

‘THE ‘FIT AND PROPER PERSONS’ CONCEPT IN HIGHER EDUCATION LAW

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Legislation¹ was recently introduced requiring each person involved in the management of a higher education provider, including a university, to demonstrate satisfy their status as a ‘fit and proper person’. The introduction of a ‘fit and proper person’ test to the higher education arena is welcomed. Where the law permits a person to hold a position and be involved in the management of a higher education provider, it is not unreasonable that the law requires such persons, who hold themselves out as ‘fit and proper persons’ to manage the property, funds, and objectives of higher education providers, to establish their credentials as ‘fit and proper persons’ before taking up such positions. Where there is a demonstrated unfitness, such persons ‘have no right to be involved in ... management.’² This paper focuses on TEQSA’s new ‘fit and proper person test relating to higher education providers, the role of public interest and the legal meaning of ‘fit and proper,’ and its relevance to higher education providers.

I INTRODUCTION

Australian higher education providers, especially universities, are crucial in providing the skills required by the 21st century workforce; they undertake valuable research and contribute to the common good through the creation and dissemination of knowledge. Universities contribute to the sector which as an ‘engine of economic prosperity and innovation, a producer of human capital and professional skills, a driver of regional growth, skilled migration and global competitiveness, and a contributor to equality of opportunity’.³ Higher education is a valuable public good requiring protection from harm.

Australia’s national regulator of higher education providers is the Tertiary Education Quality and Standards Agency (TEQSA). TEQSA is the regulatory body charged with protecting this public good by, *inter alia*, ensuring higher education providers, including universities, have good corporate governance. TEQSA has developed corporate governance standards⁴ to assist higher education providers to maintain strong governing bodies competent to direct and to oversee institutions as a whole. TEQSA has also developed a ‘fit and proper person’ test to regulate higher education governance bodies and their constituencies to facilitate competency in governance decision making and oversight.

The purposes of this article are to introduce and examine TEQSA’s fit and proper persons test; discuss the role of public interest; and examine the broader legal meaning of the term ‘fit and proper person’. It is worth noting that the discussions on the role of the public interest and the legal meaning of ‘fit and proper person’ is relevant to the application of this test in all educational settings.

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II TEQSA'S FIT AND PROPER PERSON TEST

TEQSA's Chief Executive Officer, Anthony McClaran, referred to the new fit and proper person test, affirming that 'the inclusion of the fit and proper person requirement was made to ensure people who had previously been associated with unscrupulous activities in other sectors did not become involved in Australian higher education.'⁵ The new laws⁶ introduced by amendments to the *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (TEQSA Act) and the resultant legislative instrument are said to serve as important protections for the higher education sector and the Australian public to ensure that 'those charged with high-level decision making are fit to take on such a responsibility.'⁷

As noted, TEQSA is the regulatory body entrusted by the new laws with ensuring all of its registered higher education providers, including universities, and their key personnel are 'fit and proper' persons. For those unfamiliar with TEQSA, its purposes include providing a national consistent approach to the registration and accreditation of higher education providers in Australia, including universities.

TEQSA's regulative authority comes from the *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (TEQSA Act). The objects and purposes of TEQSA aim to protect Australia's public interest in its higher education system including the protection and enhancement of Australia's national and international reputation as a quality higher education and training provider. Moreover, TEQSA's regulatory regime is designed to encourage and promote a higher education system appropriate to meet Australia's social and economic needs for a highly educated and skilled population while also safeguarding student interests.⁸

Much of the commentary regarding the application of the 'fit and proper person test' to Australian higher education providers focuses on non-university providers. As such, universities have developed policies and require declarations from members of governing bodies to ensure they comply with the test. New higher education providers are subject to the 'fit and proper person' requirements when applying for registration with TEQSA.⁹

Registered universities must to renew their registrations with TEQSA as higher education providers and will be caught by the 'fit and proper person' test at the renewal stage. For example, during 2018 Australian universities that renewed their registration for seven year periods were the University of New South Wales (20 December 2018); Deakin University (18 July 2018); University of Southern Queensland (26 April 2018); University of Wollongong (28 March 2018); James Cook University (26 October 2018) and Central Queensland University (11 October 2018).

TEQSA's determinations to renew the registrations, currently for a period of seven years, are made under s 36 of the *TEQSA Act* and are usually based on the universities' having met the continued compliance with the Provider Registration and Course Accreditation Standards of the *Higher Education Standards Framework (Threshold Standards) 2015*. Both s 36 *TEQSA Act* and the Provider Registration Standard¹⁰ require providers and 'each person who makes or participates in making decisions that affect the whole, or a substantial part, of the provider's affairs, is a 'fit and proper person'.¹¹ TEQSA has powers to impose conditions¹² on universities failing to comply with its 'fit and proper person' test such that this will certainly be a focus of governing bodies when universities are seeking renewal of their registrations.¹³

Sections 21(1)(b), 25A and 36(1)(b) of the *TEQSA Act* provide that higher education providers and each person 'who makes or participates in making decisions that affect the whole, or a substantial part, of the provider's affairs' must be a 'fit and proper person.' To assist in determining matters under the above provisions, TEQSA has developed a legislative instrument¹⁴

to identify and provide the relevant matters for consideration when determining whether persons are ‘fit and proper’.¹⁵

TEQSA offered a draft legislative instrument and engaged in community and sector consultation on the suitability of a legislative instrument to be used when determining whether a person or higher education provider is ‘fit and proper’.¹⁶ The final legislative instrument was issued by TEQSA on 6 December 2018 as the Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018 (Cth).

The legislative instrument provides numerous matters that may be considered and appears to be based on the one made for Vocational Training sector under the National Vocational Education and Training Regulator Act 2011 (Cth). The instrument includes numerous relevant matters such as compliance with the law, including previous convictions or penalty orders under the laws of Australia¹⁷; details regarding financial records, including previous or current bankruptcy or insolvent related provisions;¹⁸ and details about any disqualification from managing a corporation under Part 2D.6 Corporations Act 2001 (Cth).¹⁹

This instrument also includes higher education specific matters concerning membership of governing bodies of education providers²⁰ plus breaches of specified education statutes;²¹ details of previous or current findings against being a ‘fit and proper person’ for the purposes of education legislation or Australian Authorities;²² and details regarding false or misleading information provided to Australian Authorities.²³ The broadly drafted as ‘any other matter’ test is restricted to those ‘relevant to the honesty, knowledge or ability of the person.’

III TEQSA’S FIT AND PROPER PERSON TEST – SOME COMMENTS

Various issues are worth commenting on, especially the narrow drafting of some of the provisions of TEQSA’s proposed for the legislative instrument. For example, clause 10(1), ‘whether the person has ever been found not to be a fit and proper person’ only applies to those found ‘not to be fit and proper’ for the purposes of education legislation or Australian authorities. Clause 10(1) could have been drafted more broadly as requiring disclosure of a finding that one has been found ‘not being a fit and proper person’ for the purpose of any legislation in and outside of Australia. Not requiring disclosure of adverse findings in foreign jurisdictions is an oversight because it seems out of step with developments in comparable countries, such as the United Kingdom, in the corporate and financial sectors.²⁴

There is also a concern with the narrow approach in clause 8(3), ‘whether the person has ever been disqualified from managing corporations under Part 2D.6 of the Corporations Act 2001’. Although being disqualified from managing a corporation under the Corporations Act is certainly a relevant matter, being disqualified from holding any office, or being removed from a professional register, in and outside of Australia, are relevant matters which could be expressly included. While clause 8(1) does require consideration of cancelled, restricted, and/or suspended registration or accreditation of higher education related matters, more could have been provided.

Part 2D.6²⁵ Corporations Act 2001 (Cth) extends to disqualification from managing a corporation by order of a court in a foreign jurisdiction. Still, these provisions only refer to a disqualification order ‘that is in force’. However, the net could have been cast wider to include past disqualifications in foreign countries, not just present disqualification orders. In addition, circumstances where persons are disqualified from managing by means not involving court orders should require disclosure such as where disqualifications were by corporate regulators in foreign countries with powers similar to ASIC’s power under s 206F Corporations Act 2001 (Cth).

The legislative instrument enables TEQSA to consider the conduct persons engaged in that could reasonably suggest deliberate patterns of unethical behaviour or behaviour inconsistent with Australian law on education or training. The reasonable person test for unethical behaviour is certainly welcomed but, perhaps, the instrument could have required disclosure of unethical and other misbehaviour, falling short of criminal convictions, including in foreign jurisdictions, and required disclosure for civil breaches of law such as any acts of misfeasance or breaches of fiduciary duties.²⁶

In practice, universities and other higher education providers are developing policies requiring positive disclosure of matters that would not comply with the 'fit and proper person' test. Even so, the legislative instrument could have clearly articulated an onus on higher education providers to disclose any relevant matters. The final version of the instrument did not include the proposed catch all provision proposed in its draft. The draft provision proposed empowering TEQSA to consider 'any other relevant matter' but did not go so far as to require applicants and relevant persons to disclose any relevant matters that would assist in determinations as to persons' fit and proper status.

Clause 10(4) allows TEQSA to consider any matters relevant to the honesty knowledge or ability of persons, enabling broad considerations of matters: But its value is vastly undermined if other relevant matters are not known. The general purpose of legislative 'fit and proper person' tests are protective in nature, to safeguard stakeholders, including the public. The legislative instrument could have made this clear by putting the onus on applicants to disclose all known relevant matters as to their fitness and probity to the higher education corporation or a person that makes or participates in decision making affecting the whole, or a substantial part, of the provider's affairs'.²⁷ Failure to disclose relevant matters indicates a lack of candour on applicants' behalf and would be relevant matters as to the fitness and propriety of applicants that could have been made an offence under the Act.

Examples of legislative provisions placing the onus on applicants to satisfy the regulator that they are 'fit and proper persons' are present in existing laws such as Education and Care Services National Law (WA) Act 2012 (WA) Schedule. These provisions, and their equivalent counterparts, in other jurisdictions, are clearly articulated to place the onus on the applicants; for example the words in subsection 12(1) state the distinct message that the onus is on applicants in that:

'An applicant who is an individual must satisfy the Regulatory Authority that the applicant is a fit and proper person to be involved in the provision of an education', signposts the message that the onus is on the applicant.

Subsection 12(2) is similarly drafted for an applicant that is not an individual in that

'If the applicant is not an individual, the applicant must satisfy the Regulatory Authority that each person who will be a person with management or control of an education and care service to be operated by the applicant is a fit and proper person to be involved in the provision of an education and care service; and the applicant is a fit and proper person to be involved in the provision of an education and care service.'

By analogy, a provision in the legislative instrument, similarly drafted to the above subsection 12(2), could place the onus on a corporate higher education provider; This would require the provider to satisfy TEQSA by noting that all persons who make or participate in making decisions impacting the whole, or a substantial part, of providers' affairs, are 'fit and proper'. It should add that an applicant provider is 'fit and proper' to be a higher education provider.

TEQSA has statutory powers to do all things necessary or convenient to be done for or in connection with the performance of its functions, including investigations as to compliance with the Act.²⁸ Even so, the legislative instrument could have made it clear to registered higher education providers that TEQSA may seek further information and undertake inquiries in relation to persona, as it thinks necessary for the purpose of determining whether individuals are ‘fit and proper persons’ under the Act.²⁹

Unfortunately, the focus on the public interest was not pursued in the final version of the instrument. Clause (g) of TEQSA’s draft legislative instrument considered ‘whether the public is likely to have confidence in the person’s suitability to be involved in an organisation that provides higher education’.³⁰ It is certainly appropriate that TEQSA consider the public interest as it is part of TEQSA statutory objects to do so. So what, one asks, is the ‘public interest’?

IV THE PUBLIC INTEREST

The public interest considerations are important and should certainly be at the forefront when considering the fitness and propriety of persons involved in the management of higher education providers, including universities. This is made clear in *Griffith University v Tang*³¹, where Kirby J referred to Woodhouse P, writing “there is the very distinct public interest in seeing that the very large investment of public money in taking him so far will not be thrown away except for good and substantial reasons.”³² There is also a distinct public interest in ensuring that Australia’s higher education providers are managed by suitable persons with the knowledge, ability, and character so as to promote quality higher education serving Australia’s current and long term social and economic needs.

Tribunals and Courts are often required to determine whether decisions made in accordance with ranges of legislative provisions are in the public interest. However, the ‘public interest is not a static concept’.³³ As such, in practice it is a bit slippery because it ‘does not have any fixed meaning’³⁴ and is undefinable insofar as the prescribed definition of public interest is not desirable in the legislative context. The concept is said to have a ‘wide meaning and not readily limited by precise boundaries. Opinions have differed, do differ and doubtless always will differ as to what is or is not in the public interest.’³⁵

Courts and statutory intervention have long been involved in supervising or regulating the exercise of public decision-making where there is a public interest; for example ‘such as the ‘common callings’ of ferrymen, hotel-keeper and wharf-operator;...the holding of ‘public offices’; ...the discharge of what the law identified as ‘public duties’”³⁶ Mantziaris³⁷, notes that the Crown, through the Attorney-General, supervised the administration of a diverse range of bodies and institutions with a public character that exercised powers and or functions that affected the public, where members of the public lacked standing to initiate proceedings to protect legal rights such as ‘charitable corporations [including hospitals], universities, municipal councils and utility corporations.’³⁸

Statutory reference to the ‘public interest’ is found in a range of legislation and courts such that tribunals are often required to determinate what is in the public interest.³⁹ Tamberlin J in *McKinnon v Secretary, Department of Treasury*⁴⁰ provides observations as to the idiom ‘the public interest’ which are informative and useful to ascertaining the public interest elements inherent within the ‘fit and proper person’ test as used in the legislative instrument made under the TEQSA Act. While the term ‘public interest’ is often a consideration to be ‘balanced against private interests or in contradistinction to the notion of individual interest,’⁴¹ it appears to have

been used in the proposed legislative instrument with a different focus in mind. The term ‘public interest’ was used in the same sense as that described by Tamberlin J in McKinnon, to:

“direct... attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances”.⁴²

The relevance of public interest must be determined by referring to the words of the instrument that “prescribes the public interest as a criterion for making a determination.”⁴³

The answer to the question what is in the public interest, can be swayed by the decision-makers idiosyncrasies and caution is called on, as ‘different minds will differ as to what is, or what is not, in the public interest.’⁴⁴ But, ultimately it is for decision-maker to determine which matters are relevant and the weight to be accorded to relevant matters.⁴⁵

V SO — WHAT IS IN THE PUBLIC INTEREST FOR HIGHER EDUCATION PROVIDERS?

The evaluation of public interests involves a consideration of the relevant facets of competing and comparative public interests. Where there are competing interests, they need to be balanced. When compared to other considerations, the overriding significant interest that will prevail over all others⁴⁶ is public interest in the public good of higher education. Ensuring that only persons who are ‘fit and proper’ to be involved in the management of higher education providers, including universities, assists in facilitating the delivery of higher education as a public good. Managing universities, for example, to satisfy and deliver on their fundamental statutory objectives, especially the advancement of education, is the overriding significant public interest.

TEQSA’s objectives include serving and protecting Australia’s public interest in its higher education system, and in so doing, have a keen interest in the corporate governance framework of higher education providers, including universities. TEQSA’s interest in corporate governance includes the structures, rules, relationships, systems, and processes which higher education entities used to manage, control, and monitor their organisation’s operations.⁴⁷ This includes processes of managing, controlling and monitoring the overall operations, performance, accountability, delegations, risk, and corporate culture of the higher education entity.⁴⁸

Governing bodies of higher education corporations, including universities, are said to be the ‘centrepieces’ of the corporate governance framework,⁴⁹ especially in their ‘oversight responsibilities’ in governing the organisations. The constituency of governing bodies, especially the qualities and credentials of the persons serving on them, is essential to the fulfilment of governance obligations. It is also essential to satisfy the public interests by having effective and efficient management of organisations that promote quality higher education appropriately serving Australia’s social and economic needs in delivering higher education and a skilled population. In short, the ‘fit and proper person’ test is a form of regulatory governance in the public interest.⁵⁰

VI FIT AND PROPER

The introduction of a ‘fit and proper person’ test for those involved in the management of higher education providers is certainly a welcomed step toward protecting Australia’s higher education system and the public from harm caused by mismanagement at the hands of unfit individuals. The test is aimed at assisting TEQSA, as the decision-maker, to determine whether persons are ‘fit and proper’ to manage higher education providers. The ‘fit and proper person’

concept applies in a wide variety of legislative provisions regulating many licences, vacations, and professions.

Interestingly, TEQSA's legislative instrument regarding its 'fit and proper person' test stated that TEQSA could have regard to "the honesty, knowledge or ability of the person". These words are important to the technical legal meaning of the term 'fit and proper person'. Some background to the concept is now offered as a means of gaining a better understanding as to how this test can be effectively applied to regulate individuals involved in the management of higher education providers, including universities.

The "fit and proper" criterion, also referred to as 'good fame and character', is said to have 'ancient lineage' relating to lawyers, dating back to the 5th century Roman Theodosian Code,⁵¹ it entered the common law of England in the 13th century⁵² through the Inns of Court.⁵³ The earliest recorded judgment referring to the "fit and proper" criterion was that of Sir Edward Coke in the 'Griesley's Case'⁵⁴ in 1588. This case involved an inhabitant within the manor of Kingston, in the county of Stafford, who was, according to custom, chosen to be a constable. However, when the person refused to take the office, questions were raised as to whether the steward might impose a fine. In his judgment, Coke referred to common law requirement 'that every constable should be idoneus, hom ie apt and fit to execute the said office', writing:

in law to be idoneus, who has those three things, honesty, knowledge and ability; honesty to execute it truly, without malice, affection, or partiality; knowledge to know what he ought duly to do; and ability, as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or probity neglected.⁵⁵

From this it was said that sleeping in a parish or manor was not necessary to render a person qualified as apt and fit to serve in the office of constable.⁵⁶ Coke concluded that 'if one be elected constable who is not idoneus by the law may be discharged of his office, and another who is idoneus appointed in his place.'⁵⁷

VII FIT AND PROPER — THE GENERAL APPROACH BY AUSTRALIAN COURTS?

Modern courts continue to be informed by the echo in the wisdom of Cokes' words penned 430 years ago. In Stroud's *Judicial Dictionary of Words and Phrases 1890*, the following Latin term was used to define "A 'fit' person to execute an office, is *he-qui melius et sciat et possit, officium illud intendere*" which translates to 'He knows better and he can argue that the job'⁵⁸ Stroud then referred to Coke's three requirements: honesty, knowledge, and ability. Incidentally, Stroud added the condition that a 'fit and proper person' must also be legally eligible to be appoint.⁵⁹ The example given is illustrative and is analogous to the appointment of the Constable in *Griesley's Case*, insofar as "a 'fit and proper' person to be appointed churchwarden...had to be resident in the parish".⁶⁰

It is likely the extract in *Stroud's Judicial Dictionary*, now in its 9th ed,⁶¹ has aided the perpetuation of Coke's three requirements; 'honesty, knowledge and ability'. Nonetheless, Coke's sentiments, to be *idoneus hom*, or, 'apt and fit to execute [an] office' continue to inform the underlying meaning of what it is to be 'fit and proper' to hold office in modern Australian Courts.

The starting point by Australian courts and tribunals, when called on to assess whether persons are 'fit and proper' for professions, vocations, offices, or licences, is the following oft quoted statement in *Hughes and Vale* [1955] HCA 28⁶², where Coke's three requirements are restated as follows:

“The expression ‘fit and proper’ is of course familiar enough as traditional words when used with reference to offices and perhaps vocation. But their very purpose is to give the widest scope for judgment and indeed for rejection. ‘Fit’ (or ‘idoneus’) with respect to an office is said to involve three things, honesty, knowledge and ability: “honesty to execute it truly, without malice affection or partiality; knowledge to know what he ought duly to do; and ability as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it”⁶³

The essential attributes of the ‘fit and proper person test’, that is, “three things, honesty, knowledge and ability,” are simply attributed to Coke, presumably, in the *Griesley’s Case*. The meaning of the term “fit and proper person”, as used in the modern legal settings, is contextual, insofar as it is formed by the setting in which the text is applied.

VIII TEQSA — “FIT AND PROPER” IN CONTEXT

Kirby observes that “Where [a] statute speaks...there is no escaping the duty to give meaning to its words.”⁶⁴ Gleeson articulates the difficulty in such a duty in “[i]t is one thing to say that a statute...‘is always speaking’”. The question is: what is it saying?”⁶⁵

The TEQSA legislation⁶⁶ requires persons involved in the management of a higher education providers to be ‘fit and proper person[s]’. The ‘fit and proper’ test is frequently utilised in many statutes in numerous contexts concerning a particular office or vocation. For example, the test covers liquidators of corporations⁶⁷; solicitors⁶⁸; migration agents⁶⁹; guardianship of Adults⁷⁰; persons involved education and care services for children⁷¹; teachers⁷² Tattooists⁷³; gaming operators;⁷⁴ health professionals;⁷⁵ registered nurses;⁷⁶ tax agents⁷⁷; commercial broadcasting licences⁷⁸; entry permits⁷⁹; child adoptions;⁸⁰ transport operators⁸¹; foster-parents;⁸² Tobacco producers;⁸³ manufacturers or import/exporters of explosives;⁸⁴ commercial pilots of aeroplane or helicopters;⁸⁵ weapons holder;⁸⁶ firearms licence;⁸⁷ marriage celebrants;⁸⁸ security operator;⁸⁹ contractor licence (Plumbing and Draining);⁹⁰ gasfitter;⁹¹; building surveyor and building inspectors;⁹² jockeys;⁹³ persons engaging in credit activities;⁹⁴ strata managing agents’ licences;⁹⁵ tow truck operators;⁹⁶ real estate sales representatives;⁹⁷ and importers of specified drugs.⁹⁸

All of these statutory tests of persons focus on ensuring that only suitable persons gain access to the relevant offices or vocations. In the TEQSA test, the focus on the suitability of persons as higher education providers and individuals who makes or participate in making decisions that affect the whole, or a substantial part, of providers’ affairs.

The words of the statutes are ‘fit and proper’. Yet, how should these words be interpreted? Francis Bennion provides various examples of where the legislature uses paired words and says: ‘the phrase “fit and proper” when used to describe a person qualifying for some privilege such as the grant of a licence. Here the addition of “proper” adds little if anything to “fit”.’⁹⁹ Bennion qualifies this statement by saying ‘much depends on the context, and the purpose of the enactment. If applicants are required to be “fit and proper”, then obviously they must be both ‘fit and proper’, assuming there is some difference in meaning.¹⁰⁰

In the statutory context, in ‘ordinary parlance, the word “and” is used conjunctively, and the word “or” disjunctively’.¹⁰¹ However, in limited circumstances¹⁰², the courts treat the statutory words “and” and “or” as interchangeable. These limited circumstances include when the legislature made a mistake in a statute and used wrong conjunction.¹⁰³ So, ‘if an unintelligible or absurd result follows from usual construing of these words, the courts would read the word “and” disjunctively.’¹⁰⁴ Yet, the term ‘fit and proper’ is not one that gives rise to unintelligible

or absurd results such that the word “and” should be construed conjunctively. The term ‘fit and proper’ is a composite expression.

According to Bennion, the common usage of paring of words in legal expression is often due to drafters’ reluctance to rely on a solitary word and gave some historical reasons, including the Norman Conquest where both a French and an Anglo-Saxon equivalent meanings were given.¹⁰⁵ Further, in medieval English translations of Latin words, translators often used two English words, one with a Latin root and the other with an English root.¹⁰⁶ This theory would fit with the term ‘fit and proper’ where the old or middle English root for ‘fit’ is *fitten* and the Latin root for proper is *proprius*.

Middleton referred to the historical roots of statutory words in ‘Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content’.¹⁰⁷ On reflecting on the deposit of history as it relates to the term ‘fit and proper’, one is reminded of the use of the Latin term *idoneus* by Coke in 1588. The Latin term *Idoneus*, as used in law, is defined by Shumaker and Longsdorf as “sufficient: fit; adequate, he is said to be *idoneus homo* who hath these three things, honesty, knowledge, and civility: and if an officer, etc., be not idoneus, he may be discharged. (citing 8 Coke, 41.)”¹⁰⁸; by *Merriam-Webster* as fit, appropriate, suitable, proper¹⁰⁹ and by Lewis and Short as ‘fit for something (esp. for an action), meet, proper, becoming, suitable, apt, capable convenient, sufficient (of persons and things)’.¹¹⁰

Because composite expressions are usually construed as a whole¹¹¹, it is likely the paired words ‘fit and proper’ were required so that the English translation adequately reflects the Latin word *idoneus*. It appears the modern usage of the composite expression ‘fit and proper’ has not lost its roots with the three essential requirements as uttered by Coke, long ago and far away before the legislature’s pen became dominant¹¹², honesty, knowledge, and civility (or ability). It is likely that the words ‘fit and proper’ overlap but the word ‘fit’ aligns with the original concepts of knowledge and ability and the word proper aligns with the character requirement for honesty.

IX THE FIT AND PROPER PERSON

One’s fitness and propriety are measured according to nature and purpose of the activities being or sought to be undertaken.¹¹³ For TEQSA, the test is one for capacity to perform as a higher education provider or to make or participate in the making of decisions affecting the whole, or a substantial part, of the providers’ affairs. The test has been employed in widely differing contexts and “it takes its meaning from its context.”¹¹⁴ The test’s three requirements, “honesty, knowledge and ability” are viewed as flexible and their assessment is informed and tailored by the nature of the office or role concerned.¹¹⁵

A leading authority on the concepts of fitness and propriety is *Australian Broadcasting Tribunal v Bond*¹¹⁶, a case involving who is a ‘fit and proper person’ to hold a commercial broadcasting licence under the *Broadcasting Act 1942* (Cth), s. 88. On the concept of ‘fit and proper person’, Mason CJ observed that the “question whether a person is fit and proper is one of value judgment”¹¹⁷ and made note on the process of assessing the conduct and weight given to any matter as follows:

In that process the seriousness or otherwise of particular conduct is a matter for evaluation by the decision-maker. So too is the weight, if any, to be given to matters favouring the person whose fitness and propriety are under consideration.¹¹⁸

The most oft cited statements from *Australian Broadcasting Tribunal v Bond* is that of Toohey and Gaudron JJ as follows:

The expression "fit and proper person", standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of "fit and proper" cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities.¹¹⁹

Toohey and Gaudron JJ continued, providing some focus on the nexus between the activities required by office and a person's conduct, character and reputation as follows:

...depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.¹²⁰

In a passage cited in many civil and administrative tribunal cases, Walters J in *Sobey*,¹²¹ a dispute about the accreditation of a commercial agent, made a point of focus on the technical and moral aptitudes required to satisfy the demands of the office or role in:

... what is meant by ['fit and proper'] is that the [person]... must show not only that he [or she] is possessed of the requisite knowledge of the duties and responsibilities evolving upon him [or her] ... but also that he is possessed of sufficient moral integrity and rectitude of character as to permit him [or her] to be safely accredited to the public... as a person to be entrusted with the sort of work which [is sought].

X ON MISCONDUCT AND THE FIT AND PROPER PERSON TEST

The High Court of Australia has long held that '[a] Court may consider any conduct ... which is relevant to the question of whether he is a fit and proper person... recent and more distant behaviour may be taken into account. It is not possible to draw a line'.¹²²

In *McBride v Walton*¹²³, the NSW Court of Appeal, considered whether a senior medical practitioner was a person "not of good character, and as such, should be removed from Medical Register".¹²⁴ The NSW Court¹²⁵ the approach taken by the tribunal (Handley and Powell JJA) where there was evidence of misconduct. Gleaning the judgment in *McBride v Walton* the approach may be summarised as follows:

In determining that a person is not of good character in the context of fitness one must consider whether the misconduct was:

- an error of judgment rather than a defect of character;
- intrinsically seriousness as it relates to fitness for office;
- an isolated episode and hence atypical or uncharacteristic
- Additional considerations include:
 - the motivation for the misconduct;
 - any underlying qualities of character shown by previous and other conduct; and
 - post misconduct behaviour that allows public and professional confidence be reposed in him to uphold and observe the high standards of moral rectitude required.

The *McBride* Court referred to the tribunal as saying “It was moral blindness rather than error of judgment which led...on a course of calculated deception ... (his) misconduct ... can only be explained as emanating from a defect or flaw in his character....demonstrate(d) that he lacked this necessary moral discipline to conduct himself honourably when honesty is at stake”.¹²⁶

In Coke’s three essential criterion of a ‘fit and proper person’, the first, honesty, reflects a person’s character such that a flawed character reflects one who is unfit to hold a position to be involved in the management of a higher education provider, including a university. The character of a person is an important matter to be considered when entertaining the ‘fit and proper person’ test. In *McBride v Walton*¹²⁷ Kirby P examined the term “character” of a person as it was relevant to the term ‘is not of good character’ in the context of a professional office.¹²⁸ Kirby P started with a reflection on general dictionary definitions suggesting that ‘character’ means ‘the aggregate of qualities which distinguish one person from another’, the “moral constitution” of a person, that person’s “reputation” and “good repute.”¹²⁹

Kirby P¹³⁰ then provided some ‘general propositions’ as to the meaning of the phrase “is not of good character.” He first noted that caution should not apply to a test of “good character” according to irrelevant or peculiar notions of what “good character” may be in other contexts; rather, its purpose is to ensure the test is not divorced from the context and the purpose of the particular statute. Kirby P further cautioned against unduly enlarging the legislative reference to “good character”, providing an apt example in ‘the fact that a person, who happens to be a medical practitioner, occasionally cheats at cards when playing with family or friends would, without more, have nothing to do with his or her “good character” for the purpose of [holding a professional office]’.¹³¹

Kirby P warned that in applying the test as to character, similar to the ‘fit and proper’ test, the prime function of decision-makers such as TEQSA is to protect the public from harm. The public interest is at the forefront but the role of the decision-maker does not extend to becoming ‘moral guardians’.¹³² The decision-maker does not usually require to ‘uphold human morality or academic integrity and honesty in research’¹³³

Where one is involved in managing a higher education provider, though, including a university, dishonesty involving academic integrity or in research such as falsifying data or results, are core matters of concern going to poor character and dishonesty directly relevant to the purpose of higher education providers. Dishonesty falling short of expected standards of academic integrity and research reflect on a person as being ‘not of good character’ and not a ‘fit and proper person’ to be involved in managing a higher education provider. While ‘no person’s character is entirely flawless [and hence]...not every flaw of character’ that is relevant’¹³⁴ to a person’s character and fitness for office, flaws in character must be construed as being constrained to the particular context.

In the context of TEQSA’s assessment of the ‘fit and proper person’ test, character flaws relevant to the management of higher education providers must be determined as is required by the intention of Parliament in enacting the statutory ‘fit and proper person’ test as found in ss 21 and 25A TEQSA Act. This noted, a wrongdoing by a person, extraneous to the involvement of managing a higher education provider such as card cheating amongst friends may demonstrate character flaws, but such personal flaws may not be relevant for the purpose of the ‘fit and proper person’ test in the TEQSA act. Obviously, were a person’s flaws or behaviours ‘betoken more serious flaw of character’¹³⁵ they could demonstrate defects relevant to being involved in managing a higher education provider.

XI SOME PRINCIPLES TO USE WHEN ASSESSING THE 'FIT AND PROPER PERSON'

Courts often examine relevant legal authorities, offering summaries of the key legal principles on particular issues. In *Minniti v Motor Vehicle Industry Board*¹³⁶, the WA Court of Appeal formulated instructive principles for assessing the expression 'fit and proper'. From gleaning relevant judgments from key cases, including *Minniti*, one could summarise the principles relevant to TEQSA's 'fit and proper' person test as follows:

1. the purpose of the expression 'fit and proper person' is to give the widest scope for judgment and for rejection of applications;¹³⁷
2. the discretion falls to be exercised anew in the circumstances of each application in the light of the statutory framework;¹³⁸
3. it is not a concept which is to be narrowly construed or confined¹³⁹;
4. the term 'fit and proper person', is not capable of being stated with any degree of precision';¹⁴⁰
5. prior convictions may be relevant to applications if they represent courses of disregard for the law reflecting adversely on the character of the persons committing them;¹⁴¹
6. past conduct is relevant if, although it did not occur in the ordinary course of carrying on an occupation, it is sufficiently closely connected to it or it manifests the presence or absence of qualities incompatible with, or essential for, the carrying on the occupation¹⁴²;
7. 'fit and proper' must be interpreted in the light of the subject-matter of the Act in which the expression appears;¹⁴³
8. 'fit and proper' normally comprises the three characteristics of honesty, knowledge, and ability;¹⁴⁴
9. in deciding whether persons are 'fit and proper,' one determines the weight given to matters seen to be relevant to the applications/offices in issue.¹⁴⁵
10. (10) applicants must show not only that they possessed a requisite knowledge of the duties and responsibilities as office or licence holders;¹⁴⁶
11. applicants possess sufficient moral integrity and rectitude of character as to permit them to be accredited to the public safely without further inquiry as persons who can be entrusted with the sort of office role or licence'.¹⁴⁷
12. if persons exhibited serious deficiencies in their standards of conduct and attitudes, they must produce clear proof to show that some years later they established themselves as different persons;¹⁴⁸
13. and one cannot assume that changes occurred merely simply because some years have gone by and it is not proved that anything of a discreditable kind has occurred.

As to the seriousness of prior convictions in the context of inquiries into fitness and propriety, Wheeler J in *Tavelli v Johnson*¹⁴⁹ was cautious not to lay down an inflexible rule. As such, he highlighted that each circumstance brings with it a fresh view in light of the particular statutory framework; he also identified four factors that would indicate serious concerns about past convictions:

1. a conviction occurred in the course of or relate to the carrying out of the occupation of inquiry agent;¹⁵⁰
2. it was an offence of dishonesty;
3. it occurred while person were holders of relevant office roles or licences; and
4. they were otherwise so serious, either in themselves or as representing a course of disregard for the law, as to reflect particularly adversely on the character of the person committing them.

Wheeler J also identified factors that indicate a ‘person may be of good character and a fit and proper person notwithstanding previous convictions’ as follows:

1. where one convicted demonstrates genuine remorse and contrition, true insight, and understanding of the earlier turpitudes that are demonstrated by the person's actions as well as by the person's words;¹⁵¹
2. if the offences were committed a substantial time ago, although there is no set period, it will result in the expunging of the effect of previous convictions on character
3. any changes in persons circumstances from the time of the commission of the offences demonstrating that the factors giving rise to the offences were eliminated;
4. persons’ character generally since their commission of the offences include the lack of offending, age, family support, paid and voluntary work and character references (made in full knowledge of the fact of the commission of the offences.)

Still, it should be noted that the Courts are cautious about applying lists of considerations, warning that such lists should not be used as prescriptive formulae to determine whether persons are ‘fit and proper’. Rather, the principles are presented as a guide to use when assessing specific matter while paying regard to the circumstances of each case and the particular statutory formula such as the TEQSA Act and legislative instrument mandating the evaluative assessment of fitness and propriety.¹⁵²

XII CONCLUSION

TEQSA’s ‘fit and proper person’ framework is aimed at protecting higher education as a public good while reducing the risk of failure by higher education providers due to poor corporate governance, especially through incompetent and reckless membership of their governing bodies. Good corporate management of higher education providers, especially universities, is important to contemporary society in economic terms. Good management is also important in facilitating contributions by higher education providers to the common good through creating and disseminating their research and teaching higher levels of learning along with complex skill development. Where there is a demonstrated unfitness, such persons, whether higher education providers or senior managers and members of governing bodies, ‘have no right to be involved in decision making or management’¹⁵³ of the higher education providers’ affairs.

The aims of this article were to shine some light on TEQSA’s ‘fit and proper person’ test and provide some focus on the public interest basis of the test while offering guidance as to the concept in the legal context. A takeaway message is worth making: the determination of the ‘fit and proper person’ test by TEQSA would involve weighing the seriousness of previous conduct and calculating appropriate weight to attach to it. Such a task is ‘one of value judgment’¹⁵⁴ but one based on the ‘fit and proper person’ concept that has been considered in various contexts reaching back over 500 years.

Central to TEQSA’s ‘fit and proper person’ test is the public interest in higher education it serves to protect. Fitness and propriety are flexible concepts without predetermined definitions and the consideration of whether persons are ‘fit and proper’ involves assessments of their knowledge, honesty, and ability in the context of the role they are seeking to undertake.¹⁵⁵

Members of governing bodies of higher education providers must possess the requisite knowledge of the duties and responsibilities imposed on them and have the ability to carry them out with due care and diligence in good faith for the proper purpose of governing their institutions.

In addition to such requisite knowledge and ability, persons should possess moral integrity and rectitude of character¹⁵⁶ so as to permit them to satisfy the public expectations of ensuring success of higher education as a public good. Because the intentions of TEQSA's 'fit and proper' purpose test are good, here's hoping the ongoing outcomes of its application will prove to be the same.

Keywords: fit and proper person, public interest, higher education, universities, Tertiary Education Quality and Standards Agency (TEQSA).

ENDNOTES

- 1 *Education Legislation Amendment (Provider Integrity and Other Measures) Act 2017* (Cth) received Royal Assent on 16 August 2017.
- 2 *Rich v Australian Securities and Investments Commission* [2004] HCA 42 [105] (Kirby J) (Originally stated in the corporate context.)
- 3 Deloitte Touche Tohmatsu, 'Review of the impact of the TEQSA Act on the higher education sector', March 2017 https://docs.education.gov.au/system/files/doc/other/review_of_the_impact_of_the_teqsa_act_final_report_060417.pdf
- 4 Note Higher Education Standards Framework (Threshold Standards) 2015 Part A 6.1; see also TEQSA, 'Guidance Note: Corporate Governance' 11 October 2017
- 5 TEQSA, 'New legislative instrument increases higher education sector protections' (online) 13 December 2018 <https://www.teqsa.gov.au/latest-news/articles/new-legislative-instrument-increases-higher-education-sector-protections>.
- 6 Where McClaran was specifically referring the legislative instrument made under s S 7A(2) Tertiary Education Quality and Standards Agency Act 2011 (Cth) (TEQSA Act).
- 7 TEQSA, above n 5.
- 8 S 3 TEQSA Act; TEQSA, What we do, (Online) <https://www.teqsa.gov.au/what-we-do>.
- 9 See ss 7A and 21 TEQSA Act
- 10 *Higher Education Standards Framework (Threshold Standards) 2015*.
- 11 See Renewing registration; s 36(1)(b) TEQSA Act.
- 12 See s 25A TEQSA Act.
- 13 Tom Fletcher & Katlyn Jones, 'Changes and developments relating to TEQSA and its regulatory activities over the past year' Minter Ellison, 01 November 2018, (online) <https://www.minterellison.com/articles/teqsa-update-2018>.
- 14 S 7A(2) TEQSA Act
- 15 For the purpose of the TEQSA Act.
- 16 Tertiary Education Quality and Standards Agency, Proposed Fit and Proper Person Considerations, TEQSA Consultation Paper, October 2017.
- 17 S 6 Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018.
- 18 S 7 Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018.
- 19 S 8(3) Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018.
- 20 S 10 Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018.
- 21 S 10 Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018.
- 22 S 10 Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018.
- 23 S 9 Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018.
- 24 Giles Peel, Bridget Salaman, Mathew Rutter, DAC Beachcroft, 'Directors: are you fit and proper? Trends in fit and proper person requirements and testing', Practical Law UK, Thomson Reuters (online) 01-May-2015, [https://uk.practicallaw.thomsonreuters.com/2-611-8747?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/2-611-8747?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)
- 25 Ss 206B(6) and 206EAA *Corporations Act 2001* (Cth).

- 26 See, for example in the UK setting, Giles Peel, Bridget Salaman, Mathew Rutter, DAC Beachcroft, 'Directors: are you fit and proper? Trends in fit and proper person requirements and testing', Practical Law UK, Thomson Reuters (online) 01-May-2015, [https://uk.practicallaw.thomsonreuters.com/2-611-8747?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/2-611-8747?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).
- 27 As required by ss 21 and 36 TEQSA Act.
- 28 s134 & s 63 TEQSA Act.
- 29 See for example s 14 Education and Care Services National Law (WA) Act 2012 (WA) Schedule, and its equivalent provision in other jurisdictions.
- 30 Tertiary Education Quality and Standards Agency, Proposed Fit and Proper Person Considerations, TEQSA Consultation Paper, October 2017 4.
- 31 Griffith University v Tang [2005] HCA 7
- 32 Norrie [1984] 1 NZLR 129 135 (Woodhouse P) cited in Griffith University v Tang [2005] HCA 7 [167](Kirby J)
- 33 Harris v Australian Broadcasting Corporation [1983] FCA 242 [unpaginated] (Beaumont J).
- 34 McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 [8] (Tamberlin J)
- 35 Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health [1995] FCA 1060 [34] (Lockhart J). Also cited in McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 [96] (Conti J).
- 36 Christos Mantziaris, 'The Attorney-General and The Public Interest (2004) 25 Adelaide Law Review 211 214.
- 37 Ibid.
- 38 Ibid.
- 39 McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 [8] (Tamberlin J)
- 40 McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 [8] (Tamberlin J)
- 41 McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 [10] (Tamberlin J)
- 42 McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 [9] (Tamberlin J)
- 43 McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 [11] (Tamberlin J).
- 44 McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 [246] (Jacobson J)
- 45 Sean Investments Pty Limited v McKellar (1981) 38 ALR 363 375 (Deane J), cited in McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 [11] (Tamberlin J).
- 46 McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 [12] (Tamberlin J).
- 47 TEQSA, Guidance Note: Corporate Governance, Version 2.3, 11 October 2017, 1 (Online) <https://www.teqsa.gov.au/latest-news/publications/guidance-note-corporate-governance>.
- 48 Ibid.
- 49 Ibid.
- 50 Professional Standards Authority for Health and Social Care (UK), 'Fit and Proper'? Governance in the public interest' March 2013.
- 51 Deborah L. Rhode, Moral Character as a Professional Credential, 94(3) The Yale Law Journal 491 (1985) 493; see also P de Jersey, "The 'fit and proper' criterion: indefinable, but fundamental" Bar Practice Course final lecture, Banco Court Friday 18 February 2005, 6pm, 3 - 4; Y Ross, Ethics in Law, 3rd ed, (Butterworths 2001) 132.
- 52 see also P de Jersey, Ibid; Y Ross, Ibid.
- 53 Ibid.
- 54 Griesley's Case, Trin. 30 Eliz. Rot. 1012. in the CommoD Pleas, reported in John Henry Thomas , John Farquhar Fraser , Robert Philip Tyrwhitt, Edward Coke, The Reports of Sir Edward Coke, Knt, in Thirteen Parts, Vol IV (Joseph Butterworth and Sone 1826) 215; Griesley's Case (1588) 8 Co Rep 38a cited in Chantal Stebbings, Legal Foundations of Tribunals in Nineteenth-Century England (Cambridge University Press 2006) 298.
- 55 Griesley's Case, Ibid, 215.

- 56 The king v Adlard, 1825 Michaelmas Term, Sixth Geo IV, 343 reported in James Dowling and Archer Ryland, Reports of Cases argued and determined in The Court of Kings Bench during Michaelmas and Hilary Terms in the Sixth and Seventh GEO IV. Volume VII (Sweet and Maxwell, 1827).
- 57 Griesley's Case, above n 54, 215.
- 58 Frederick Stroud, The Judicial Dictionary of Words and Phrases Judicially interpreted, 2nd ed Vol II (Sweet and Maxwell 1890) 780. Note the reference to 'Dwar 685' is a reference to 'Dwarris on Statutes' see for example, Dwarris, Fortunatus, Sir, 1786-1860; Potter, Platt, 1800-1891, A general treatise on statutes: their rules of construction, and the proper boundaries of legislation and of judicial interpretation (Albany: William Gould & Son, 1875) 288.
- 59 Stroud's Judicial Dictionary of Words and Phrases 7th ed, Vol 2, cited in Mansoor and Department of Transport, matter no CC 1489/2010 (Senior Member McNab) referred to in Topic and Department Of Transport [2015] WASAT 16 [40] (Senior Member M Spillane).
- 60 As per (Church Building Act 1831 (c.38), s 16), citing the cases, "R. v Harding, 6 T.L.R. 53; R. v Cree, 67 L.T. 556; as to such residency, see Stephenson v Langston, [1804] EngR 125; Stroud's Judicial Dictionary of Words and Phrases 7th ed, Vol 2 cited in Mansoor and Department of Transport, matter no CC 1489/2010 (Senior Member McNab), referred to in Topic and Department Of Transport [2015] WASAT 16 [40] (Senior Member M Spillane).
- 61 Daniel Greenberg (ed) Stroud's Judicial Dictionary of Words and Phrases 9th ed (Sweet & Maxwell 2017).
- 62 Hughes and Vale Pty Ltd v New South Wales (No. 2) [1955] HCA 28 [9] (Dixon CJ, McTiernan and Webb JJ).
- 63 Hughes and Vale Pty Ltd v New South Wales (No. 2) [1955] HCA 28 [9] (Dixon CJ, McTiernan and Webb JJ) citing 'Coke' meaning the Griesley's Case (1588).
- 64 Michael Kirby, 'Towards a Grand Theory of Interpretation The Case of Statutes and Contracts', Clarity and Statute Law Society Joint Conference Cambridge University 13 July 2002 http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_statute.htm.
- 65 Murray Gleeson, 'The Meaning Of Legislation: Context, Purpose and Respect for Fundamental Rights,' Victoria Law Foundation Oration, Melbourne, 31 July 2008 15. http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_31jul08.pdf.
- 66 Ss 21 and 25A TEQSA Act.
- 67 Previously s 1282(2)(c) and now in Schedule 2 s20-20(4)(h) Corporations Act 2001 (Cth).
- 68 For example; Legal Profession Act 1987 (NSW)
- 69 Migration Agents Regulations 1998.
- 70 Guardianship of Adults Act (NT).
- 71 Children (Education and Care Services National Law Application) Act 2010 (NSW), s 8(b)).
- 72 Teachers Registration And Standards Act 2004 (SA) s 21.
- 73 For example, Tattoo Parlours Act 2012 (NSW) & Tattoo Parlours Regulation 2013 (NSW).
- 74 Gaming Machines Act 2001(NSW).
- 75 Health Professions Registration Act 2005 (Vic).
- 76 Nurses Act 1999 (SA) s 26.
- 77 Income Tax Assessment Act 1936 s 251JA.
- 78 s 88(2) of the Broadcasting Act 1942(Cth).
- 79 Fair Work Act 2009 (Cth) s 512.
- 80 Adoption Act 2000 (NSW) s 27 (1)(b); s13B (2) (b) of the Adoption of Children Act 1964 (Qld).
- 81 s 33 Passenger Transport Act 1990 (NSW).
- 82 State Children Act 1895 (SA).
- 83 Tobacco producer licences; Excise Act 1901.
- 84 Explosives Act 2003 (NSW) s 21(b)).
- 85 Civil Aviation Act 1988 (Cth).

86 For exemplar; weapons licence; Weapons Act 1990 (Qld).
 87 ; Firearms Act s 11(1)(c) (WA); Firearms Act 1996 (Vic).
 88 s 39C(1)(c) Marriage Act 1961 (Cth).
 89 To carry on security activities; Security Industry Act 1997 s 15 (NSW).
 90 For example, s 31 of the Queensland Building Services Authority Act (Qld).
 91 Home Building Act 1989 (NSW).
 92 Building Act 1993 (Vic).
 93 Racing Act 2002 (Qld).
 94 s 80 National Consumer Credit Protection Act 2009 (Cth).
 95 Property, Stock and Business Agents Act 2002 (NSW).
 96 Tow Truck Industry Act 1998; Tow Truck Industry Regulation 2008 (NSW).
 97 For example, Real Estate and Business Agents Act 1978 (WA).
 98 Customs (Prohibited Imports) Regulations 1956 (Cth).
 99 Francis Bennion, *Threading the Legislative Maze* - 8 , 1999, (online) 1999.003 'Threading the
 Legislative Maze 8', 163 JPN (1999) 264; <http://www.francisbennion.com/list/webtitles.htm>.
 100 Ibid.
 101 *Victims Compensation Fund Corporation v Brown* [2003] HCA 54; and *Victims Compensation Fund Corporation v Brown* [2002] NSWCA 155 [62] Spigelman CJ citing DC Pearce and RS Geddes, *Statutory Interpretation in Australia* 4th ed (Butterworths 1974) 23; *City of Adelaide v Environment Protection Authority* [2005] SASC 221 [26] (Debelles J); *Mary Suresha Kumaraperu v Minister for Immigration & Multicultural Affairs* [1998] FCA 1333 [unpaginated] (Weinberg J). see also D C Pearce, *Statutory Interpretation in Australia*, (Butterworths 1974)23.
 102 *Mary Suresha Kumaraperu v Minister for Immigration & Multicultural Affairs* [1998] FCA 1333 [unpaginated] (Weinberg J) citing *Re The Licensing Ordinance* (1968) 13 FLR 143 at 147 per Blackburn J and *R v Oakes* [1959] 2 QB 350 and DC Pearce and RS Geddes, *ibid*.
 103 *The Minister for Education and The Director General of the Education Department of Western Australia v The Civil Service Association of Western Australian (Inc)*. [1997] WAIRComm 174 [unpaginated] (President P J Sharkey).
 104 *City Of Adelaide v Environment Protection Authority* [2005] SASC 221 [26] (Debelles J) citing *Federal Steam Navigation Co Ltd v Department of Trade & Industry* [1974] 1 WLR 505 [523 – 524] (Lord Salmon).
 105 Francis Bennion, *Threading the Legislative Maze* - 8 , 1999, (online) 1999.003 'Threading the Legislative Maze 8', 163 JPN (1999) 264; <http://www.francisbennion.com/list/webtitles.htm>.
 106 Francis Bennion, *above n 99*.
 107 John Middleton, *Statutory Interpretation: Mostly Common Sense?* (2016) 40 Melbourne University Law Review 632, citing *Frankfurter J in Rochin v California* 342 US 165, 169–70 (1952).
 108 Walter .A. Shumaker and George F Longsdorf, *The Cyclopedic Dictionary of Law*, (Keefe-Davidson Law Book Co, 1901) 452.
 109 Idoneous. Merriam-Webster.com. Merriam-Webster, <https://www.merriam-webster.com/dictionary/idoneous>.
 110 EA Andrews (ed), *Harpers' Latin Dictionary, A New Latin Dictionary*, enlarged and rewritten by Charlton T Lewis and Charles Short, (Harper & Bothers, Clarendon Press 1891).
 111 F Bennion, *Statutory Interpretation* 3rd ed (1997) pp431, 925-7 and Supplement (1999) pp S63-4 cited in *Victims Compensation Fund Corporation v Brown* [2002] NSWCA 155 [73] Spigelman CJ).
 112 See Michael Kirby, 'Statutory Interpretation: The Meaning of Meaning; (2011) 35(1) Melbourne University Law Review 113.
 113 *Kabir v Roads and Maritime Services* [2014] NSWCATOD 153 [26] (J McAteer, Senior Member)
 114 *Australian Broadcasting Tribunal v Bond* [1990] HCA 33 [36] (Toohey and Gaudron JJ).
 115 *ASIC v Fernandez*, Matter No: 02/VIC13, Companies Auditors and Liquidators Disciplinary Board

- [320] (Howard Insall SC, David Barnett and Robert Ferguson).
- 116 [1990] HCA 33.
- 117 Australian Broadcasting Tribunal v Bond [1990] HCA 33 [63] (Mason CJ).
- 118 Australian Broadcasting Tribunal v Bond [1990] HCA 33 [63] (Mason CJ).
- 119 Australian Broadcasting Tribunal v Bond [1990] HCA 33 [36] (Toohey and Gaudron JJ).
- 120 Australian Broadcasting Tribunal v Bond [1990] HCA 33 [36] (Toohey and Gaudron JJ).
- 121 Sobey v Commercial and Private Agents Board (1979) 22 SASR 70, [76] (Walters J) cited in Legal Services Board v McGrath [2010] VSC 266 [12] (Warren CJ).
- 122 Re Davis (1947) [1947] HCA 53 [unpaginated]; 75 CLR 409 416 (Latham CJ) said in the context of a barrister in legal practice
- 123 McBride v Walton CA 40436 of 1993; BC9402907, Unreported Judgments NSW, Supreme Court of New South Wales Court of Appeal (Kirby P, Handley and Powell JJA)
- 124 As was held by the Medical Tribunal. The tribunal's decision was upheld (Handley and Powell JJA; Kirby P dissenting).
- 125 McBride v Walton CA 40436 of 1993; BC9402907, Unreported Judgments NSW, Supreme Court of New South Wales Court of Appeal 9 (Handley JA) and impliedly 88 (Powell JA). Also note Huynh v Commissioner for Fair Trading [2016] NSWCATOD 2 [49] (Senior Member K Rosser) although Rosser attributes these considerations to the NSWCA rather than the tribunal.
- 126 McBride v Walton CA 40436 of 1993; BC9402907, Unreported Judgments NSW, Supreme Court of New South Wales Court of Appeal 9 (Handley JA).
- 127 McBride v Walton CA 40436 of 1993; BC9402907, Unreported Judgments NSW, Supreme Court of New South Wales Court of Appeal 21 (Kirby P).
- 128 In the context of the case means a 'medical practitioner'.
- 129 McBride v Walton CA 40436 of 1993; BC9402907, Unreported Judgments NSW, Supreme Court of New South Wales Court of Appeal 21 (Kirby P).
- 130 McBride v Walton CA 40436 of 1993; BC9402907, Unreported Judgments NSW, Supreme Court of New South Wales Court of Appeal 22 (Kirby P).
- 131 McBride v Walton CA 40436 of 1993; BC9402907, Unreported Judgments NSW, Supreme Court of New South Wales Court of Appeal 22 (Kirby P).
- 132 McBride v Walton CA 40436 of 1993; BC9402907, Unreported Judgments NSW, Supreme Court of New South Wales Court of Appeal 22 (Kirby P)
- 133 McBride v Walton CA 40436 of 1993; BC9402907, Unreported Judgments NSW, Supreme Court of New South Wales Court of Appeal 23 (Kirby P).
- 134 McBride v Walton CA 40436 of 1993; BC9402907, Unreported Judgments NSW, Supreme Court of New South Wales Court of Appeal 24 (Kirby P).
- 135 McBride v Walton CA 40436 of 1993; BC9402907, Unreported Judgments NSW, Supreme Court of New South Wales Court of Appeal 24 (Kirby P).
- 136 Minniti v Motor Vehicle Industry Board [2011] WASCA 275 [29]-[31](Pullin, Newnes and Murphy JJA), a case concerning an application of a motor vehicle dealers license See s 15 Motor Vehicle Dealers Act 1973 (WA).
- 137 Hughes and Vale Pty Ltd v New South Wales [No 2] [1955] HCA 28 [9] (Dixon CJ, McTiernan and Webb JJ.) cited in Minitti v Commissioner of Police [2010] WASCA 198 [11] (Pullin JA).
- 138 Tavelli v Johnson (Unreported, WASC, Library No 960693, 25 November 1996) (Wheeler J) and Re Jones; Ex parte The Commissioner of Police cited in Minitti v Commissioner of Police [2010] WASCA 198 [11] (Pullin JA).
- 139 Australian Broadcasting Tribunal v Bond [1990] HCA 33 [64] (Mason CJ)
- 140 Sobey v Commercial and Private Agents Board (1979) 22 SASR 70, 76 (Walters J)
- 141 Tavelli v Johnson (Unreported, WASC, Library No 960693, 25 November 1996) (Wheeler J) cited in Minitti v Commissioner of Police [2010] WASCA 198 [11] (Pullin JA).
- 142 citing Mavaddat v Real Estate & Business Agents Supervisory Board [2009] WASCA 179, [73] (Newnes JA) and referring to Ziems v The Prothonotary of the Supreme Court of New South Wales

- [1957] HCA 46; *Hoile v Medical Board of South Australia* [1960] HCA 30; *Marten v Royal College of Veterinary Surgeons' Disciplinary Committee* [1966] 1 QB 1, 9; *Ex parte Tziniolis; Re Medical Practitioners Act* (1967) 84 WN (Pt 2) (NSW) 275, 277; *New South Wales Bar Association v Cummins* [2001] NSWCA 284 [56].
- 143 Registrar, Real Estate & Business Agents Supervisory Board v Barnett (Unreported, WASCA, Library No 970426A, 26 August 1997), Kennedy J citing *Maxwell v Dixon* [1965] WAR 167 169 (Hale J), a case concerned with the refusal of an application to renew a land agent's licence.
 - 144 *Hughes and Vale Pty Ltd v New South Wales* (No. 2) [1955] HCA 28 [9] (Dixon CJ, McTiernan and Webb JJ) citing 'Coke' meaning the *Griesley's Case* (1588).
 - 145 *Minniti v Motor Vehicle Industry Board* [2011] WASCA 275 [31] (Pullin, Newnes and Murphy JJA).
 - 146 *Sobey v Commercial and Private Agents Board* (1979) 22 SASR 70, 76 (Walters J).
 - 147 *Sobey v Commercial and Private Agents Board* (1979) 22 SASR 70, 76 (Walters J).
 - 148 *Ex parte Tziniolis; Re Medical Practitioners Act* [1967] 1 NSW 357 366 (Walsh JA)
 - 149 *Tavelli v Johnson* (Unreported, WASC, Library No 960693, 25 November 1996) (Wheeler J) cited in *Minniti v Motor Vehicle Industry Board* [2011] WASCA 275 [32] (Pullin, Newnes and Murphy JJA).
 - 150 *Citing New Broadcasting Ltd v Australian Broadcasting Tribunal* (1987) 73 ALR 420.
 - 151 *See Good v Medical Board of WA*; unreported; SCt of WA; Library No 940678; 6 December 1994 at 31
 - 152 *Minniti v Motor Vehicle Industry Board* [2011] WASCA 275 [33]-[34] (Pullin, Newnes and Murphy JJA).
 - 153 Similarly, in the corporate context see *Rich v Australian Securities and Investments Commission* [2004] HCA 42 [105] (Kirby J).
 - 154 *Australian Broadcasting Tribunal v Bond* [1990] HCA 33 [63] (Mason CJ).
 - 155 *See AJO v Director-General, Department of Transport* [2012] NSWADT 101. [28] (Molony, Judicial Member); *Australian Broadcasting Tribunal v Bond* [1990] HCA 33 [63] (Mason CJ), [36] Toohey and Gaudron JJ; *Hughes and Vale Pty Ltd v New South Wales* (No. 2) [1955] HCA 28 [9] (Dixon CJ, McTiernan and Webb JJ).
 - 156 *Sobey v Commercial and Private Agents Board* 20 SASR 70 [76] (Walters J). Cited in numerous tribunal cases involving the 'fit and proper person' test, see *Ogilvie v Independent Liquor and Gaming Authority* [2016] NSWCATAD 195 [27] (Montgomery, Senior Member).