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Fit and proper test in sharp focus in recent TPB litigation

By Keeli Cambourne, deputy editor, SMSF Adviserand Matthew Burgess, Director, View Legal

The "fit and proper test" for a tax agent came into focus in a recent Federal Court decision highlighting that "subjective and irrelevant considerations" must not be taken into account, Matthew Burgess, director of View Legal, said.

Burgess said in Tax Practitioners Board v Free [2026] FCA 1155, a tax agent that had the termination by the Tax Practitioners Board (TPB) of his registration and two-year prohibition on reapplying set aside by the ART, appears likely to again face de-registration.

"The Tribunal had concluded that the applicant was a fit and proper person, although emphasised that the tax agent 'would be well-advised to ensure full transparency in his future dealings with the Board and not rely on contestable constructions of documents or events'," he said.

"This was despite the original de-registration decision of the TPB that the agent had failed to act with integrity and honesty in his communications with the TPB and failed to comply with his tax obligations in respect of his personal affairs including an SMSF his wife controlled."

Burgess said the Tribunal also accepted that the tax agent failed to give truthful evidence in the Tribunal hearing, and engaged in dishonest conduct and deliberately chose not to disclose the existence of "serious findings of dishonest conduct directly related to [the agent's] obligations as a tax agent" made by an official adjudicatory.

Additionally, he also failed to act with integrity in relation to the statement that there were no matters relevant to his good name to be disclosed.

"In returning the matter to the Tribunal for a determination to be made in accordance with the law as correctly understood, the Court confirmed that while it might be possible for reasonable minds to differ as to whether a tax agent is a fit and proper person, a finding that past conduct demonstrated a lack of integrity does not of itself compel a conclusion that an applicant is not a fit and proper person, nor do findings of past or continuing breaches of the Code," Burgess said.

"This said, in determining whether an agent is a 'fit and proper person' the relevant decision maker must not take into account subjective and irrelevant considerations, nor reach a conclusion that is legally unreasonable in light of the factual matrix; particularly if there is an implicit finding of a lack of integrity and dishonesty as there was here."

He continued that there cannot be a leap in logic from serious findings about an agent's conduct, to the ultimate conclusion that they are nonetheless a fit and proper person;

"Ultimately, the test for fitness and propriety is one of character and reputation in the context where honesty and integrity are critical (see Su v Tax Agents' Board, South Australia (1982) 61 FLR 1 and Stasos v Tax Agents' Board of New South Wales (1990) 21 ATR 974)," he said.

"Whether a decision suffers from unreasonableness requires that there be 'a conclusion which may be applied to a decision which lacks an evident and intelligible justification' (see Minister for Immigration and

Citizenship v Li (2013) 249 CLR 332). It is not enough to show that another rational decision-maker might have emphatically disagreed with the reasoning process and findings (see SZTDD v Minister for Immigration and Border Protection [2016] FCA 136)."

Burgess said the court noted that although legal unreasonableness is a difficult ground to establish, in this case there was "no logical or intelligible way that the Tribunal could have made the serious findings which it did regarding (the agent's) lack of integrity and honesty, … deliberate choice as to the extent of his disclosure to the Board, and … ongoing and 'concerning' lack of insight, while also forming the ultimate view that (the agent) was a fit and proper person to be registered as a tax agent. There was no rational bridge or intelligible path of reasoning between these findings and the ultimate conclusion'."

"Therefore, there was a manifest unreasonableness in the Tribunal's finding that the agent was a fit and proper person to be registered as a tax agent, given there was no rational basis on which it could be found that a perceived sense of grievance that the agent had against his former employer was sufficient to overcome, justify or mitigate the failure by him to give honest evidence," he said.