FITNESS AND PROPRIETY, SPENT CONVICTIONS AND TECHNOLOGY: LESSONS FROM ASIC INVESTIGATIONS

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The Full Court of the Federal Court of Australia decision to uphold ASIC's permanent ban on Mr Rudy Frugtniet from engaging in credit activities[1] concludes the most recent chapter in what has been almost 25 years of conflict between Mr Frugtniet and various authorities. At the heart of this conflict lies Mr Frugtniet's repeated failure to satisfy regulators that he is a 'fit and proper person' to engage in a range of professions. At times they have also negatively impacted on those around him, including his business partner and one-time domestic partner, Ms Meenakshi Callychurn, who was also recently banned by ASIC. Through the lenses of these two decisions, this article seeks to explore the understanding of 'fit and proper person' obligations, the importance of disclosure obligations owed by directors to the Australian Securities and Investments Commission (ASIC), the use by the Administrative Appeals Tribunal (AAT) of material not available to an original decision-maker when reviewing a decision and the potential pitfalls that can arise when agencies rely on standard electronic forms which may be flawed.

This article considers two recent appeals to the Full Court of the Federal Court of Australia (Full FCA) from decisions of two single judges each dismissing separate appeals from the AAT which, in turn, had each affirmed decisions by delegates of the ASIC to impose banning orders on Ms Meenakshi Devi Callychurn and Mr Rudy Noel Frugtniet.[2]

First, we focus on Mr Frugtniet's chequered history and brushes with the law, his tendency towards dishonesty and lack of candour when dealing with various authorities, and the consequences that followed.

We then discuss the reasons for Mr Frugtniet's failed applications for admission to the legal profession in 2002 and 2005 and examine the phrase 'fit and proper person' in the context of the legal and other professions. We examine the Werribee Magistrates' Court event that resulted in Mr Frugtniet's disqualification under the legal profession.

We analyse ASIC's separate actions against Mr Frugtniet and Ms Callychurn and their subsequent appeals to the Full FCA in respect of ASIC's banning orders. We compare and contrast the differing outcomes in the Full FCA between Mr Frugtniet's permanent ban and Ms Callychurn's four-year ban (subject to a rehearing before the AAT at the time of writing).

We conclude with significant learnings from these cases, including the peculiar operation of ss 85ZV and 85ZZH of the *Crimes Act 1914* (Cth); responsibilities owed by company

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directors; and technology issues in the use of electronic forms. We also raise the possibility of a shared information database between authorities flagging persons the subject to disciplinary action, enabling early preventative action.

Mr Frugtniet's chequered history

Mr Frugtniet has been remarked as carrying with him a 'massive bag of dishonest conduct',[3] possessing disgraceful conduct[4] and demonstrating a 'pattern of conduct [which] rais[ed] a substantial question mark concerning his honesty and his character and reputation'.[5] It is worth setting the scene by examining Mr Frugtniet's history of confrontations with regulators and law enforcement that have led to such comments.

Mr Frugtniet was born in Sri Lanka in 1954 and spent his early years in the United Kingdom. It was here, aged 23, where he had his first brush with the law. Mr Frugtniet was convicted at the Leeds Crown Court on 15 counts of handling stolen goods, forgery and obtaining property by deception and theft. He was sentenced to four years in prison, of which he served two[6] (the UK convictions). As he later reflected on his UK convictions, Mr Frugtniet appeared to deny responsibility for these actions, instead laying the blame squarely at the feet of others, stating 'I was easily influenced and manipulated into joining a group of friends that caused me to commit the offences'[7] and 'as a young man, I fell into bad company, was naïve, totally lost and vulnerable to a group of people who manipulated and exploited me'.[8]

Between 1982 and 1988, Mr Frugtniet travelled to and from Australia periodically, with stints working in the Australian travel industry. In 1989, while working as a travel agent, Mr Frugtniet on several occasions debited credit cards twice for a single transaction. He was initially charged with obtaining property by deception; however, the charges did not proceed to trial because a witness failed to cooperate with the police.[9]

In 1990, Mr Frugtniet migrated to Australia and was granted citizenship. He married and worked in his wife's travel agency. Soon after, Mr Frugtniet began what would become a pattern of ignoring legal requirements and misleading regulatory and licensing authorities.

In 1992, Mr Frugtniet, when giving evidence before the Travel Agents Licensing Authority (TALA) in a matter relating to his wife's travel agent's licence, stated on oath that he had never been convicted of a criminal offence. He specifically denied that he had ever been convicted of a criminal offence in the United Kingdom. His wife lost her licence and appealed to the AAT.[10] In the AAT proceedings, Mr Frugtniet again lied on oath, repeatedly denying suggestions that he had been convicted in the UK as 'the most outrageous suggestion … a most scandalous allegation'.[11] The AAT found that Mr Frugtniet had acted in a 'systematic breach'[12] by being involved with his wife's travel agency, despite there being a special condition imposed on the agency excluding him from involvement in the business.[13] AAT Deputy President MacNamara noted Mr Frugtniet's 'tortuous history', admonished him as 'verbose and argumentative' and declared his 'evidence … simply incredible'.[14]

Unfortunately, Mr Frugtniet did not appear to learn from these experiences. In 1997, he was charged with five counts of obtaining financial advantage by deception for selling invalid airline tickets through his wife's travel agency (the airline tickets charges),[15] demonstrating a 'significant level of criminality'.[16] Mr Frugtniet pleaded guilty to one count of the airline tickets charges in the Broadmeadows Magistrates' Court and paid a $1000 fine, although no conviction was recorded.[17]

Later in 1997, Mr Frugtniet was charged with three counts of perjury in relation to evidence given in 1992 to TALA and the AAT (the perjury charges).[18] He successfully argued that he had believed that his UK convictions were 'spent' convictions and that he was not required to

reveal them to either authority. His claims were accepted by the jury who acquitted him of the perjury charges.[19] In later proceedings, Pagone J noted that the relevant legislation on which Mr Frugtniet believed he had relied did not in fact apply in Victoria[20] and stated that his successful defence 'was not that [Mr Frugtniet's] evidence had been truthful, but rather that his state of mind at the time of giving the evidence afforded him with a defence' to the perjury charges.[21]

In March 1998, while employed by the Australia and New Zealand Banking Group, Mr Frugtniet was charged with six counts of theft and three of attempted theft (the ANZ charges). It was alleged that Mr Frugtniet had provided an accomplice with personal details of account holders, enabling his accomplice to steal money from those accounts.[22] Despite the accomplice pleading guilty, in March 2000, Mr Frugtniet was acquitted.

In October 1999, Mr Frugtniet applied to the Migration Agent Registration Authority (MARA) for registration as a migration agent. As part of this application, Mr Frugtniet was asked whether he was the subject of any outstanding charges or had been convicted of any offence which is not spent.[23] Although his ANZ charges were still on foot, Mr Frugtniet answered 'no' (the false MARA declarations).[24]

In May 2002, MARA initiated an investigation over the possible false MARA declarations.[25] In response, Mr Frugtniet provided a letter of explanation to MARA. This letter was described by Gillard J, in the course of considering his second admission application, as follows:

> [The letter is] rambling, full of irrelevant detail and obviously aimed at creating confusion in the minds of the persons looking into his conduct. He was successful. MARA did not take any further action.[26]

In 2003, Mr Frugtniet was charged with defrauding the Commonwealth of Australia by failing to declare income to Centrelink resulting in his overpayment of entitlements (the Centrelink frauds); however, these charges were dismissed in 2004.[27]

Admission to the legal profession and disciplinary actions against Mr Frugtniet

In 2001, Mr Frugtniet had graduated with a Bachelor of Laws degree from Deakin University, Victoria,[28] and sought admission to the legal profession. It is a core requirement of admission to practice that an applicant is a fit and proper person for admission to legal practice, and an applicant must supply an affidavit of disclosure asserting that he or she has made full disclosure of every matter which is relevant to consideration of fitness for admission. The form of disclosure emphasises both the depth of information needed to be produced and the breath of subject matter to be covered.[29]

Fit and proper person: the various iterations

First, we consider what the phrase 'fit and proper person' means. The expression 'fit and proper person' standing alone carries no precise meaning;[30] rather, it takes meaning from its context.[31] It refers to the personal qualities and conduct of a person in discharging his or her responsibilities, with defining characteristics being honesty, knowledge and ability: honesty to execute truly without malice, affection or partiality; knowledge to know what one ought duly to do; and the ability to execute one's office diligently.[32] The concept of a 'fit and proper person' is not confined to the legal profession. The general principles are replicated across a broad range of fields and vocations.[33] It was observed by Hale J:

> Clearly different qualifications are needed by e.g. lawyers, transport operators, hotel keepers and land agents …[34]

The criteria have been used in the context of the grant of licences for broadcasting,[35] licensing of persons to import drugs under customs regulations[36] and licensing under air navigation regulation,[37] amongst others.

Fit and proper person: legal practitioners

As outlined above, an applicant seeking admission must satisfy an admissions board[38] that he or she is a 'fit and proper' person and suitable for admission to the legal profession. This applies both at the time of first admission (to newly admitted practitioners) and to post-admitted practitioners attempting to renew their annual Australian practising certificate.[39]

The admissions board is entitled to take into consideration a myriad of wide-ranging factors[40] to determine whether a person meets the criteria of being a 'fit and proper person'. The list of factors is non-exhaustive but includes whether a person:[41]

- is currently of good fame and character;[42]
- is, or has been, a bankrupt in his or her personal capacity;[43]
- has been convicted or found guilty of an offence, including a spent offence in Australia or a foreign country, having regard to the nature of the offence, how long ago the offence was committed, and the applicant's age when the offence was committed;[44] or
- has been the subject of any disciplinary action in Australia or a foreign country in any profession or occupation,[45] regardless of whether there was an adverse finding against the person.[46]

One question asks whether a person is currently able satisfactorily to carry out the inherent requirements of practice as an Australian legal practitioner.[47] However, there has been no case law on this specific point to date.

At the time of Mr Frugtniet's application for admission in August 2001, his disclosure affidavit deposed to details relating to his 1997 conviction before the Broadmeadows Magistrates' Court, but not to the UK convictions, perjury charges or ANZ charges mentioned above.[48] When these came to light, his application was rejected by the Board of Examiners.[49]

Mr Frugtniet appealed the Board of Examiners' decision. On 1 May 2002, his de novo appeal was heard by Pagone J in the Supreme Court of Victoria without success. Justice Pagone criticised Mr Frugtniet's 'significant' omission in failing to disclose his UK convictions,[50] stating that the obligation was to 'inform the decision-maker of everything that could bear upon the judgement that needed to be made about … his character … not to select and edit from his life's experiences'[51] and that he should have been, but was not, the 'source of the Board's and the Court's knowledge' of the matters.[52]

His Honour stated:

> the way in which details of perjury charges, the ANZ charges and, more particularly, the UK convictions [came] to light in [the] proceedings [does not] leave [me] with sufficient confidence in the applicant[53] … I am not satisfied that [the failure to volunteer the facts which had given rise to the convictions] have been satisfactorily explained or justified by the applicant.[54]

Whilst Pagone J acknowledged that it was not his task to make a positive finding that Mr Frugtniet was not a fit and proper person for admission to practice,[55] on the materials before him, he found that Mr Frugtniet had failed to satisfy the court that he was a fit and proper person for admission.

Whether an applicant is a fit and proper person for admission to practise is a matter to be determined as at the time of admission.[56] Significant weight can be given to past events. Yet, the existence of old offences, even involving dishonesty, are not necessarily a bar to admission to practice if an applicant can show that he or she has reformed.

In July 2005, Mr Frugtniet made a second application to the Victorian Board of Examiners for admission. He was again refused. Mr Frugtniet appealed against this decision and his appeal was heard by Gillard J of the Supreme Court of Victoria on 24 August 2005.

Justice Gillard heard the matter afresh and delivered a decision on the evidence presented. His Honour recounted Mr Frugtniet's lengthy history, noting that, despite Mr Frugtniet's resolution 'never to do wrong that might cause me to ever lose my freedom',[57] his conduct between 1989 and 2000 clearly showed that his resolve was put to one side.[58]

His Honour described the criteria for a court to be satisfied that a person who has a history of previous transgressions has indeed been reformed: demonstration that his past character or past outlook have changed,[59] usually by evidencing a long period of blameless, honest life.[60]

It has been said that the more serious the transgressions, the longer the period of time necessary to show rehabilitation. Mere expression of contrition is not sufficient — rather, a person claiming to be reformed must show that, on the balance of probabilities, there is not only contrition but that one will not deviate from the high standards required by his profession.[61]

His Honour noted Mr Frugtniet's chequered history, raising the airline ticket charges, perjury charges, ANZ charges, Centrelink frauds, false MARA declarations and UK convictions as examples of dishonesty and deception.[62] He made several damning statements of Mr Frugtniet: 'a man who is loose with the truth and prepared to distort [it] if he thinks it will help him';[63] 'a witness whose first move was to think of an answer which would help his cause rather than being frank and honest';[64] and 'went off on some tangent seeking to minimise his criminality in the past'.[65] His Honour questioned Mr Frugtniet's credibility and went so far as to call Mr Frugtniet's claims 'humbug'.[66] Needless to say, the Court did not accept that Mr Frugtniet was contrite or had reformed, stating that he had refused candidly to admit his level of honesty[67] and that he 'carries … a massive bag of dishonest conduct'.[68]

Justice Gillard went one step further than Pagone J in 2002, remarking that he considered it unlikely that Mr Frugtniet would ever meet the required threshold to demonstrate that he was a fit and proper person. Mr Frugtniet's failure to demonstrate that he was a fit and proper person for admission to the legal profession in 2002 and 2005 effectively closed the door to him practising as an Australian legal practitioner.[69]

At various other times he also failed to meet these criteria to engage in credit activities,[70] to be registered as a tax agent,[71] to give immigration assistance,[72] or to be eligible to work as a licensed conveyancer.[73]

Fit and proper person: migration agents

Mr Frugtniet was first registered as a migration agent on 28 October 1996. Each year thereafter, he applied for repeat registration.[74] In November 2014, a delegate of MARA decided to cancel Mr Frugtniet's registration on the basis that Mr Frugtniet was not a person of integrity or was otherwise not a fit and proper person to give immigration assistance[75] and because of the possible false MARA declarations. Mr Frugtniet appealed the decision to cancel his registration and his appeal was heard by Forgie DP in the AAT in January 2016.

Under the *Migration Act 1958* (Cth), MARA must not register an applicant if the applicant is not a fit and proper person to give immigration assistance.[76] In determining whether an applicant is a fit and proper person, relevant consideration is given to whether the applicant has been convicted of a criminal offence[77] and any inquiry or investigation[78] or disciplinary action[79] of which the applicant has been the subject. MARA may also consider any other matter relevant to the applicant's fitness to give immigration assistance.[80]

Noting Mr Frugtniet's history and the fact that he continued to display no contrition or remorse, instead attempting to distort what happened and refusing to candidly admit his dishonesty,[81] the AAT found that Mr Frugtniet did not exhibit the requisite behaviour of a fit and proper person and a person of integrity.

Relevantly, Forgie DP stated:

> The responsibilities of a registered migration agent are, to a large extent, codified … but, for all that, they are little different from those described by Pagone J as those of a legal practitioner … While the focus of a migration agent will be much narrower than that of a legal practitioner, the same commitment to honesty is required as is candour and frankness irrespective of self-interest and embarrassment.[82]

Fit and proper person: tax agents

After investigating three complaints from Mr Frugtniet's clients about his conduct, the Tax Practitioners Board (Tax Board) in February 2013 took the decision to terminate Mr Frugtniet's registration and prohibited him from reapplying for five years on the basis that he ceased to meet the tax practitioner registration requirement that he was a fit and proper person.[83]

The income tax regime applies the fit and proper person criteria for registration as a registered tax agent[84] and to prepare income tax returns.[85] The legislation features references to 'good fame, integrity and character'.[86] In the context of a tax agent, it has been said:

> A person is a fit and proper person to handle the affairs of a client if he is a person of good reputation ... He should be a person of such competence and integrity that others may entrust their taxation affairs to his care. He should be a person of such reputation and ability that officers of the Taxation Department may proceed upon the footing that the taxation returns lodged by the agent have been prepared by him honestly and competently.[87]

Further, in completing his application for registration as a migration agent, Mr Frugtniet claimed that he had not had his membership or registration with a professional body or registration board refused, cancelled or suspended. The Tax Board regarded this answer as false or misleading.[88] Significant weight was also given to the two decisions in 2002 and 2005 where the Supreme Court declined to find that Mr Frugtniet was a fit and proper person for admission as a legal practitioner. On appeal, AAT Senior Member Fice affirmed the Tax Board's decision, stating that Mr Frugtniet's 'disgraceful conduct [as] a registered tax agent'[89] showed that he was clearly not a fit and proper person to be registered as a tax agent.[90]

Fit and proper person: credit activities

Under the Credit Act, a fit and proper person to engage in credit activities is one who has the attributes of good character, diligence, honesty, integrity and judgement.[91]

ASIC's decision to make banning orders against Mr Frugtniet and Ms Callychurn on the basis that ASIC had reason to believe that both were not fit and proper persons to engage in credit activities[92] is examined in greater detail below. It is sufficient to say that Mr Frugtniet's persistent contraventions[93] and adverse disciplinary history did not meet the standards expected of a fit and proper person. Similarly, Ms Callychurn's failure to engage actively in the operations of the credit business also demonstrated that she was not a fit and proper person.

Disqualification under the Legal Profession Act 2004 (Vic) and fit and proper persons in the context of licensed conveyancers

On 25 May 2010, Mr Frugtniet attended Werribee Magistrates' Court, where he deliberately and falsely represented to the magistrate and opposing party's barrister that he was a sole legal practitioner appearing on behalf of a party.[94] In fact, having twice been refused admission to practice, he had never been an Australian legal practitioner.

Consequently, the Law Institute of Victoria (LIV) applied to the Victorian Civil and Administrative Tribunal (VCAT) for an order that Mr Frugtniet be designated a disqualified person under the *Legal Profession Act 2004* (Vic) (now repealed and replaced by the *Legal Profession Uniform Law Application Act 2014*).[95] Disqualification would have the effect of preventing him from acting as a lay associate of a law practice without the approval of the Legal Services Board.[96] VCAT noted that Mr Frugtniet 'failed to demonstrate any insight into his behaviour' and 'failed to express any responsibility or remorse'[97] and imposed a three-year disqualification order.

During the VCAT hearing, Mr Frugtniet claimed that he had not represented himself as a legal practitioner. Instead, he said he relied on a general power of attorney to appear in the Werribee Magistrates' Court. Although he tendered a document which appeared to have been signed and stamped by a registrar at the Magistrates' Court of Victoria on the day of the hearing, it transpired that the registrar was not working at the Werribee Magistrates' Court on that day.[98] No copy of the power of attorney was listed as being filed or located on the court file.

Vice President Judge Jenkins noted the contrast between Mr Frugtniet's evidence and the evidence of various employees at the Magistrates' Court, concluding:

> I have grave reservations about the veracity of his evidence in a number of respects, but in particular his evidence that he filed the original power of attorney with the Court Registry …[99]

It was also noted that:

> the circumstances reveal that there appears to have been some degree of planning undertaken by Mr Frugtniet in order to get around the limitation which he faced.[100]

Mr Frugtniet sought leave to appeal VCAT's decision.[101] In July 2012, his appeal was heard by Warren CJ, Nettle JA and Beach AJA in the Court of Appeal of the Supreme Court of Victoria.

On appeal, Mr Frugtniet argued that the LIV could only seek a disqualification order in respect of a person who has in fact acted as a lay associate, and the LIV was required to establish that, but for a disqualification order, it was probable that such person would have become an associate.

The Court of Appeal[102] rejected both arguments. The Court said that a disqualification order could be sought regardless of whether the person was a lay associate at the time of the order[103] in order to prevent inadequately disposed persons acting as lay associates:

> given the evident legislative purpose of preventing inappropriate persons from acting as associates of solicitors, it is unrealistic to suppose that Parliament intended to limit the scope of the delegation to taking action against existing associates of solicitors.[104]

Notwithstanding the findings against him, in December 2012 Mr Frugtniet applied for special leave to appeal the decision of the Court of Appeal to the High Court. The special leave application was refused by Hayne and Crennan JJ,[105] stating 'an appeal … would enjoy no prospect of success'.[106]

As a disqualified person[107] under the Legal Profession Act, Mr Frugtniet was automatically disqualified under the *Conveyancers Act 2006* (Vic)[108] and ineligible to obtain a conveyancing licence. In circumstances where a licensed conveyancer has the ability to deal with trust moneys and operate a trust account, it is sensible and logical[109] that a person who is disqualified from the legal profession is also disqualified from conveyancing. The effect of this is that the Conveyancers Act imports the same honesty and fit and proper person requirements from the Legal Profession Act.

Decisions before the Full FCA

Permanent ban from engaging in credit activities

Having presented Mr Frugtniet's background, we now move on to discuss the parts of his story and those of his one-time business and domestic partner, Ms Callychurn,[110] which are directly relevant to the principal cases in this article.

In 2004, Mr Frugtniet commenced work as a finance broker, becoming the sole proprietor of Unique Mortgage Services (UMS), which provided mortgage and loan facilities to consumers.[111] In July 2005, UMS entered into an agreement with Australian Finance Group (AFG) under which UMS would receive a commission for each potential customer it referred to AFG.[112]

In November 2010, UMS lodged an application with ASIC for an Australian Credit Licence (ACL) under the *National Consumer Credit Protection Act 2009* (Cth) (Credit Act),[113] which was granted on or about 24 December of that year.[114] Mr Frugtniet was, at this time, the sole director, secretary and shareholder of UMS.[115] Having obtained an ACL, UMS commenced business as a finance and mortgage broker and an intermediary between credit providers and consumers, dealing with home, vehicle and personal loans and credit cards.[116]

In June 2011 Ms Callychurn was appointed as a director of UMS.[117] Soon after this, in October that year, Mr Frugtniet ceased to be a director of UMS, having been a disqualified person under the Legal Profession Act, leaving Ms Callychurn as the sole director.[118] In spite of this, Mr Frugtniet remained the sole signatory for UMS's bank accounts[119] and continued to maintain control of certain other areas of UMS's operations which ought to have been controlled by its director. For instance, he was responsible for writing and processing loan applications, and he remained the sole contact on the website and for complaints against the company.[120]

At this time, Ms Callychurn also became one of UMS's fit and proper persons for the purposes of its ACL.[121]

As part of her duties as a director of UMS, Ms Callychurn was responsible for lodging its annual compliance certificates with ASIC in the years 2011 and 2012. On 5 February 2012, she completed and lodged online the annual compliance certificate for the compliance period ending 24 December 2011. On 6 February 2013, Ms Callychurn completed the 2012 annual compliance certificate for the compliance period ending 24 December 2012.[122]

She was required to answer the following questions in her certificate on behalf of UMS:

(1) Does the licensee certify that it has no reason to believe that any of its fit and proper people have:
(2) been refused the right or been restricted in the right to carry on any trade, business or profession for which an authorisation (licence, certificate, registration or other authority) is required by law?
(3) been subject to disciplinary action in relation to any such authorisation?
(4) within Australia or overseas been the subject of any investigations or proceedings that are current or pending and which may result in disciplinary action being taken in relation to any such authorisation?

Mr Frugtniet had ceased to be one of UMS's fit and proper persons on 12 January 2013. However, due to technical issues with the online filing form, entering Mr Frugtniet's name in the section for individuals who were no longer fit and proper persons automatically removed his name from the section for naming who *was* (had been) a fit and proper person in the 2012 compliance year, although he had only ceased to be a fit and proper person on 12 January 2013, *after* the annual compliance date of 24 December 2012 and the 2012 year had concluded.[123] This technical glitch prevented Ms Callychurn from properly completing the form and resulted in her filing a document that was, in effect, inaccurate and false in a material particular or materially misleading.

ASIC began investigating both Mr Frugtniet and Ms Callychurn and, in March 2014, issued notices under the Credit Act requiring the production of certain books in UMS's possession, as well as those in the possession of another company, Ozwide Financial Services Pty Ltd, for which Ms Callychurn was the director. Ms Callychurn failed promptly to comply with those notices.[124]

Following on from these investigations, on 26 June 2014, an ASIC delegate made a permanent banning order against Mr Frugtniet under s 80(1) of the Credit Act,[125] effectively preventing Mr Frugtniet from ever again carrying on a business providing credit. Despite its proximity to these proceedings, Mr Frugtniet failed to inform ASIC of his termination as a migration agent by MARA, providing yet another example of what appears to be a pattern of attempts to conceal past behaviour from regulators.[126]

Shortly after this, on 27 February 2015, a delegate of ASIC made a banning order prohibiting Ms Callychurn from engaging in credit activities for five years and,[127] as a consequence of no longer having any directors or fit and proper persons, the delegate also stripped UMS of its ACL under s 55(1) of the Credit Act.[128] Under the Credit Act, ASIC has powers to make a banning order against a person if ASIC has reason to believe that the person is not a fit and proper person to engage in credit activities.[129] As will be outlined below, ASIC alleged that Ms Callychurn failed actively to engage in the operations of the business and failed to meet the standards expected in the roles of key person and fit and proper person. It followed from such allegations being established that she would be unfit to engage in credit activities.[130]

Ms Callychurn sought review before the AAT, which found that, given her knowledge of the disciplinary action and proceedings against Mr Frugtniet, she had contravened s 225 of the Credit Act by failing to take reasonable steps to ensure that she did not make, or authorise the making of, a statement which was false in a material particular or materially misleading in filing the annual compliance certificates for the years 2011 and 2012, 'a matter that could [have affected] the ability of [ASIC] to appropriately monitor UMS'.[131] The AAT also relied on other

facts in determining that Ms Callychurn had failed in her duties as a director of UMS and was not a fit and proper person to engage in credit activities. For example, although Mr Frugtniet ceased to be one of UMS's fit and proper persons, Ms Callychurn allowed him to continue controlling UMS's affairs.[132] They also considered that Ms Callychurn caused UMS not to respond to a notice to produce documents issued by ASIC.

It is worth taking a moment to go into more detail about the steps that appear to have been taken to save UMS from losing its ACL, including the appointment of Madeleine Seyfarth as a director in April 2015 and the appointment of David Fu as company secretary in June 2015, when Ms Seyfarth resigned as director.[133] It later emerged that Ms Seyfarth was the niece of Mr Frugtniet and, as an undischarged bankrupt,[134] had been disqualified from managing corporations. While little is known of Mr Fu, his appointment was not sufficient to save UMS, and the AAT decision-maker, Deputy President Professor Robert Deutsch, expressed concerns about his relationship with the other parties.[135] Also of note at this time were two applications made by Ms Callychurn — the first to stay proceedings before the AAT[136] and the second for the member, Deputy President Professor Robert Deutsch,[137] to recuse himself on the grounds of apprehended bias. Neither application was granted.[138]

The AAT upheld ASIC's decision but varied the length of Ms Callychurn's ban from five years to four years.[139] Before the AAT, Ms Callychurn raised her particular difficulty in completing the 2012 certificate on ASIC's online form. Initially ASIC did not accept this point but, after the AAT hearing, it conceded that Ms Callychurn's claim was accurate and the online form was deficient, as it did not permit Ms Callychurn to manually add Mr Frugtniet's name to the 'list of fit and proper people as at the licensee's annual compliance date'.[140]

Ms Callychurn and Mr Frugtniet separately appealed the AAT decisions in their respective proceedings to the Federal Court of Australia. Both appeals were denied, Ms Callychurn's by Bromberg J in 2016[141] and Mr Frugtniet's by Beach J in 2017.[142] Mr Frugtniet and Ms Callychurn each then appealed to the Full Federal Court.

The Frugtniet decision

Mr Frugtniet raised a number of grounds of appeal, all of which were ultimately dismissed by Reeves, Farrell and Gleeson JJ of the Full FCA. However, it is worth considering this case for some key statements of current law, most notably around the areas of the requirements of fit and proper person tests and material which the AAT may consider when considering an application for review.

Both Bromberg J at first instance and the Full FCA applied the *Bond* test[143] whereby a question of who is fit and proper should be considered in context of the activities in which he or she will be engaged.

The second area of note is the application of ss 85ZM, 85ZV and 85ZZH of the Crimes Act regarding 'spent' convictions. While s 85ZV provided that Mr Frugtniet was not required 'to disclose to any Commonwealth authority in that State … for any purpose, that fact that [he had] been charged with or convicted of [an offence within the meaning of s 85ZM]', s 85ZZH excludes the operation of this section where 'a court or tribunal [is] established under Commonwealth law … for the purpose of making a decision'. This means that, while the ASIC delegate was not able to consider certain of Mr Frugtniet's past convictions (namely the Broadmeadows and UK convictions) in reaching his or her conclusion, the AAT was not so restrained. Despite describing this as possibly 'giv[ing] rise to strange outcomes … [where] the AAT in reviewing [a] decision of ASIC, could take account of material that ASIC was not permitted to take into account',[144] Bromberg J chose to follow a decision of Middleton J in *Toohey v Tax Agents' Board of Victoria*[145] (*Toohey*) and held that the AAT was not precluded

from considering more material than ASIC.[146] Justice Bromberg considered the Toohey decision on point and that, unless Middleton J's decision was 'plainly wrong', he should follow it[147] — a view endorsed by the Full FCA on appeal.[148] In further considering this, the Full FCA also drew on an 'instructive' decision from the NSW Court of Appeal's decision in *Kocic v Cmr of Police, NSW Police Force*,[149] which considered a similar provision in the *Criminal Records Act 1991* (NSW).[150] The Full FCA found the reasoning of White JA in that matter 'persuasive' and noted that:

> The question for determination of a Tribunal is not whether the decision which the decision-maker made was the correct or preferable one *on the material before him*. The question for the determination or the Tribunal is whether that decision was the correct or preferable one *on the material before the Tribunal*.[151]

The Full FCA finally drew on the High Court's decision in *Shi v Migration Agents Registration Authority*,[152] concluding that 'that case makes it clear that, depending on the decision under review, the [AAT] may have regard to material that was not before the original decision maker'.[153] In an interesting quirk of law, it is clear that the AAT was allowed to consider the Broadmeadows and UK convictions and therefore had an expanded pool of considerations to draw from as compared with the original ASIC delegate.

The Callychurn decision

Central to Ms Callychurn's appeal to the Full FCA were her affirmative responses to the three authorisation questions in UMS's annual compliance certificates for the 2011 and 2012 years. Justices Rares, Collier and O'Callaghan focused on two main grounds of appeal: first, whether Ms Callychurn had accurately answered the three authorisation questions, as Mr Frugtniet had not, as a result of the VCAT order, been refused or restricted the right to carry on a profession for which he was required to hold an authorisation (being that of a lay associate of a law practice); and, secondly, whether Ms Callychurn's inability to complete the defective online annual compliance certificate meant that the certificate was false or misleading.

Regarding the first ground, when completing the annual compliance certificate, Ms Callychurn had answered a series of questions (outlined previously), including one as to whether any of UMS's fit and proper people had been 'refused the right … to carry on any trade, business or profession for which an authorisations … is required by law'. The AAT had stated that, as a result of the VCAT disqualification order, Mr Frugtniet was restricted in his right to practice as a lawyer. The Full FCA noted that this was 'clearly incorrect', since Mr Frugtniet had never been a lawyer; rather, he had been denied admission to practise in the first place in 2002 and 2005.[154] Further, the Full FCA disagreed with the AAT's finding that the effect of the VCAT order was that Mr Frugtniet was required to obtain authorisation to work as a lay associate of a legal practice. Rather, the Court found that there was, in fact, no authorisation required at law for a person to be employed as a lay associate under the provisions of the *Legal Profession Act 2004* (Vic).[155] Mr Frugtniet had not, therefore, 'been refused or restricted in a right to do anything for which any authorisation was required by law',[156] so Ms Callychurn's answers to the authorisation questions on the annual compliance certificate were neither inaccurate nor false and misleading.[157]

The second ground of appeal concerned the difficulty that Ms Callychurn had encountered in completing the 2012 certificate electronically, due to the deficiency in the online form:

> Put simply … it was not possible for [Ms Callychurn] when completing the online form, once she had filled in the field that Mr Frugtniet had ceased to be a fit and proper person … to include his name in the field immediately below in the list of fit and proper people as at the licensee's annual compliance date.[158]

This was a view which ASIC ultimately accepted.[159] The Full FCA resolved the issue neatly and succinctly, reasoning that questions of 'whether a person makes a statement that he or she knows to be false in a material particular requires the tribunal of fact to read the documents as a whole'.[160] As a logical consequence of its proper reading the form 'conveyed to a reasonable reader that Mr Frugtniet had been a fit a proper person [of UMS]' in December 2012 as he had ceased to be one in January 2013.[161]

There was no issue on appeal that Ms Callychurn was a fit and proper person to engage in credit activities; accordingly, the Court remitted the matter to the AAT for reconsideration of the period of the ban according to law.[162] As at the time of writing, Ms Callychurn's matter in the AAT is still ongoing, with a further hearing to be resumed on 26 March 2018.

Conclusions and learnings

Drawing from the experiences of Mr Frugtniet and Ms Callychurn, the ASIC investigations reveal key learnings in respect of the use by a Commonwealth court or tribunal of material not available to an original decision-maker when reviewing a decision and the potential pitfalls that can arise when agencies rely on flawed electronic forms. It also raises the possibility of a shared knowledge database in respect of persons with an adverse disciplinary history. Emphasis was placed on the fact Commonwealth must observe a traditional standard of fair play in dealing with private parties,[163] as private parties cannot be penalised for government system malfunctions, and these implications extend beyond just ASIC to other Commonwealth bodies.

Crimes Act and spent convictions

As outlined above, in several proceedings Mr Frugtniet claimed that some of his past convictions were 'spent' and, as such, he was not required to disclose them or, alternatively, that decision-makers should not take them into account. In particular, this was a significant issue in Mr Frugtniet's appeal against ASIC's permanent banning order. Although ASIC has the power, under the Credit Act, to consider any criminal conviction from up to 10 years before the banning order is proposed to be made[164] or any other matter ASIC considers relevant,[165] it could not consider his older convictions due to provisions within the Crimes Act. As discussed previously, however, the AAT was not so restricted. While Bromberg J suggested that this interpretation could give rise to 'some strange outcomes',[166] it was endorsed by the Full FCA.[167]

The peculiar result of this finding is that the AAT had the ability to take into account various past convictions of Mr Frugtniet which the ASIC delegate had been prevented from considering. While the delegate's decision and that of the AAT were no different in their effect one could envisage a scenario where a delegate, or other decision-maker, prevented from considering convictions in excess of 10 years old, imposes a *relatively* minor ban but on review, the AAT, or some other tribunal, taking in to account these prior convictions increases the ban, or other negative outcome, for the party seeking review. Persons with chequered histories who are aggrieved of decisions by statutory bodies and considering reviews by a tribunal should be aware of such a contingency lest they find themselves in a worse position than they were in before.

Responsibilities of company directors

Generally, a company is to be managed by or under the direction of its directors.[168] Company officers carry important legal and fiduciary responsibilities. As company directors, Ms Callychurn and Mr Frugtniet were found to have failed in discharging their duties with due care

and diligence,[169] in good faith in the best interests of the corporation and for a proper purpose.[170]

Director duties are contained in the *Corporations Act 2001* (Cth) and other laws, including the general law. Obligations on directors apply equally to validly appointed directors as well as persons who are not validly appointed but act as de-facto directors and shadow directors.[171] For example, Mr Frugtniet maintained control of all material aspects of UMS operations despite having been removed as a director. His responsibility for writing and processing loan applications and his responsibility as the sole signatory to UMS's bank account were indicative of powers and duties characteristic of a company director.[172] As the sole contact on the company website and for complaints against the company, Mr Frugtniet could reasonably be perceived by third parties as a company director.[173] Non-director persons associated with business operations should take care not to act outside their authority.

Ms Callychurn also failed in her director duties by failing to respond to notices issued to her companies. She failed to be honest and forthcoming in her interactions with regulatory authorities and her excuse for non-compliance was described by the court as untenable.[174] Persons who are company directors must demonstrate that they are appropriately engaged with operating the business and attending to duties associated with their office. Vice versa, improper and inappropriate delegation also constitutes a dereliction of duty.

Technology

Many government and statutory bodies are spearheading the move to electronic document management systems. Sophisticated online portals permit template electronic forms to be accessed, completed, and lodged. For example, ASIC requires many commonly used forms to be lodged online via portals and ASIC Connect. The State Revenue Office operates the Duties Online system for payment and processing of duty, Land Victoria maintains the online title registry, and property exchange platform PEXA facilitates property transactions and settlements.

Often, it is in the interests of the administering bodies to use template forms specifying a set number of potential responses. For instance, users may only be permitted to select an answer from a drop-down pick list of designated pre-completed options or 'tick' a limited number of options on a checklist. Furthermore, forms with open-ended questions may have a character or size limit. Whilst one could previously pen in additional information in the column of a paper form, or annex extra sheets to the end elaborating on answers, most electronic forms do not allow this.

Although this is an efficient exercise for administering bodies, electronic platforms throw up a new set of challenges for the users, especially those less literate in technology. Indeed, Ms Callychurn complained of the difficulty in providing accurate information where the glitch in ASIC's system operated to automatically omit Mr Frugtniet's name from the list of 'fit and proper persons', and there was no functionality for Ms Callychurn to manually add his name in. It is here that the Full FCA provides some comfort to users, stating:

> ASIC knew, or must be taken to have known, of how its own electronic form operated to prevent listing someone in the field for fit and proper persons at the compliance date where that person's name appeared in the field for persons who had ceased to be fit and proper persons.[175]

Nevertheless, in the face of any uncertainty, users should err on the side of caution and ensure that they take reasonable steps to supply accurate information and keep detailed records substantiating their answers.

Concurrently, administering bodies may also be able to overcome the technology glitch experienced by ASIC in the design stage and rigorous pilot testing, as well as ensuring that they have intrinsic knowledge of their electronic platforms (including limitations of same) and make available adequate technical support for users.

A shared database?

There is a considerable body of case law relating to Mr Frugtniet and his associates. A search of the Frugtniet name brings up cases dating back to 1991 involving Mr Frugtniet, his ex-wife, his brother and sister-in-law, his niece and Ms Callychurn. Mr Frugtniet currently has proceedings on foot before the MARA and therefore his litigation story is still a work in progress.

Our review of the existing case law with respect to Mr Frugtniet showed that the various authorities, in the course of taking disciplinary action against him, consistently and exhaustively repeated a similar set of facts relating to his history and misbehaviour. There is a clear pattern of regulators discovering Mr Frugtniet's history and taking action which Mr Frugtniet appeals, even when, as one judge stated, 'the appeal is incompetent, and even if treated as competent it is of little merit'.[176] This litigation places pressure on both the courts and the regulators themselves.

Whilst noting that many of the authorities maintain a register of disciplinary action, a single shared database amongst the authorities flagging persons with disciplinary history and sanctions could, therefore, prove useful for authorities and also serve the public interest. As evidenced by Mr Frugtniet, it is not unusual that a legal practitioner might also practise in conveyancing, tax, and migration matters — and might have been subject to disciplinary proceedings in each field. In *SZFDE v Minister for Immigration and Citizenship*,[177] an individual had held himself out as being a solicitor and a migration agent when in fact he had been struck off as a solicitor and deregistered as a migration agent, then defrauded his clients into not appearing before the Refugee Review Tribunal to their detriment.

Despite the Supreme Court of Victoria finding in 2002 that Mr Frugtniet was not a fit and proper person, nevertheless, in December 2010, a company of which he was sole director, secretary and shareholder was granted an ACL. Shared knowledge between the various statutory bodies could go some way to avoid this recurring.

Further, or in the alternative, tying in legislation across various industries to mirror the causal relationship of the Legal Profession Act and Conveyancers Act in respect of disqualified persons — a disqualified person under the Conveyancers Act is now a disqualified person within the meaning of the Legal Profession Uniform Law (Victoria) — could potentially reduce the need for each authority to expend individual resources in separately commissioning investigations and pursuing persons of interest.

Endnotes

1 *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162.
2 *Callychurn v Australian Securities and Investments Commission [*2017] FCAFC 137; and *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162.
3 *Frugtniet v Board of Examiners* [2005] VSC 332, [67] (Gillard J).
4 *Frugtniet and Tax Practitioners Board* [2014] AATA 766, [104].
5 *Frugtniet v Board of Examiners* [2005] VSC 332, [68] (Gillard J).
6 *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [7].
7 *Frugtniet v Board of Examiners* [2005] VSC 332, [39].
8 Ibid [41].
9 Ibid [17].
10 Ibid.

11 Ibid.
12 *Corine G Frugtniet (t/a Karina Travel Int) v Travel Agents Licensing Authority (1995/32930)* [1995] VICCAT 39.
13 Ibid; *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [8].
14 *Corine G Frugtniet (t/a Karina Travel Int) v Travel Agents Licensing Authority (1995/32930)* [1995] VICCAT 39.
15 *Frugtniet v Board of Examiners* [2005] VSC 332, [53].
16 Ibid [59].
17 *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [9]; *Frugtniet v Board of Examiners* [2002] VSC 140, [2]; *Frugtniet v Board of Examiners* [2005] VSC 332, [60].
18 *Frugtniet v Board of Examiners* [2005] VSC 332, [17]; *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [49]; *Frugtniet v Board of Examiners* [2002] VSC 140, [5].
19 *Frugtniet v Board of Examiners* [2005] VSC 332, [17]; *Frugtniet v Board of Examiners* [2002] VSC 140, [7].
20 *Frugtniet v Board of Examiners* [2005] VSC 332, [17].
21 *Frugtniet v Board of Examiners* [2002] VSC 140, [7] (Pagone J).
22 *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [10]; *Frugtniet v Board of Examiners* [2002] VSC 140, [5]; *Frugtniet v Board of Examiners* [2005] VSC 332, [48].
23 *Frugtniet v Board of Examiners* [2005] VSC 332, [45].
24 *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [11].
25 Ibid [13].
26 *Frugtniet v Board of Examiners* [2005] VSC 332, [50].
27 *Frugtniet v Secretary, Department of Family and Community Services* [2004] AATA 996.
28 *Frugtniet v Board of Examiners* [2005] VSC 332, [17].
29 *Frugtniet v Board of Examiners* [2002] VSC 140, [2].
30 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, [380].
31 Ibid.
32 *Hughes and Vale Pty Ltd v State of NSW (No 2)* (1955) 93 CLR 127, [156].
33 Ibid.
34 *Maxwell v Dixon* [1965] WAR 167, [169].
35 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.
36 *Re Dowling and Secretary to Department of Health* [1985] AATA 237; (1985) 8 ALD 171.
37 *Re Taylor and Department of Transport* [1978] AATA 64; (1978) 1 ALD 312.
38 In Victoria and New South Wales, lawyers and law practices are subject to the same framework of Legal Profession Uniform Rules made by the Legal Services Council — in Victoria, the Victorian Legal Admissions Board; in New South Wales, the Legal Profession Admission Board.
39 Legal Profession Uniform Law, s 45(2). The Uniform Law applies as if it were an act: see *Legal Profession Uniform Law Application Act 2014* s 4. The Uniform Law is in force in New South Wales by application of the *Legal Profession Uniform Law Application Act 2014*. The Uniform Rules also apply to Australian-registered foreign lawyers.
40 *Legal Profession Uniform Admission Rules 2015*.
41 *Legal Profession Uniform General Rules 2015* r 13(1), in force in Victoria and New South Wales.
42 Ibid r 10(1)(f). The equivalent provision for a renewal of practicing certificate is the *Legal Profession Uniform General Rules 2015* r 13(1)(a).
43 Ibid r 10(1)(g). The equivalent provision for a renewal of practising certificate is the *Legal Profession Uniform General Rules 2015* r 13(1)(b)(i).
44 Ibid r 10(1)(h). The equivalent provision for a renewal of practising certificate is the *Legal Profession Uniform General Rules 2015* r 13(1)(c).
45 Ibid r 10(1)(i).
46 Ibid r 10(1)(j). The equivalent provision for a renewal of practising certificate is the *Legal Profession Uniform General Rules 2015* rr 13(1)(g)(i), (ii).
47 Ibid r 10(1)(k). The equivalent provision for a renewal of practicing certificate is the *Legal Profession Uniform General Rules 2015* r 13(1)(m).
48 *Frugtniet v Board of Examiners* [2002] VSC 140, [3] and [5].
49 *Frugtniet v Board of Examiners* [2005] VSC 332, [17].
50 *Frugtniet v Board of Examiners* [2002] VSC 140, [3] and [5].
51 Ibid [11].
52 Ibid [14].
53 Ibid [11].
54 Ibid [13].
55 Ibid [15].
56 *Re B* [1981] 2 NSWLR 372, [381].
57 *Frugtniet v Board of Examiners* [2005] VSC 332, [43].
58 Ibid [43] and [44].
59 Ibid [31].
60 Ibid [32].
61 *Stasos v Tax Agents' Board of New South Wales* [1990] FCA 379.
62 *Frugtniet v Board of Examiners* [2005] VSC 332, [18].

63 Ibid [68].
64 Ibid [37].
65 Ibid [68].
66 Ibid [65].
67 Ibid [66].
68 Ibid [67].
69 *Frugtniet v Board of Examiners* [2002] VSC 140; *Frugtniet v Board of Examiners* [2005] VSC 332; *Frugtniet v Law Institute of Victoria Ltd* [2012] VSCA 178.
70 *National Consumer Credit Protection Act 2009* (Cth) s 37(2).
71 *Tax Agent Services Act 2009* (Cth) s 20.15.
72 *Migration Act 1958* (Cth) s 303(1)(f).
73 By virtue of being deemed a 'disqualified person': *Conveyancers Act 2006* (Vic) ss 5(c), 11(c).
74 *Frugtniet v Migration Agents Registration Authority* [2016] AATA 299, [1].
75 Ibid.
76 *Migration Act 1958* (Cth) s 290(1).
77 *Migration Act 1958* (Cth) ss 290(2)(c), (d).
78 *Migration Act 1958* (Cth) ss 290(2)(e), (f).
79 *Migration Act 1958* (Cth) s 290(2)(g).
80 *Migration Act 1958* (Cth) s 290(2)(h).
81 *Frugtniet v Board of Examiners* [2005] VSC 332, [566].
82 *Frugtniet v Migration Agents Registration Authority* [2016] AATA 299, [136].
83 *Frugtniet and Tax Practitioners Board* [2014] AATA 766, [12].
84 *Tax Agent Services Act 2009* (Cth)s 20-5(1)(a).
85 *Income Tax Assessment Act 1936* (Cth) s 251BC(1).
86 *Income Tax Assessment Act 1936* (Cth) s 251BC(1)(d).
87 *Su v Tax Agents' Board of South Australia* [1982] AATA 127, [4] and [5].
88 *Frugtniet and Tax Practitioners Board* [2014] AATA 766, [108].
89 Ibid [104].
90 Ibid [106].
91 *Australian Securities and Investments Commission Regulatory Guide* 204.177.
92 *National Consumer Credit Protection Act 2009* (Cth) s 80(f).
93 *Australian Securities and Investments Commission Regulatory Guide* 218.55 Table 2.
94 *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [22].
95 Pursuant to div 3 of pt 2.2. of the *Legal Profession Act 2004* (Cth) (the applicable legislation at that time).
96 *Law Institute of Victoria Limited v Frugtniet (Legal Practice)* [2011] VCAT 596; *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [3]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [9]; *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [25].
97 *Law Institute of Victoria Limited v Frugtniet (Legal Practice)* [2011] VCAT 596, [163].
98 Ibid [62].
99 Ibid [152].
100 *Frugtniet v Law Institute of Victoria Ltd* [2011] VCSA 184, 20.
101 *Rudy Noel Frugtniet v Law Institute of Victoria Ltd* [2011] VSCA 176.
102 *Frugtniet v Law Institute of Victoria Ltd* [2012] VSCA 178.
103 *Rudy Noel Frugtniet v Law Institute of Victoria Ltd* [2011] VSCA 178, [22] and [29]; *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [3]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [8]; *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [25].
104 *Frugtniet v Law Institute of Victoria Ltd* [2012] VSCA 178, [29].
105 *Rudy Noel Frugtniet v Law Institute of Victoria Ltd* [2012] HCASL 162.
106 Ibid.
107 *Conveyancers Act 2006* (Vic) s 5.
108 *Frugtniet v Law Institute of Victoria Ltd* [2011] VSCA 184, [18].
109 Ibid.
110 *Frugtniet v Secretary, Department of Social Services* [2018] FCA 1227, 3. Centrelink had determined that, during this period, Mr Frugtniet was a member of a couple with Ms Callychurn for the purposes of the *Social Security Act 1991* (Cth).
111 *Frugtniet and Australian Securities and Investments Commission* [2015] AATA 128, [8]. In addition, Mr Frugtniet also conducted a business and tax consultancy and migration agency under the Unique Mortgages Services business name: see *Frugtniet v Tax Practitioners Board* [2014] AATA 766.
112 *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [20].
113 Ibid [23].
114 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [2]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [6]; *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [23].

115 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [2]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [6]; *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [23].
116 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [2].
117 Ibid [7].
118 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [3] and [4]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [8].
119 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [15].
120 *Callychurn v Australian Securities and Investments Commission* [2016] AATA 114, [53]–[56].
121 *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [10].
122 Ibid [12].
123 Ibid.
124 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [16]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [15].
125 *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [16]; Australian Securities and Investments Commission, 'ASIC permanently bans Victorian finance broker', (Media Release, 14-163MR, 10 July 2014) <http://Australian Securities and Investments Commission.gov.au/about-Australian Securities and Investments Commission/media-centre/find-a-media-release/2014-releases/14-163mr-Australian Securities and Investments Commission-permanently-bans-victorian-finance-broker/>.
126 *Frugtniet v Australian Securities and Investments Commission* [2017] FCAFC 162, [30].
127 *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [17]; Australian Securities and Investments Commission, 'ASIC bans finance broker and cancels Australian Credit Licence' (Media Release, 15-064MR, 20 March 2015) <http://Australian Securities and Investments Commission.gov.au/about-Australian Securities and Investments Commission/media-centre/find-a-media-release/2015-releases/15-064mr-Australian Securities and Investments Commission-bans-finance-broker-and-cancels-australian-credit-licence/>.
128 *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [17].
129 *National Consumer Credit Protection Act 2009* s 80(f).
130 Australian Securities and Investments Commission, '15-064MR ASIC bans finance broker and cancels Australian Credit Licence' (Media Release, 15-064MR, 20 March 2015) <http://Australian Securities and Investments Commission.gov.au/about-Australian Securities and Investments Commission/media-centre/find-a-media-release/2015-releases/15-064mr-Australian Securities and Investments Commission-bans-finance-broker-and-cancels-australian-credit-licence/>.
131 *Callychurn v Australian Securities and Investments Commission* [2017] AATA 114, [30]–[43].
132 Ibid [57]–[59], [66].
133 *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [19].
134 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [17]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [26].
135 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [47].
136 *Callychurn v Australian Securities and Investments Commission* [2015] AATA 567; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [20]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [73].
137 *Callychurn v Australian Securities and Investments Commission* [2015] AATA 726.
138 Ibid [30]; *Callychurn v Australian Securities and Investments Commission* [2015] AATA 726, [53]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [20]; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [97] and [77].
139 *Callychurn v Australian Securities and Investments Commission* [2016] AATA 114, [86].
140 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [47].
141 *Frugtniet v Australian Securities and Investments Commission* [2016] FCA 995.
142 *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29.
143 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.
144 *Frugtniet v Australian Securities and Investments Commission* [2016] FCA 995, [74].
145 (2007) 171 FCR 291.
146 *Frugtniet v Australian Securities and Investments Commission* [2016] FCA 995, [76].
147 Ibid [76].
148 *Frugtniet v Australian Securities and Investments Commission* [2017] FCA 162, [93].
149 (2014) 88 NSWLR 159.
150 *Frugtniet v Australian Securities and Investments Commission* [2017] FCA 162, [104]–[105].
151 *Frugtniet v Australian Securities and Investments Commission* [2017] FCA 162, [116] (emphasis in original).
152 (2008) 235 CLR 286.
153 *Frugtniet v Australian Securities and Investments Commission* [2017] FCA 162, [116].
154 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [35].
155 Ibid [40].
156 Ibid [41].
157 Ibid [42]–[43].
158 Ibid [47].
159 Ibid [48].

160 Ibid [52].
161 Ibid [53].
162 Ibid [56].
163 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, [342].
164 *National Consumer Credit Protection Act 2009* (Cth) s 80(2)(c).
165 *National Consumer Credit Protection Act 2009* (Cth) s 80(2)(d).
166 *Frugtniet v Australian Securities and Investments Commission* [2016] FCA 995, [74].
167 *Frugtniet v Australian Securities and Investments Commission* [2017] FCA 162, [116].
168 *Corporations Act 2009* (Cth) s 198A(1).
169 Ibid s 180(1).
170 Ibid s 181(1).
171 Ibid s 9 (definition of 'director' in (b)(ii)); *Chameleon Mining NL v Murchison Metals Ltd* [2010] FCA 1129 [87], [93]).
172 *Deputy Commissioner of Taxation v Austin* [1998] FCA 1034, [569]–[570]. Whether a person is acting as a director of a company will depend upon the nature of the functions and powers which are exercised and the extent to which they are exercised. It is a question of fact which may often be one of degree. It requires consideration of the duties performed by the person in the context of the operation and circumstances of the company.
173 *Deputy Commissioner of Taxation v Austin* [1998] FCA 1034, [570]. The circumstances which bear on the question include the size of the company, its internal practices and structure and how the alleged de facto director is perceived by outsiders who deal with the company.
174 *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29, [88].
175 *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137, [53].
176 *Frugtniet v Tax Practitioners Board* [2013] FCA 752, [38].
177 (2007) 237 ALR 64.