and skills relevant to the tax agent services he provided)
- 30-10(9) (for failing to take reasonable care in ascertaining the state of affairs of clients).

These breaches ultimately resulted in the Board's finding that the tax agent was not a fit and proper person. In finding that he was not fit and proper, the Board had particular regard to the following circumstances:

- the agent was approached by six third parties and lodged tax returns in respect of 346 tax file numbers (TFN) on the basis of representations made by those third parties
- the agent did not ask for proof of identification of any of the six third parties
- the agent received up-front cash payments in respect of the 346 tax returns
- the agent took no steps to verify the accuracy of the documentation prior to lodging the 346 tax returns. He did not see or interview any individual clients for whom he lodged returns other than the six third-parties
- the agent charged as much as \$70 more than his usual fee for a basic income tax return, in respect of each of the 346 tax returns, even though they took half the length of time to complete. The agent failed to explain this adequately
- the agent was aware that information on the ATO portal for particular TFNs did not match the information provided to him by the six third-parties. He made no further inquiries about this

- the agent was aware that the PAYG instalments in payment summaries for all of the 346 returns were high relative to the income of the taxpayer. The salary and tax instalment deduction amounts on payment summaries presented to the agent by the six third-parties showed deductions that consistently exceeded the published withholding rates. The agent said he did not question this
- 401 lodgments made by the agent were cancelled by the ATO, and 346 of these were identified as connected to the information provided by the six third parties
- the agent stated that he believed that the tax file numbers belonged to friends of the third parties who were too busy to lodge themselves, including one taxpayer for whom he prepared 102 income tax returns
- the agent stated that he considered the arrangement he had with these third parties was “fine” because he was provided with bank details for all the individuals, and he had no reason to doubt the legitimacy of the taxpayer’s bank account. Yet 17 bank account numbers were used on four or more occasions and some on as many as eight occasions.

During the Tribunal hearing, the agent said:

- when asked about the basis upon which he charged his clients, that he charged on the basis of what he had saved the client and stated that if the client did not know about the deduction (to which he or she was entitled) then he was entitled to charge more
- when questioned regarding the enquiries he made regarding the authenticity of the returns, that “Tax agents are not auditors” - which was similar to his comment to investigators from the Australian Taxation Office (ATO) to whom he said that tax agents are not policemen that some of the returns he lodged following the details supplied by the six third parties did not conform to details held by the ATO in their Portal, but stated that if the Portal rejected the return that was “OK” as the ATO system would sort it out.

The Tribunal affirmed the Board’s decisions to terminate the agent’s registration and disqualify the agent from reapplying for registration for a period of three years.

#### **Relevant principle/s established or confirmed by the case**

- To be considered a fit and proper person to handle the affairs of a client, a tax practitioner should be of such competence and integrity that others may entrust their taxation affairs to the tax practitioner’s care. The tax practitioner should have the reputation and ability that officers of the ATO may proceed upon the footing that returns lodged by the tax practitioner have been prepared honestly and competently.
- A person who has been shown to be other than a fit and proper person to be registered must satisfy the Board (or Tribunal) considering the person’s application for registration or termination of registration as the case may be, that he or she appreciates the significance of their wrongdoing, that he or she regrets the wrongdoing and that the person has rehabilitated themselves such that it is unlikely that there will be any lapse in the future from the standards required of them.

- A tax practitioner's willful blindness to fraudulent schemes will be likely to reflect adversely on the tax practitioner's continued fitness and propriety to be registered.

## Hourani and Tax Practitioners Board [2012] AATA 518

### Summary

Fitness and propriety of registered tax agent considered in relation to:

- the agent's involvement in activity defrauding the ATO and taxpayers
- the agent's misleading and dishonest dealings with the ATO.

**Keywords:** *fit and proper; fraudulent activity; improper dealings with client money; conduct during tax audit*

### Outline of relevant facts

This case involved an application to the Tribunal for review of the Board's decision to reject an applicant's original application for registration as a tax agent.

The Board decided to reject the application for registration on the basis that it was not satisfied that the applicant met the 'fit and proper' eligibility requirement for registration. In finding that the applicant was not fit and proper, the Board had particular regard to the following circumstances:

- the applicant was employed by a registered tax agent in the tax agent's accounting business
- at some time around 2000 or 2001 the tax agent advised the applicant that the accounting practice's trust account was not in order and that he needed the applicant to deposit client cheques, drawn in favour of the ATO, into the applicant's bank account
- the applicant started to see amounts of money being deposited into his bank account and assumed that they were client cheques, deposited by the tax agent
- after some time had passed, rather than depositing the cheques himself, the tax agent started giving the cheques to the applicant with instructions to deposit the cheques into his account
- the applicant would write a cheque in favour of the ATO (for a lesser amount than that of the respective clients' cheques) and would send the ATO the cheques in its favour. The applicant would then provide the remaining funds to the tax agent
- in May 2004 the ATO notified the applicant that it intended to audit his tax affairs, and in particular, an apparent discrepancy between the income as reported to the ATO in his 2001 and 2002 tax returns, and the income disclosed to a bank for the purpose of raising a loan

- during the ATO audit the applicant advised the ATO that the income disclosed to the financial institution was correct, and that the source of the additional income was a separate bookkeeping business that he had conducted
- the applicant later admitted that what he told the ATO was false.

The Tribunal affirmed the Board's decision to reject the applicant's application for registration as a tax agent.

#### **Relevant principle/s established or confirmed by the case**

- A lack of contrition or insight by a person into the implications of their misconduct or wrongdoing such that it cannot be established that there will be no recurrence of the conduct in future is relevant in determining whether they are fit and proper to exercise the functions of a tax practitioner.
- Character references in support of a person who has engaged in wrongdoing will do little to support a contention that the person in question is fit and proper if the provider of the character reference is not aware of the nature and extent of the wrongdoer's conduct.

## **Fortune Corporation Pty Ltd and Anor and Tax Practitioners Board [2012] AATA 11**

### **Summary**

Fitness and propriety of registered tax agent considered in relation to:

- agent's involvement in fraud by third parties
- the public protection rationale of the legislation.

**Keywords:** fit and proper; third party fraud; failure to make enquiries; incompetence; public protection rationale

### **Outline of relevant facts**

This case involved an application to the Tribunal for review of the Board's decisions to:

- terminate the tax agent registration of an individual, on the basis that he ceased to meet the tax practitioner registration requirement that he be a fit and proper person
- terminate the tax agent registration of a company, of which the individual agent was the sole director and a supervising tax agent, on the basis that the company ceased to meet the tax practitioner registration requirements that each director is a fit and proper person and that it has a sufficient number of individual tax agents to provide tax agent services to a competent standard and carry out supervisory arrangements.

In finding that the individual tax agent was not fit and proper, the Board had particular regard to the following circumstances:

- two third parties whom the individual tax agent had never met before attended at his accountancy practice and stated they operated a recruitment business and that they wished him to prepare tax returns for their clients
- all fees were paid by the third parties to the individual agent in cash
- the individual agent prepared returns from documents provided to him by the third parties
- the individual agent never undertook any steps to verify the identity of the alleged taxpayers, or whether their claims could be substantiated, nor did he obtain any authorisation from the taxpayers to act on their behalf
- the individual agent contended that he relied on the ATO to check that the information contained in the returns was correct
- the individual agent did not check if returns had been rejected, instead leaving the processing of returns to his staff without adequately supervising them
- the individual agent's actions resulted in the perpetuation of a fraud on the Commonwealth totaling thousands of dollars as well as the compromise of taxpayers' tax affairs through the fraudulent capture and use of their tax file numbers.

The Tribunal affirmed the Board's decisions to terminate the registrations of the company and the individual as tax agents.

**Relevant principle/s established or confirmed by the case**

- To be considered a fit and proper person to handle the affairs of a client, a tax practitioner should be of such competence and integrity that others may entrust their taxation affairs to the tax practitioner's care. The tax practitioner should have the reputation and ability that officers of the ATO may proceed upon the footing that returns lodged by the tax practitioner have been prepared honestly and competently.
- Termination of registration on the basis that a person is considered to no longer be a fit and proper person is not to impose a penalty or punishment on the person concerned, but to be preventative in that it removes a perceived threat to the public interest and to public confidence by removing the person in question from the relevant profession. Matters of mitigation or personal hardship must therefore be weighed against any such perceived threat to the public interest and public confidence from the person remaining in the relevant profession.

# Kolya and Tax Practitioners Board [2011] AATA 804

## Summary

Fitness and propriety to be registered as tax agent and BAS agent considered in relation to:

- agent's provision of false and misleading information to the Board in his application for registration
- agent's omission of relevant information concerning his fitness and propriety in his application for registration
- agent's conduct and competence when providing tax agent services were not to the required standard.

**Keywords:** fit and proper, dishonesty, dealings with the Board, incompetence, improper conduct

## Outline of relevant facts

This case involved an application to the Tribunal for review of the Board's decisions to reject the agent's original application for registration as a tax agent registration, and terminate the agent's registration as a BAS agent.

The Board decided to reject the agent's application for tax agent registration and terminate his BAS agent registration, based on a finding that he was not a fit and proper person.

In finding that the agent was not fit and proper, the Board had particular regard to the following circumstances:

- the agent provided incorrect information in his application for transitional registration as a BAS agent, when he stated that he had previously been registered as a tax agent or nominee of a tax agent registered under the name H&R Block, when this was not true
- the agent misrepresented his relevant experience claiming that he had worked as a tax agent under the TASA and ITAA 1936 and under the supervision and control of a tax agent registered under those Acts, as well as claiming to have worked as an Australian legal practitioner, when these claims were not true
- in his application for transitional registration as a BAS agent, the agent failed to disclose his convictions for taxation offences (when these were relevant matters which may have affected his eligibility for registration) and misrepresented his tertiary qualifications
- the agent misrepresented to clients that he was a registered tax agent, when in fact he was not
- the agent's lack of competence and knowledge of taxation laws when providing services to clients.

The Tribunal affirmed the Board's decisions to reject the agent's application for registration as a tax agent and terminate the agent's registration as a BAS agent.



## Relevant principle/s established or confirmed by the case

- Conduct that demonstrates an apparent disrespect for the Courts and the Board is considered to be inconsistent with the conduct that is expected of a registered tax practitioner, and as such weighs against an individual's fitness and propriety to act in such a capacity.
- The provision of incorrect, incomplete or misleading information to the Board by a tax practitioner, or a prospective tax practitioner, is not consistent with the standards of fitness and propriety attached to registration under the TASA, or with the standards set out in the Code. It is not consistent with the promotion of mutual trust between the Board, the ATO and registered tax practitioners.

## Delis and Tax Practitioners Board [2015] AATA 820

### Summary

Fitness and propriety of registered tax agent considered in relation to:

- failure to ensure personal compliance with tax laws and the compliance of two companies (in their capacities as corporate trustees) of which the tax agent was the sole director
- personal circumstances (e.g. ill-health, and family issues).

**Keywords:** *fit and proper, compliance with tax laws, superannuation payments, personal circumstances, pattern of behavior*

### Outline of relevant facts

This case involved an application to the Tribunal for review of the Board decisions to refuse the agent's application for renewal of registration as a tax agent, as well as the application for renewal of registration as a tax agent for a company of which the agent was the sole director (the Company).

The Board decided to refuse the applicant's individual application for renewal of registration on the basis that he ceased to meet the tax practitioner registration requirement that he be a fit and proper person. Further, the Board decided to refuse the Company's application for renewal of registration on the basis that the Company ceased to meet the tax practitioner registration requirement that each director is a fit and proper person.

In finding that the agent was not fit and proper, the Board had particular regard to the following circumstances:

- the agent regularly failed to meet lodgment dates for his personal income tax returns
- the Company repeatedly failed to remit sufficient superannuation payments for its employees as and when they fell due

- the Company repeatedly failed to pay tax liabilities as and when they became due
- the Company failed to lodge 50 out of 63 BAS when they became due for lodgment
- Pinia Holdings, a company controlled by the agent, as trustee for the Pinia Investment Trust, failed to make payments of its liabilities since June 2010 and as at 19 June 2015 had outstanding tax liabilities totaling \$52,840.48
- the agent, despite entering into numerous payment arrangements with the ATO on behalf of the Company and on his own behalf, has defaulted on almost all of those arrangements.

Despite the tax debts owed by the agent personally and the entities (including the Company) which he controls being discharged immediately after the conclusion of the Tribunal hearing (and prior to the Tribunal's decision and reasons being handed down), the Tribunal affirmed the Board's decisions to reject the agent's and the Company's applications for renewal of registration as tax agents.

#### Relevant principle/s established or confirmed by the case

- A failure to comply with tax obligations (including the payment of tax liabilities as and when they fall due), both personally and for entities of which the agent is responsible, constitutes a significant factor when evaluating an agent's fitness and propriety to be registered in view of a clear public interest in tax practitioners upholding the standards applicable to the preparation and lodgment of returns and compliance with tax obligations generally.
- The subsequent compliance with outstanding tax obligations at the time of the Tribunal's consideration of the agent's conduct after a significant period of non-compliance will not necessarily satisfy the Tribunal that the agent's pattern of non-compliant behaviour, once the immediate threat of adverse findings have passed, will not again be established.

## Kely and Tax Practitioners Board [2015] AATA 712

### Summary

Fitness and propriety to be registered as tax agent considered in relation to:

- agent's failure to comply with Board orders made under section 30-20 of the TASA
- agent's failure to comply with the taxation laws in the conduct of his personal affairs.

**Keywords:** *fit and proper; taxation affairs; period of time lapsed.*

### Outline of relevant facts

This case involved an application to the Tribunal for review of the Board decision to terminate the agent's registration as a tax agent.

The Board decided to terminate the agent's tax agent registration on the basis that he ceased to meet the tax practitioner registration requirement that he be a fit and proper person.

In finding that the agent was not fit and proper, the Board had particular regard to the following circumstances:

- as a result of a previous investigation into the agent, the Board had found that the agent had breached subsection 30-10(2) of the Code in the TASA by failing to comply with taxation laws in the conduct of his personal affairs by failing to lodge his and associated entities' income tax returns for the years ended 30 June 2006 to 30 June 2013 by their respective due dates
- as a result of the Board's finding, the Board imposed two orders on the agent, requiring the agent to:
  - complete and pass a course of education or training approved by the Board in relation to the Code in the TASA (the Course)
  - comply with his undertaking to lodge his and his associated entities' outstanding income tax returns for the years ended 30 June 2006 to 30 June 2013 by 30 September 2014 (subject to any formal arrangements that may be entered into with the ATO)
- the agent failed to comply with the Board's orders, and as such, the Board terminated the agent's registration as a tax agent on the basis that the agent was not a fit and proper person
- on the day before the Tribunal hearing in relation to the agent's application for review of the Board's termination decision, the agent lodged almost all of the outstanding tax returns (except for two tax returns for superannuation funds associated with the agent)
- the agent also indicated at the Tribunal hearing that he had enrolled in an appropriate course as required by the Board's order
- the agent provided the following reasons for his failure to comply with the Board's orders (both of which were rejected by the Tribunal based on the evidence available):
  - the income tax returns were not lodged because of an error by the ATO in assessing his tax returns for the 2004 and 2005 income years
  - he had been granted an extension of time to lodge the relevant returns
- the agent had also submitted to the Board that enrolment and completion of the course would be "*a waste of time*".

The Tribunal affirmed the Board's decision to terminate the agent's registration as a tax agent.

#### **Relevant principle/s established or confirmed by the case**

- Tax practitioners should hold themselves up to a higher standard than the general public. The public should be able to entrust their taxation affairs to tax practitioners and have confidence that they are able to lead by example and file their tax returns on time as required by the law.
- It is insufficient for a tax practitioner to state that he or she disregarded their own personal taxation obligations because they gave priority to their clients' affairs. While this explanation may be true, it evinces either severe personal disorganisation (which in turn is likely to impact adversely on the practitioner's professional duties) or a severe lack of regard for the very legal framework within which they practice.