Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

**DIVISION: TAXATION AND COMMERCIAL DIVISION**

File Number: 2015/1419

Re: **Meenakishi Callychurn**

APPLICANT

And **Australian Securities and Investments Commission**

RESPONDENT

File Number: 2015/1420

Re: **Unique Mortgage Services Pty Ltd**

APPLICANT

And **Australian Securities and Investments Commission**

RESPONDENT

**DECISION**

Tribunal: **Deputy President J Redfern**

Date: **25 October 2019**

Place: **Melbourne**

The decisions under review are affirmed.

.....[sgd].....

Deputy President J Redfern

**CATCHWORDS**

*CORPORATIONS – consumer credit – application for review of decision prohibiting applicant from engaging in any credit activities for a specified period under s 80(1) of the National Consumer Credit Protection Act 2009 (Cth) – whether applicant contravened s 225 of the National Consumer Credit Protection Act 2009 (Cth) – whether applicant is a fit and proper person to engage in credit activities – whether the applicant is likely to contravene or be involved in the contravention of any credit legislation – disqualification period – decision under review affirmed*

*CORPORATIONS – consumer credit – application for review of decision to cancel an Australian Credit Licence under s 55(1) of the National Consumer Credit Protection Act* 2009 *(Cth) – whether credit licensee is a fit and proper person – whether likely to contravene credit legislation in the future – decision under review affirmed*

*JURISDICTION – scope of review on remittal – order that the matter be remitted to the Tribunal for further consideration in accordance with law – no express or implied limitation – matter remitted is the whole matter – matter remitted is not confined to the question of law considered – new grounds and evidence raised before this Tribunal on review following remittal*

**LEGISLATION**

*Acts Interpretation Act 1901 (Cth)*, s 2C(1)
*Administrative Appeals Tribunal Act 1975 (Cth)*, ss 43, 43(1)
*Australian Securities and Investments Commission Act 2001 (Cth)*, s *12DA,* 13
*Broadcasting Act 1942 (Cth)*
*Conveyancers Act 2006 (Vic)*
*Corporations Act 2001 (Cth)*
*Crimes Act 1958 (Vic), ss 82, 83, 83A*
*Crimes Act 1914 (Cth),* Part VIIC
*Legal Profession Act 2004 (Vic)*, Part 2.2 - Div 3
*Migration Act 1958 (Cth)*, ss 290(2), 303, 303(1), 303(1)(f), 303(1)(h), 314
*Migration Agents Regulations 1998 (Cth)*, Schedule 2
*National Consumer Credit Protection Act 2009 (Cth),* ss 29, 37, 37(2), 37(2)(h), 37(2)(h)(i), 37(3), 45, 47, 47(1), 53, 55, 55(1), 55(1)(a), 55(1)(b), 55(2), 55(2)(b)(ii), 55(3), 55(4), 80, 80(1)(d), 80(1)(e), 80(1)(f), 80(2), 80(3), 80(4), 117, 123, 160D, 225, 225(2), 225(5), 247, 266, 267, 290, 327; Schedule 1

**CASES**

*Allesch v Maunz* (2000) 203 CLR 172

*Australian Broadcasting Tribunal v Bond* [1990] HCA 33

*Callychurn and Australian Securities and Investments Commission* [2016] AATA 114

*Callychurn v Australian Securities and Investments Commission* [2017] FCA 29

*Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137

*Callychurn v Australia and New Zealand Banking Group T/A ANZ* [2016] FWCFB 1944

*Callychurn v Australia and New Zealand Banking Group* [2016] FWC 526

*Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194

*Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577

*Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16

*Frugtniet v Law Institute of Victoria Ltd* [2012] VSCA 178

*HIH Insurance Limited and HIH Casualty And General Insurance Ltd; Australian Securities and Investments Commission v Adler* [2002] NSWSC 483

*Horwarth v Australian Securities and Investments Commission* [2008] AATA 278

*Jebb v Repatriation Commission* (1988) 80 ALR 329

*Kim v Minister for Immigration and Citizenship* [2008] FCAFC 73

*Law Institute of Victoria Limited v Frugtniet (Legal Practice)* [2011] VCAT 596

*Liedig v Commissioner of Taxation* (1994) 50 FCR 461

*Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666

*Mobil Oil Australia Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475

*Nation v Repatriation Commission (No 2)* (1994) 37 ALD 63

*Peacock v Repatriation Commission* [2007] FCAFC 156

*Perpetual Trustee Co (Canberra) Ltd v Commissioner for ACT Revenue* (1994) 123 ACTR 17

*Power v Hammond* [2006] VSCA 25

*Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (New South Wales)* (1978) 1 ALD 167

*Re Control Investment Pty Ltd and Australian Broadcasting Tribunal (No 2)* (1981) 3 ALD 88

*Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* [1979] 2 ALD 634

*Repatriation Commission v Yates* (1997) 46 ALD 487

*Shi v Migration Agents Registration Authority* [2008] HCA 31

*Story v National Companies and Securities Commission* (1988) 13 NSWLR 661

*Tarrant v Australian Securities and Investment Commission* [2013] AATA 926

**SECONDARY MATERIALS**

Australian Securities and Investments Commission, *Regulatory Guide 204 - Applying for and varying a credit licence*, February 2013

Australian Securities and Investments Commission, *Regulatory Guide 218 - Licensing: Administrative action against persons engaging in credit activities*, November 2010

Dennis Pearce, *Administrative Appeals Tribunal* (LexisNexis Butterworths, 4th ed, 2015)

*Explanatory Memorandum, National Consumer Credit Protection Bill 2009* (Introduced 25 June 2009)

**REASONS FOR DECISION**

**Deputy President J Redfern**

**25 October 2019**

1. These proceedings concern two applications for review. The first matter relates to an application by Ms Meenakishi Callychurn, who was a director of Unique Mortgage Services Pty Ltd ('UMS'), the applicant in the second matter. The reviews concern two decisions by a delegate of the Australian Securities and Investments Commission ('ASIC') made on 27 February 2015, first, to ban Ms Callychurn from engaging in credit activities for a period of five years and, secondly, to cancel the Australian Credit Licence of UMS. The applicants sought review of the delegate's decisions and the Tribunal, differently constituted, affirmed the cancellation decision in respect of UMS but set aside the decision to ban Ms Callychurn and substituted a decision that she be banned for a period of four years: *Callychurn and Australian Securities and Investments Commission* [2016] AATA 114.

2. The applicants sought judicial review of the Tribunal's decisions by the Federal Court. The Federal Court dismissed the appeals: *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29. The applicants appealed to the Full Court of Federal Court, which set aside the decisions and remitted the matters to the Tribunal to be determined according to law: *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137.

3. The matters are now before the Tribunal pursuant to the order of the Full Court. The parties advanced contentions and evidence similar to that previously submitted. However, ASIC has raised new grounds and has sought to rely on additional evidence in support of its contentions. The applicants have raised issues regarding the scope of the review on remittal and dispute ASIC's ability to raise new grounds and evidence.

4. For the reasons that follow, the decisions under review are affirmed.

**BACKGROUND**

5. UMS was granted an Australian Credit Licence on 24 December 2010, which gave it authority to engage in certain credit activities. UMS carried on business as a finance and mortgage broker and intermediary between credit providers or lessors and consumers, dealing with home, vehicle and other personal loans, car and consumer leases and credit

cards. Ms Callychurn has been a director of UMS since 16 June 2011. She was nominated as a fit and proper person on the Australian Credit Licence of UMS from 24 December 2011. Mr Rudy Frugtniet was a director of UMS until 14 October 2011 and ceased as a fit and proper person on 12 January 2013. He was disqualified by the Victorian Civil and Administrative Appeals Tribunal ('VCAT') on 8 April 2011 from practising as a lay associate of a legal practice in Victoria for three years.[1] Mr Frugtniet unsuccessfully appealed this decision and the circumstances that lead to his disqualification are set out in the judgement of the Court of Appeal in *Frugtniet v Law Institute of Victoria Ltd* [2012] VSCA 178. Mr Frugtniet was permanently prohibited from engaging in any credit activities by ASIC on 26 June 2014. Mr Frugtniet and Ms Callychurn were domestic partners and have two children. Ms Callychurn says that she separated from Mr Frugtniet in 2012. She has been the sole director of UMS since 14 October 2011 and its sole fit and proper person since 12 January 2013.

6. By notice dated 13 October 2014 addressed to Ms Callychurn, ASIC expressed concern that she had answered questions in the 2011 and 2012 annual compliance certificates for UMS in a manner that was false or misleading. The questions in the compliance certificates sought warranties about certain matters and an affirmative response certified that there was "no reason to believe" the existence of the matters that were identified as being adverse. Ms Callychurn had answered in the affirmative in respect of four questions in each of the annual compliance certificates and ASIC expressed concern that she may have thereby contravened the credit legislation. ASIC also expressed concern that there was reason to believe Ms Callychurn was not a fit and proper person to engage in credit activities. There were two grounds particularised in the notice. First, Ms Callychurn was said to lack the requisite knowledge and ability to manage UMS because she purportedly allowed Mr Frugtniet to continue to exercise control over UMS in circumstances where she ought not to have allowed him to do so. Secondly, it was alleged that Ms Callychurn had not appropriately responded to requests by ASIC in relation to its investigations. Those concerns were based on a variety of matters, which are outlined later in these reasons. Finally, ASIC expressed its concern that there may be reason to believe Ms Callychurn was likely to contravene the credit legislation by reason of her previously particularised conduct. There were typographical errors in the notice, which will be referred to in more detail later in these reasons.

[1] *Law Institute of Victoria Limited v Frugtniet (Legal Practice)* [2011] VCAT 596 (8 April 2011).

7. By further notice, also dated 13 October 2014 and addressed to UMS, ASIC expressed concern that it may have reason to believe UMS was likely to contravene its general conduct obligations under the credit legislation and that UMS was not fit and proper to engage in credit activities. The particulars were based on the concerns raised in relation to Ms Callychurn.

8. After a hearing, the delegate found that a number of the concerns set out in the notices, but not all, were made out. The delegate found that Ms Callychurn had provided false or misleading information in the 2011 and 2012 annual compliance certificates in contravention of the credit legislation, she was not a fit and proper person to engage in credit activities and there was reason to believe she was likely to contravene the credit legislation.[2] Having regard to these findings, the delegate banned Ms Callychurn from engaging in credit activities for a period of five years.[3] Based on the findings made in respect of Ms Callychurn and the fact that she was the sole director as well as the sole fit and proper person for UMS, the delegate found that UMS was likely to contravene its general conduct obligations under the credit legislation and there was reason to believe UMS was not fit and proper to engage in credit activities.[4] Accordingly, the delegate cancelled the Australian Credit Licence held by UMS.[5]

9. As already noted, the applicants sought review of these decisions by this Tribunal. In essence, the Tribunal, as previously constituted, found that Ms Callychurn had contravened the credit legislation in relation to the 2011 and 2012 annual compliance certificates and that she was not a fit and proper person based on similar reasoning to that of the delegate.[6] The Tribunal also found that there was reason to believe Ms Callychurn would be likely to contravene the credit legislation in the future.[7] However, the Tribunal determined that any banning order should be at "the lighter end of the scale" and set aside the decision to impose a four year banning order.[8] The Tribunal stated that the cancellation of the Australian Credit Licence held by UMS "must inevitably follow" given

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[2] Decision of the delegate of the ASIC dated 27 February 2015 at [21], [46] and [49].
[3] Decision of the delegate of the ASIC dated 27 February 2015 at [55].
[4] Decision of the delegate of the ASIC regarding UMS dated 27 February 2015 at [10].
[5] Decision of the delegate of the ASIC regarding UMS dated 27 February 2015 at [16].
[6] *Callychurn and Australian Securities and Investments Commission* [2016] AATA 114 at [29], [43] and [59].
[7] Ibid at [72] - [77].
[8] Ibid at [82].

Ms Callychurn was its sole director and in the absence of any other acceptable director being nominated, affirmed the decision to cancel the Australian Credit Licence of UMS.[9]

10. The applicants appealed the decision of the Tribunal to the Federal Court. Their appeals were dismissed.[10] The applicants then appealed to the Full Court of the Federal Court.[11] The Full Court found that the Tribunal erred in finding that Ms Callychurn had contravened the credit legislation in respect of certain answers given both in the 2011 and 2012 annual compliance certificates.[12] The Full Court also noted as follows (at [30]):

> *Counsel for the appellants accepted that if either or both grounds succeeded, the matter should be remitted to the Tribunal to enable reconsideration of the period of the banning order. In circumstances where no challenge is now made to the other bases upon which the Tribunal found that Ms Callychurn was not a fit and proper person to engage in credit activities, and where other grounds may be raised on remittal, counsel's concession is an appropriate one. There was no issue on this appeal about the Tribunal's cancellation of the Australian credit licence held by UMS.*

11. The Full Court observed that the answers given by Ms Callychurn to one of the questions in both the 2011 and 2012 compliance certificates, being the fourth question under the heading "Offences", was self-evidently untrue to Ms Callychurn's knowledge but ASIC did not rely on that answer in the proceedings before the Tribunal, the primary judge or on appeal.[13]

12. The Full Court allowed the appeal and ordered that the matters "be remitted to the Tribunal for hearing according to law".[14]

13. The matters were reconstituted on remittal and listed for hearing in March 2018. The parties provided post hearing written submissions in May and June 2018. In May 2019, Ms Callychurn made a further written submission following the decision of the High Court in *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16, apparently taking issue with ASIC raising new grounds on remittal. Given this submission raised a significant matter, the parties were invited to provide further written submissions directed to the High Court case together with any updated evidence and/or submissions

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[9] Ibid at [83].

[10] *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29.

[11] *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137.

[12] Ibid at [40] - [46] and [49] - [54].

[13] Ibid at [55].

[14] Ibid.

that they wished to rely on pending the Tribunal's proposed determination of the matter. The parties were also invited to attend a further hearing if required. Both parties provided further written submissions and declined the invitation to attend a further hearing.

**STATUTORY FRAMEWORK**

14. ASIC has an important role in the regulation of credit activities and is responsible for granting, refusing, suspending and cancelling Australian Credit Licences under the *National Consumer Credit Protection Act 2009* (Cth) ('the NCCPA'). The NCCPA establishes a national consumer credit regime which includes, amongst other things, a comprehensive national licensing regime for persons engaged in credit activities, industry-wide responsible lending conduct requirements for licensees and a sanctions and consumer remedy framework that is supported by a three-tier dispute resolution system for consumer credit issues. The NCCPA also contains a *National Credit Code* which regulates aspects of the provision of certain types of credit and consumer leases.[15]

15. Generally speaking, a person or entity cannot engage in a credit activity if the person or entity does not hold an Australian Credit Licence: s 29 of the NCCPA. ASIC may impose conditions on an Australian Credit Licence (s 45 of the NCCPA) and has wide ranging powers under Part 6 of the NCCPA to undertake investigations, collect information through this issue of compulsory notices, inspect books and records, prosecute or commence civil proceedings, hold hearings, impose infringement notices and take administrative action such as product intervention orders. Licensees have general conduct obligations to, among other things, do all things necessary to ensure that all credit activities authorised by the licence "are engaged in efficiently, honestly and fairly" and to "comply with the credit legislation": refer s 47(1) of the NCCPA. A licensee is obliged to lodge an annual compliance certificate no later than 45 days after the licensing anniversary date which must be in an approved form: s 53 of the NCCPA.

16. Section 225 of the NCCPA provides for criminal liability and civil penalties where a document is required to be lodged with ASIC and a statement made in the document is knowingly or recklessly *false in a material particular* or *materially misleading* or is knowingly based on information that is *false in a material particular* or *materially misleading*: s 225(2) of the NCCPA. This includes omissions that render a document

[15] The *National Credit Code* largely replicates the State and Territory based *Uniform Consumer Credit Code* and is contained in Schedule 1 of the NCCPA.

"materially misleading" or "false in a material particular". There is also an obligation under s 225(5) for a person to "take reasonable steps" to ensure the person does not make or authorise the making of such statements or omissions in a document required to be lodged. Subsection 225(5) provides:

> *A person must take reasonable steps to ensure that the person does not:*
> - *(a) make, or authorise the making of, a statement in the document that:*
>   - *(i) is false in a material particular or materially misleading; or*
>   - *(ii) has omitted from it a matter or thing the omission of which renders the document materially misleading; or*
>   - *(iii) is based on information that is false in a material particular or materially misleading, or has omitted from it a matter or thing the omission of which renders the document materially misleading; or*
> - *(b) omit, or authorise the omission of, a matter from the document, without which the document is false in a material particular or materially misleading.*

17. Section 80 gives ASIC discretion to make an order banning any person from engaging in credit activities. Relevantly, that section provides as follows:

> ***ASIC's power to make a banning order***
>
> *(1) ASIC may make a banning order against a person:*
> *…*
> - *(d) if the person has:*
>   - *(i) contravened any credit legislation; or*
>   - *(ii) been involved in a contravention of a provision of any credit legislation by another person; or*
> - *(e) if ASIC has reason to believe that the person is likely to:*
>   - *(i) contravene any credit legislation; or*
>   - *(ii) be involved in a contravention of a provision of any credit legislation by another person; or*
> - *(f) if ASIC has reason to believe that the person is not a fit and proper person to engage in credit activities;*
>
> *(2) For the purposes of paragraphs (1)(e) and (f), ASIC must (subject to Part VIIC of the Crimes Act 1914 ) have regard to the following:*
> - *(a) if the person is a natural person--the matters set out in paragraphs 37(2)(a) to (f) and subparagraph 37(2)(g)(i) in relation to the person;*
> - *(b) if the person is not a natural person:*
>   - *(i) the matters set out in paragraphs 37(2)(a) to (f) in relation to the person; and*
>   - *(ii) whether ASIC has reason to believe that any of the persons referred to in paragraph 37(2)(h) in relation to the person is not a fit and proper person to engage in credit activities;*
> - *(c) any criminal conviction of the person, within 10 years before the banning order is proposed to be made;*
> - *(d) any other matter ASIC considers relevant;*
> - *(e) any other matter prescribed by the regulations.*
>
> *Note: Part VIIC of the Crimes Act 1914 includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them.*

*(3) ASIC must (subject to Part VIIC of the Crimes Act 1914), in considering whether it has reason it has reason to believe that a person referred to in subparagraph (2)(b)(ii) is not a fit and proper person to engage in credit activities, have regard to the matters set out in paragraphs (2)(a), (c), (d) and (e) in relation to the person.*

[Emphasis in original]

18. Section 55 of the NCCPA relevantly provides that:

*(1) ASIC may suspend or cancel a licensee's licence (subject to complying with subsection (4)) if:*
*(a) the licensee has contravened an obligation under section 47 (which deals with general conduct obligations of licensees); or*
*(b) ASIC has reason to believe that the licensee is likely to contravene an obligation under that section; or*
*(c) ASIC has reason to believe that the licensee is not a fit and proper person to engage in credit activities;*

19. Subsections (2) and (3) of s 55 are in the same terms as ss 80(2) and (3). These provisions refer to the matters that ASIC *must* have regard to when assessing whether there is reason to believe that a person or licensee is not fit and proper or is likely to contravene the credit legislation or, in the case of a licensee, the general conduct obligations of a licensee. They include certain matters set out in s 37(2), relevantly, whether a banning or disqualification order has ever been made in respect of the person either under the NCCPA or the *Corporations Act 2001 (Cth)* ('Corporations Act') or, in the case of a corporation, whether there is reason to believe that a director, secretary or senior manager of the body corporate who would perform duties in relation to the credit activities to be authorised by the licence is not fit and proper. Subsection 37(3) provides that when considering whether a director, secretary or senior manager of a body corporate is not fit and proper person to engage in credit activities regard must be had, amongst other things, to whether a banning or disqualification order has ever been made in respect of the person either under the NCCPA or the Corporations Act. While there is some circularity between ss 37(3), 55(3) and 80(3), the combined effect is that the existence of prior banning or disqualification orders is relevant to the question of whether there is reason to believe a person, and in some cases a corporation, is not fit and proper and whether that person or corporation is likely to contravene. Section 37 is extracted in full as an attachment to this decision.

20. As noted by the Full Court, there is no dispute that s 37 of the NCCPA does not impact on the decision in respect of Ms Callychurn because she has not previously been the subject

of a banning or disqualification order.[16] However, ASIC contends s 37(3) (and presumably s 55(3)) is relevant to the question of whether there is reason to believe UMS is not fit and proper or is likely to contravene the credit legislation because if Ms Callychurn, as a director and senior manager of UMS is found not to be fit and proper, this is a matter to which the Tribunal must have regard in deciding whether UMS is fit and proper or likely to contravene the general conduct obligations under s 47 of the NCCPA.

21. ASIC can only exercise its powers under ss 55 and 80 of the NCCPA, if it has first given the party the opportunity to appear and be represented at a private hearing and to make submissions on the matter: refer ss 55(4) and 80(4) of the NCCPA.

**OUTLINE OF THE PARTIES' CONTENTIONS**

22. There is dispute about the matters that fall for determination in this review. Both parties rely on the decision of the Full Court to submit that the issues in dispute for determination on remittal were limited.

23. ASIC contends that the Full Court concluded the Tribunal erred in finding Ms Callychurn had contravened s 225 for the purposes of s 80(1)(d) of the NCCPA in respect of the 2011 and 2012 annual compliance certificates but considered she may have made a false or misleading statement by answering the fourth question of the 2011 and 2012 annual compliance certificates in the affirmative and, as a consequence, may have contravened s 225(5) of the NCCPA. The finding that the Tribunal had reason to believe Ms Callychurn was not a fit and proper person for the purpose of s 80(1)(f) was not challenged and this finding therefore remains. As such, ASIC contends there was no error shown to effect the Tribunal's conclusion that there was power to make a banning order. Furthermore, there was no challenge to the decision made in respect of UMS. At the time of ASIC's contentions, UMS had been deregistered and ASIC submitted it could no longer take part in any review. However, UMS was re-registered by the time of the hearing before this Tribunal and this issue was not subsequently pressed.[17]

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[16] Refer at *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137 at [19].

[17] On 26 August 2019 ASIC wrote to the Tribunal to advise that ASIC commenced strike off action against UMS for unpaid annual review fees. As at the date of this decision the Tribunal has not been notified that UMS has been de-registered

24. Given the terms of the Full Court findings and the Tribunal's task on remittal, ASIC submits that the Tribunal should find there is power to make a banning order under s 80 of the NCCPA.

25. First, it is submitted that the Tribunal should find Ms Callychurn contravened s 225(5) of the NCCPA in respect of the answer she gave to the fourth question in the 2011 annual compliance certificate.[18] Ms Callychurn knew there were proceedings against Mr Frugtniet which had by that time been determined adversely against him and in answering "yes" to this question she at least failed to take reasonable steps to ensure that she did not knowingly make a statement in which was false in a material particular or materially misleading or was based on information given to her by Mr Frugtniet that was false in a material particular or materially misleading. This was sufficient to engage the power under s 80(1)(d) of the NCCPA.

26. Secondly, it is submitted that Ms Callychurn was not a fit and proper person because she:

(1) allowed Mr Frugtniet to exercise continuing control over the credit activities of UMS and did so even after a delegate of ASIC had made a permanent banning order against him on 26 June 2014;

(2) failed to give any, or any adequate, response to ASIC's requests for information;

(3) proffered another person, Ms Seyfarth, as a solution to ASIC's concerns about the management of UMS, without disclosing relevant information about her that may have been relevant to her suitability;

(4) gave misleading information to her former employer, Australia New Zealand Banking Corporation ('ANZ'), about her involvement in credit activities outside of her employment with ANZ; and

(5) allowed Mr Frugtniet to continue his involvement in and association with UMS even after he was prohibited from such involvement and association by reason of a condition on UMS's conveyancing licence.

[18] ASIC also made this contention in relation to the 2012 annual compliance certificate in its Statement of Facts, Issues and Contentions but withdrew this at the hearing.

27. Having regard to the forgoing matters, ASIC contends that the power to make a ban under s 80(1)(f) of the NCCPA is enlivened. The matters referred to above at [26](1) and (2) of these reasons were raised before the delegate and the previous Tribunal and the Tribunal's findings were not disturbed on appeal.

28. Thirdly, having regard to the first and second matters, ASIC submits that there is evidence to support a finding that Ms Callychurn was likely to contravene the NCCPA in the future. This is said to engage s 80(1)(e) of the NCCPA.

29. ASIC contends that, having regard to the seriousness of the matters said to form the basis for the banning order, the banning of Ms Callychurn for a period of five years was appropriate. ASIC further submits that Ms Callychurn's evidence and submissions in the proceedings were "characterised by a lack of insight into inadequacies in her past conduct", that she attempted to "downplay" the seriousness of her conduct and the Tribunal should have "serious reservations" about the credibility of Ms Callychurn's evidence.[19] The Tribunal should therefore affirm the decision to ban Ms Callychurn for five years. She is the sole director and shareholder of UMS and there was no evidence that any other suitable person had been put forward as an alternative fit and proper and key person for UMS. As such, ASIC submits that if the Tribunal affirms the decision to make a banning order against Ms Callychurn, it should also be satisfied that it is appropriate to affirm the decision to cancel UMS's licence. In oral submissions made at the opening of the hearing, ASIC expressly limited its case in respect of UMS to its contentions that there was reason to believe Ms Callychurn was not fit and proper, that she was likely to contravene the credit legislation and that UMS was thereby not fit and proper or likely to contravene having regard to s 37(2)(h) of the NCCPA.[20]

30. The applicants submit that Counsel in the hearing before the Full Court did not concede the matter should be remitted only for reconsideration of the banning order but rather that, if the appeal succeeded, this would itself call for reconsideration of the banning order. According to the applicants, if the Tribunal is satisfied Ms Callychurn is a fit and proper person, it would inevitably follow that the licence of UMS would be reinstated.

31. The applicants further submit that ASIC had not previously raised an issue about her answer to the fourth question in the annual compliance certificates nor did the delegate

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[19] ASIC's Closing Submissions dated 11 June 2018 at [5].

[20] Transcript, T21 - T22.

make a finding on this issue. An issue that is not part of the valid exercise of power made by the delegate could not now be raised. ASIC had in its possession all the facts, information and evidence and the delegate was satisfied about the matters referred to in her decision but did not rule on this issue. This was not raised before the first Tribunal, the Federal Court or the Full Court and so could not be raised on remit. In any event, it is submitted that the evidence does not establish Ms Callychurn contravened s 225 of the NCCPA. She made adequate enquiries before answering the fourth question and she reasonably believed that the reference to "Offences" was confined to criminal matters and that she had undertaken all reasonable checks at that time, being checks relating to the band registers, credit checks and bankruptcy searches. Her affirmative answer to this question was therefore appropriate in the circumstances.

32. In relation to the ASIC's allegation that Ms Callychurn is not a fit and proper person, the applicants submit that the Tribunal must consider the position at the time of the decision. There is no evidence Mr Frugtniet has continued his alleged control of UMS. The applicants further submit that it is not open to the Tribunal to make findings about contraventions or conduct in relation to ss 266 or 267 of the NCCPA by virtue of s 327, which sets out the decisions which may be reviewed by the Tribunal but does not include any decision made pursuant to those provisions of the NCCPA. The applicants dispute the evidence and contentions relied on by ASIC about the credibility of Ms Seyfarth, Ms Callychurn's alleged false or misleading statements to her former employer ANZ and allegations about contraventions of conditions on UMS's conveyancing licence. The applicants submit that the material provided to the Tribunal is fragmented and incomplete and should not be permitted on remittal. While it is not disputed that ASIC has broad information gathering powers under the NCCPA and *Australian Securities and Investments Commission Act 2001 (Cth)* ('ASIC Act'), the applicants submit that ASIC's investigative powers are extinguished once it has made a decision that contraventions have occurred. As such, the applicants contend that the evidence obtained after the decision of the delegate in February 2015 by an ASIC investigator was acquired in circumstances where the investigator had acted outside the scope of his delegation. The new evidence referred to in and attached to the investigator's affidavit was previously in the possession of ASIC but were not matters that were put to the applicants in the notice served prior to the delegate's hearing. This evidence should be rejected by the Tribunal but is not relevant or probative in any event.

33. Further, the applicants submit that the Tribunal cannot be satisfied on the basis of the available evidence that Ms Callychurn would contravene the NCCPA in the future. She completed the 2012, 2013 and 2014 annual compliance certificates correctly and this demonstrated her diligence.

34. The applicants contend Ms Callychurn should not be banned in the circumstances of the case. Even if the banning order against Ms Callychurn remains in place, the applicants submit that Mr David Fu, who is an accountant and tax agent as well as the company secretary of UMS from 2016, could act as a fit and proper and key person for UMS.

35. In reply, ASIC contends that the Tribunal is entitled, and ought, to make its decision on the basis of relevant material before it at the time of the decision. ASIC's case is not concerned with Mr Frugtniet's current involvement in UMS but rather his involvement between 2013 and early 2015 when Ms Callychurn was the sole director and shareholder of UMS and its only key person and fit and proper person for UMS. ASIC's concern regarding the nomination of Ms Seyfarth as a director of UMS hinges on the failure to disclose her familial relationship with Mr Frugtniet, her former bankruptcy and her place of residence. ASIC further submits that Ms Callychurn's contention about its case in respect of her alleged failure to respond to its notices was misconceived; ASIC says that it does not seek a review of a decision made under ss 266 or 267 of the NCCPA but rather to rely on Ms Callychurn's alleged inadequate response to its claim she is not a fit and proper person. Finally, ASIC submits that there is no evidence before the Tribunal to support a finding that Mr Fu would be willing, let alone able, to act as UMS's fit and proper person or as its key person.

36. As already noted, following these submissions, the applicants sought to raise further submissions in the light of the High Court decision of *Frugtniet v ASIC*. The applicants contend that where there is a legal constraint on the decision-maker, the Tribunal is similarly constrained, relevantly, the Tribunal cannot make findings about contraventions of ss 266 and 267 of the NCCPA and this is not reviewable by the Tribunal. The applicants also contend that the High Court decision of *Frugtniet v ASIC* is authority for the proposition that the new grounds and evidence cannot be relied on by ASIC in the proceedings before the Tribunal.[21]

[21] Email from Ms Callychurn dated 16 May 2019.

37. In submissions made by the applicants following the High Court decision in *Frugtniet v ASIC,* which expanded on the original supplementary submissions,[22] the applicants contend that even though the delegate raised concerns about the contravention of s 225 on the basis of Ms Callychurn's answer to the fourth question, the delegate made no finding of contravention. The allegation of contravention is therefore a new ground. The applicants submit that the Tribunal cannot take into account this new ground and if it were to do so "this would change the nature of the decision", contrary to the finding of the High Court in *Frugtniet v ASIC* at [15]. The applicants also submit that the finding by the Full Court that nothing in s 37(2) applied to the case precludes consideration of this issue by the Tribunal on remittal. The applicants reiterated an earlier submission that the allegation Ms Callychurn had failed to comply with notices issued under ss 266 and 267 of the NCCPA created an offence under s 290 is not reviewable by the Tribunal given the terms of s 327 of the NCCPA. The applicants submit that the exercise of information gathering powers under s 247 of the NCCPA and s 13 of the ASIC Act are not authorised and are extinguished once ASIC has made a decision that a contravention has occurred. The new evidence or information referred to by the applicants relates to legally obtained new evidence. As such, information in the possession of ASIC but not put before Ms Callychurn in the areas of concern cannot now be raised as a matter of concern. Any information submitted by the ASIC investigator cannot now be raised because the delegate, and presumably the Tribunal by implication, must be impartial and independent of the investigation on these matters therefore could not form the basis for concerns before the Tribunal.

38. In reply, ASIC contends that the Full Court's reference to s 37 was merely an observation and not a finding that limited the Tribunal's consideration of the substantive issues on remittal. ASIC also submits that the High Court decision in *Frugtniet v ASIC* is about whether the Tribunal on review could take into account a spent conviction when ASIC was prohibited from doing so in making its decision to impose the banning order.[23] ASIC contends that principles set out by the High Court in *Frugtniet v ASIC* do not apply to the circumstances of this case and therefore does not support the applicants' contention that the Tribunal's considerations are confined to the matters previously raised on remittal. ASIC rejects the contention that the Tribunal cannot take into account information that

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[22] Submissions dated 5 August 2019.

[23] As that term is defined within Pt VIIC of the *Crimes Act 1914* (Cth). Generally, spent convictions are where 10 years has passed since a person was convicted, and the person was not imprisoned for more than 30 months in respect to that conviction.

was either obtained by ASIC after the banning order was made by the delegate or that was in ASIC's possession but not considered by the delegate. In any event, ASIC says the new evidence sought to be relied on was not obtained through the use of compulsory notices issued after the findings of the delegate were made.

**QUESTIONS FOR DETERMINATION**

39. The questions for determination are:

(1) What is the scope of this review on remittal?

(2) Can ASIC raise a new allegation that Ms Callychurn breached s 225 of the NCCPA by answering question four in the 2011 annual compliance certificate in the affirmative?

(3) If so, did Ms Callychurn contravene s 225 of the NCCPA?

(4) Can ASIC raise the new grounds and new evidence referred to in its Statement of Facts, Issues and Contentions in support of its claim that there are reasonable grounds to believe that Ms Callychurn is not fit and proper or that she is likely to contravene the credit legislation? In making this assessment, can ASIC rely on evidence obtained after the decision of the delegate and the decision of the previous Tribunal?

(5) Is the Tribunal satisfied that Ms Callychurn is not fit and proper or that she is likely to contravene the credit legislation?

(6) If the Tribunal is satisfied about any of the above matters, should Ms Callychurn be banned and if so, for how long? and

(7) Should the Australian Credit Licence of UMS be cancelled?

**THE SCOPE OF THE REVIEW ON REMITTAL**

40. The parties contend that the task of the Tribunal on remittal in this case is limited. ASIC contends the Full Court decision does not disturb the AAT's finding that Ms Callychurn was not a fit and proper person nor the finding is that the Australian Credit Licence of UMS should be cancelled. The applicants contend that the Tribunal is not so limited but is

nonetheless constrained in the nature of the enquiry it should undertake in assessing these matters. That is, the applicants say that the Tribunal cannot consider matters that were not raised previously.

41. Both the banning and cancellation proceedings were remitted to the Tribunal for hearing according to law. The parties accept that the question of whether the Australian Credit Licence of UMS should remain cancelled is dependent on the question of whether the Tribunal is satisfied there is reason to believe Ms Callychurn is not fit and proper or is likely to contravene the credit legislation. If the Tribunal is not so satisfied the applicants say the basis for the cancellation of the Australian Credit Licence held by UMS falls away. ASIC appears to contend that it has already been established by the findings of the previous Tribunal that Ms Callychurn is not fit and proper and as such the power to cancel has been established.

42. Given the time that has elapsed since the time of the delegate's decision and the intervening appeals, it is useful to examine the task of the Tribunal in the circumstances of this case.

43. The decisions to ban Ms Callychurn from engaging in credit activities for a period of five years and to cancel the Australian Credit Licence of UMS were made by the delegate on 27 February 2015. There was no stay of these orders. Accordingly, the banning order in respect of Ms Callychurn and the cancellation of the Australian Credit Licence held by UMS came into effect from the date of the delegate's decision. Ms Callychurn's banning order expires on 27 February 2020. One of the reasons given for the cancellation of the UMS licence by the delegate was that Ms Callychurn was found not to be fit and proper. She was the sole director, key person and fit and proper person at the relevant time. No alternative person was put forward on behalf of UMS or was available to take her place so cancellation was appropriate. By the time of the hearing before this Tribunal following the remittal from the Full Court and the final and further submissions made by the applicants, over four years of Ms Callychurn's banning period have expired.

44. The Tribunal's role on review is to consider the matter afresh and to make the correct or preferable decision.[24] Unless the legislation which provides the source for the power

[24] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589 (Bowen CJ and Deane J), 599 (Smithers J); *Shi v Migration Agents Registration Authority* [2008] HCA 31 at [35] (Kirby J), [98] (Hayne and Heydon JJ), [140] - [141] (Kiefel J).

specifies otherwise, the decision is generally based on the information and evidence available at the time of the decision.[25] It is well established that the Tribunal stands in the shoes of the decision-maker and exercises all the powers and discretions that were available to the original decision-maker for the purposes of reviewing the decision.[26] An authorised decision-maker has the power to make a banning order against a person in the circumstances enumerated in s 80(1) of the NCCPA. Relevant to the facts of this case, the power to make a banning order will arise if ASIC, and the Tribunal standing in the shoes of ASIC, is satisfied that the person *has contravened* any credit legislation or been involved in the contravention of credit legislation, has reason to believe that the person *is likely to contravene* any credit legislation or *will be involved* in a contravention or has reason to believe the person *is not a fit and proper person* to engage in credit activities.

45. The first ground alleged is based on the decision-maker being satisfied that a contravention *has* occurred and must therefore be assessed at the time the power is said to be engaged. The other grounds are not so limited. The language used in ss 80(1)(e) and (f) suggests that the assessment is to be undertaken by reference to information available at the time the decision is made. Both parties agree with this proposition.

46. This being the case, it appears to be common ground that the decision-maker must have reason to believe that the person is *likely to contravene* or that the person is *not a fit and proper person* to engage in credit activities at the time of making a decision and exercising the discretion to cancel. As such, even though there may have been concerns about the person's ability to discharge their role under the credit legislation or to properly engage in credit activities, by the time of any decision the person may have proven themselves or may be able to demonstrate to the decision-maker that there is no longer any reason for the decision-maker to have concerns. This is what the applicants contend. Once the decision-maker is satisfied that the basis for the grounds to exercise the discretion have been established, there is a further decision-making process to be undertaken and that is to decide whether the banning order should be made. There appears to be no controversy that this decision-making process involves consideration of all available material as at the time of the exercise of the discretion, which will be at the time of the decision.

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[25] *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 670-671 (Smithers J); *Shi v Migration Agents Registration Authority* [2008] HCA 31 at [134] (Kiefel J); see also *Liedig v Commissioner of Taxation* (1994) 50 FCR 461 at 464, adopting and adapting *Mobil Oil Australia Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 502.

[26] *Re Control Investment Pty Ltd and Australian Broadcasting Tribunal (No 2)* (1981) 3 ALD 88 at 92 (Davies J); *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (New South Wales)* (1978) 1 ALD 167 at 175-176; Section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth).

47. The issue that arises is whether the banning of Ms Callychurn is the correct or preferable decision and whether this decision should be affirmed, varied or set aside and substituted with a different decision.

48. There are similar considerations in relation to the cancellation of an Australian Credit Licence under s 55 of the NCCPA. The power to suspend or cancel a licence will only arise if the decision-maker is satisfied that the licensee *has contravened* an obligation under s 47 of the NCCPA or that the decision-maker has reason to believe the licensee *is likely to contravene* an obligation or *is not* a fit and proper person to engage in credit activities. When a licence has been cancelled and there is no stay order in place, the practical question for the Tribunal is whether the licence should remain cancelled. If it is determined that this should be the case, the Tribunal will affirm the decision under review and the licence will remain cancelled. If it is determined the licence should not be cancelled, the decision under review will be set aside or varied. Regardless of the outcome, the effect of subs 43(6) of the AAT Act is that the decision of the Tribunal is taken to be the decision of the original decision-maker and has effect, unless the Tribunal otherwise order, on and from the date on which the decision has or had effect.

49. One of the material issues identified by the delegate and the previous Tribunal in respect of UMS was the practical implication that would arise if Ms Callychurn was banned. According to the previous Tribunal (at [89]), the cancellation "must inevitably follow" because Ms Callychurn was the sole director, key person and fit and proper person for the purposes of the credit legislation. However, this is not the legal basis on which the licence of UMS could be cancelled, even though it may be a compelling discretionary consideration warranting cancellation.

50. The grounds for the exercise of the discretion under s 55(1) arise in respect of UMS if it is established there has been a contravention by UMS or there is reason to believe UMS is not fit and proper or is likely to contravene s 47 of the NCCPA. The relevance of a finding that there is reason to believe Ms Callychurn is not a fit and proper person or is likely to contravene the credit legislation is that she is (and was at the relevant time) a director and senior manager who would perform duties in relation to the credit activities to be authorised by UMS. This is a matter that *must* be taken into account under ss 37(2)(h) and (3) in assessing whether UMS is not fit and proper or likely to contravene the credit legislation. As such, the legal basis for enlivening the power to suspend or cancel would be a finding that Ms Callychurn, as a director or senior manager of UMS, is not a fit and proper person or is likely to contravene the credit legislation. If Ms Callychurn is banned

and therefore could not discharge her functions as a director or fit and proper or key person of UMS and there was no other person to discharge those functions, this would be a compelling reason to cancel the Australian Credit Licence held by UMS.

51. These matters were not referred to in the previous Tribunal's decision, nor was this reasoning exposed in any detail in the delegate's decision, ASIC's Statement of Facts, Issues and Contentions or its written submissions. However, Counsel for ASIC explained this in oral submissions during the hearing.[27]

52. These matters have relevance to the task of the Tribunal on review of a matter following remittal by the Full Court.

53. The Full Court recognised that the legal error by the Tribunal could have an impact on any disqualification order. Ms Callychurn says that the effect of this is that all of the issues need to be remitted to the Tribunal for reconsideration. While ASIC does not accept this, it appears that at a practical level this may be the preferable course.

54. For instance, if on remittal the Tribunal is not satisfied Ms Callychurn contravened the NCCPA and is not satisfied she is not a fit and proper person or is likely to contravene or, if satisfied, is not satisfied that her banning should continue, the impact on the UMS cancellation decision would be material. Clearly, these issues are interrelated. Further, if as ASIC contends the findings of the previous Tribunal in February 2016 that there was reason to believe Ms Callychurn was not a fit and proper person remain in effect, how does this impact on this Tribunal's decision making, which is to be made at the time of this decision?

55. Both parties argue that new information, available as at the time of decision, should be taken into account by the Tribunal on review following remittal by the Full Court. Accordingly, both parties seek to rely on new evidence in support of their claims before this Tribunal – ASIC in respect of a new ground for contravention and additional evidence to support findings that Ms Callychurn is not fit and proper or is likely to contravene and the applicants to argue that given the time that has passed and other new evidence, the Tribunal should find she is in fact fit and proper, or at least should find there is no reason to believe she is not fit and proper.

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[27] Transcript, T16 – T17.

56. These issues are not only relevant to the exercise of any discretion but go to the heart of whether the power to make a banning order or cancel a licence arises. ASIC contends these matters are already established based on the previous findings of the Tribunal that have not been disturbed on appeal. However, the position is far from clear, particularly where ASIC seeks to rely on additional grounds to further establish why Ms Callychurn is not fit and proper and new evidence to establish a further contravention of by Ms Callychurn of the credit legislation. Notably, this ground was originally argued but the basis for the contention was rejected by the Full Court because of legal error. The nature and extent of any findings on these additional matters are matters that would be likely to impact on any banning order made and this was recognised by the Full Court in its decision. Similarly, it is not consistent for Ms Callychurn to contend that only the new information that is favourable to her should be considered on the remitted review.

57. For this reason, the approach that has been taken to the hearing of this review on remittal is to conduct the hearing *de novo* and to allow both parties to raise new issues and evidence, subject to submissions about relevance, procedural fairness and the matters raised by the applicants as considered below.

58. This approach is consistent with the commentary in Dennis Pearce, *Administrative Appeals Tribunal* (LexisNexis Butterworths, 4th ed, 2015) at [13.47] to the effect that unless the order of the court referring the matter back expressly forbids it, the Tribunal may receive further evidence.[28] It is also consistent with decision of the Full Court in *Peacock v Repatriation Commission* [2007] FCAFC 156, the Court suggested that in the absence of some express limitation, the whole of the matter must be considered by the Tribunal hearing the remittal.

**CAN ASIC RAISE NEW GROUNDS AND RELY ON NEW EVIDENCE?**

59. The applicants contend that ASIC cannot allege a contravention of s 225 of the NCCPA based on Ms Callychurn's answer to question four of the 2011 annual compliance certificate. While this matter was raised before the delegate, no findings were made about this. The applicants contend that it is implicit the delegate found there was no contravention. ASIC did not raise this issue before the previous Tribunal and the applicants cannot raise this issue now.

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[28] Referring to *Repatriation Commission v Yates* (1997) 46 ALD 487; *Perpetual Trustee Co (Canberra) Ltd v Commissioner for ACT Revenue* (1994) 123 ACTR 17 at 25.

60. The applicants also contend that ASIC cannot now raise new grounds to establish Ms Callychurn is not a fit and proper person. The new grounds alleged are that Ms Callychurn gave misleading information to ANZ and that she allowed Mr Frugtniet to continue his involvement and association with UMS even after he was prohibited from doing so by a condition on UMS's conveyancing licence. The applicants rely on the decision of the High Court in *Frugtniet v ASIC* at [15] as follows:

> *Depending on the nature of the decision the subject of review, the AAT may sometimes take into account evidence that was not before the original decision-maker, including evidence of events subsequent to the original decision. But subject to any clearly expressed contrary statutory indication, the AAT may do so only if and to the extent that the evidence is relevant to the question which the original decision-maker was bound to decide; really, as if the original decision-maker were deciding the matter at the time that it is before the AAT. The AAT cannot take into account matters which were not before the original decision-maker where to do so would change the nature of the decision or, put another way, the question before the original decision-maker. As Kiefel J observed in Shi, identifying the question raised by the statute for consideration will usually determine the facts that may be taken into account in connection with the decision. The issue is one of relevance, to be determined by reference to the elements of the question necessary to be addressed in reaching a decision.*
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> [Footnote references omitted]

61. The applicants further contend that ASIC cannot rely on its compulsory powers to obtain new evidence to establish contraventions and that Ms Callychurn is not a fit and proper person.

62. ASIC rejects these contentions. ASIC submits that it is entitled to rely on new grounds and evidence not previously raised. In particular, it is said that the Tribunal is entitled to have regard to information obtained by ASIC following the banning decision made by the delegate in February 2015 and any information in ASIC's possession prior to the banning decision but not relied upon the delegate. ASIC contends that none of the information referred or attached to the investigator's affidavits was obtained using ASIC's compulsory powers following the banning decision in February 2015 and there is no evidence this information or the documents relied on were unlawfully obtained. The Tribunal is entitled to, and ought, make its decision on the basis of all relevant materials before it at the time of its decision, including any new evidence or information.

63. It is further submitted that *Frugtniet v ASIC* does not limit the matters the Tribunal can consider on review in the circumstances of this case. In *Frugtniet v ASIC* the central issue was whether the Tribunal could take into account a spent conviction in considering whether Mr Frugtniet was not a fit and proper person for the purposes of a banning order

under s 80 of the NCCPA when ASIC was not entitled to do so. The High Court held that the Tribunal exercises the same powers as the decision-maker whose decision is under review and is subject to the same constraints, including the considerations that could be taken into account. As such, the Tribunal had erred in taking the spent conviction into account and the appeal was allowed. ASIC contends that the observations in *Frugtniet v ASIC* at [15] must be considered in light of the question that was before the High Court. This decision does not stand for the broader principle that no new grounds or evidence can be considered on review.

64. These submissions should be accepted.

65. Review by the Tribunal is *de novo*. It is not in the nature of an appeal limited by the matters argued before or found by the original decision-maker.

66. The powers of the Tribunal on review are set out in s 43(1) of the *Administrative Appeals Tribunal Act 1975 (Cth)* ('the AAT Act') which provides:

> *(1) For the purpose of reviewing a decision, the Tribunal* ***may exercise all the powers and discretions that are conferred by any relevant enactment*** *on the person who made the decision and shall make a decision in writing:*
> *(a)* affirming the decision under review;
> *(b)* varying the decision under review; or
> *(c)* setting aside the decision under review and:
> *(i) making a decision in substitution for the decision so set aside; or*
> *(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.*
>
> [Emphasis added]

67. As such, the Tribunal stands in the shoes of the decision-maker[29] and may exercise all powers and discretions conferred on the original decision-maker for the purpose of reviewing the decision.[30]

68. The nature and scope of the Tribunal's role on review was considered by the High Court in *Shi v Migration Agents Registration Authority* [2008] HCA 31, which is expressly referred to in *Frugtniet v ASIC* at [14] and [15]. Relevantly, the High Court noted at [14] that the question for determination by the Tribunal on review is whether the decision under

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[29] *Nation v Repatriation Commission (No 2)* (1994) 37 ALD 63 at 68.

[30] *Administrative Appeals Tribunal Act 1975 (Cth)*, s 43(1).

review is the correct or preferable decision and that this question is "required to be determined on the material before the AAT, not on the material as it was when before the original decision-maker." The High Court also observed that "the AAT is not at large" and was "subject to the same general constraints as the original decision-maker." The High Court made the further observations, at [15], referred to by the applicants and did not derogate from the principles set out in *Shi* but reaffirmed them.

69. As there are parallels between *Shi* and the facts in this case, it is useful to outline the arguments raised and the findings of the Court in some detail.

70. Like ASIC the Migration Agents Registration Authority ('MARA') has regulatory oversight and in July 2003 cancelled the appellant's registration as a migration agent under s 303 of the *Migration Act 195*8 *(Cth)* ('the Migration Act'). This provision gives MARA discretion to cancel the registration of a migration agent if satisfied, relevantly, that the agent has not complied with the Code of Conduct prescribed under the Migration Act or that the agent is "not a person of integrity or is otherwise not a fit and proper person to give immigration assistance".[31] The power under s 303, which was considered by the High Court in *Shi,* has similarities to the power under the NCCPA to make a banning order and cancel a licence. For instance, in both cases the decision-maker must decide whether the grounds which give rise to the power to ban or cancel exist, namely, whether there has been a relevant contravention by the regulated person or entity or whether the regulated person or entity is not fit and proper. MARA found there had been breaches of the Code of Conduct and that the appellant was not a person of integrity or a fit and proper person to give immigration assistance.[32] Unlike in this case, there were conditional stay orders in place enabling the appellant in the *Shi* to continue acting as a migration agent for some time after the cancellation decision was made.

71. In deciding whether or not the appellant was not a person of integrity or otherwise not fit and proper to give immigration assistance, the Tribunal took into account evidence of the conduct of the appellant from the date of the original decision to the date of the decision by the Tribunal.[33] In deciding whether there were contraventions of the Code of Conduct,

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[31] See generally, s 303(1) of the Migration Act. The Code of Conduct is prescribed pursuant to s 314 of the Migration Act and is set out in the *Migration Agents Regulations 1998 (Cth)*, Sch 2.

[32] Migration Act, s 303(1)(f); *Shi v Migration Agents Registration Authority* [2008] HCA 31 at [12].

[33] *Shi v Migration Agents Registration Authority* [2008] HCA 31 at [86].

the Tribunal only considered evidence about alleged non-compliance up to the time of the decision of the original decision-maker.

72. There were two critical issues in the appeal. First, whether the Tribunal could consider information available as at *the date of its decision* or whether it was limited to the information that was available *at the time of the original decision* and, secondly, the nature of the orders that could be made.[34] The second issue is not relevant for the purposes of this case.

73. The High Court allowed the appeal. In summary, the Court found that the Tribunal's role was to determine the correct or preferable decision.[35] The question of whether this should be determined based on information available at the time of the decision of the original decision-maker or at the time of the Tribunal's decision was dependent on the terms of the applicable legislative provision.[36] The Court found that there was no temporal element in the relevant legislative provision and, as such, the Tribunal should have regard to all material before it at the time of its decision, including information and evidence obtained after the original decision was made.

74. In reaching this view, the High Court discussed the role of the Tribunal in three separate but consistent judgements.

75. His Honour, Justice Kirby observed at [37], while regard may be had to the decision of the primary decision-maker as part of the material before the Tribunal:

> *…ultimately it was for the Tribunal to reach its own decision upon the relevant material including any new, fresh, additional or different material that had been received by the Tribunal as relevant to its decision.*

76. According to Kirby J, the Tribunal was not ordinarily confined to material that was before the original decision-maker or to consideration of events that occurred up to the time of that decision.[37] According to his Honour, the Tribunal's function is part of a continuum,[38] although it was important to recognise that it may be "inherent in the nature of a particular

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[34] Ibid at [116] (Crennan J).

[35] Ibid at [140].

[36] Ibid at [132].

[37] Ibid at [44] - [46].

[38] Ibid at [45] quoting with approval Davies J in *Jebb v Repatriation Commission* (1988) 80 ALR 329 at 333 - 334.

decision that review of that decision is confined to identified past events".[39] His Honour summarised the role of the Tribunal as follows:

> *There is thus a general approach deriving in particular from the statutory function of substituting one administrative decision for another. Nevertheless, the particular nature of the "decision" in question may sometimes, exceptionally, confine the Tribunal's attention to the state of the evidence as at a particular time.*[40]
>
> [Emphasis and citations omitted]

77. His Honour further observed that it is necessary to consider the nature of the review in respect of a particular decision by directing attention to the scope of the legislative provision giving rise to the power. Once it is considered the Tribunal is authorised have regard to new, additional or different evidence and should make its decision on the basis of current facts and circumstances, it "necessarily follows" that the Tribunal is able to use all powers available to the original decision-maker, including powers that have accrued since the original decision was made.[41]

78. In a separate joint decision, Hayne and Hayden JJ made similar observation noting at [99]:

> *Once it is accepted that the Tribunal is not confined to the record before the primary decision-maker, it follows that, unless there is some statutory basis for confining that further material to such as would bear upon circumstances as they existed at the time of the initial decision, the material before the Tribunal will include information about conduct and events that occurred after the decision under review. If there is any such statutory limitation, it would be found in the legislation which empowered the primary decision-maker to act; there is nothing in the AAT Act which would provide such a limitation.*

79. Their Honours found there was no temporal element in the relevant provisions of the Migration Act and the question of whether the appellant is not a fit and proper person to give immigration assistance "invites attention to the state of affairs as they exist at the time the Tribunal makes its decision".[42]

80. Her Honour, Justice Kiefel (as her Honour then was and with whom Crennan J agreed on this issue) drew a distinction between the role of the Tribunal in assessing whether the ground alleging a contravention had been made out (being contraventions of the Code of Conduct under s 303(1)(h) of the Migration Act and the enquiry that would need to be

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[39] Ibid at [44].

[40] Ibid at [46].

[41] Ibid at [60] (Kirby J).

[42] Ibid at [110].

undertaken on whether the agent was not a person of integrity and not a fit and proper person to provide immigration assistance: s 303(1)(f) of the Migration Act. The observations are useful in the context of the present case where there is dispute between the parties about the role of the Tribunal on remittal and information that should be considered. Her Honour noted at [146]:

> *The question which here arose for the Authority under s 303(1), which it answered, was whether it should exercise its powers, under pars (a) to (c) of the sub-section, because the grounds in pars (h) and (f) were established, in particular because the appellant had breached the Code of Conduct. That part of the decision which comprises the finding, that the ground in par (h) had been made out, was referable to conduct which had occurred to a point in time. That is the nature of the finding required by the provision. It follows that* ***the Tribunal was restricted to a consideration of events to that point and not those occurring later, in determining for itself whether there had been non-compliance with the Code****. The appellant accepted as much in his submissions.*
>
> [Emphasis added]

And at [149]:

> *Section 303(1)(f) provides that the Authority may take disciplinary action if it "becomes satisfied" that a registered migration agent is not a person of integrity or otherwise not a fit and proper person to give immigration assistance. The Migration Act provides the Authority with an ongoing role, to monitor the conduct of agents and to take disciplinary action where necessary. The reference to the Authority becoming satisfied was considered by Tracey J [in Shi v Migration Agents Registration Authority [2007] FCAFC 59] to identify a point in time, one at which the Authority was no longer satisfied about the agent. The topic with which s 303(1)(f) is concerned is not, however, one which identifies particular conduct, as is the case with respect to breaches of the Code of Conduct. The enquiry posed by the paragraph is a general one, and it may be considered by the Tribunal in that way. It does not limit an assessment of an agent's integrity and fitness to what has been conveyed by any breaches. There is no reason why the Tribunal's review should not extend to any information which sheds light upon the presence or absence of the necessary characteristics in the migration agent. The list in s 290(2) is not exhaustive.* ***There is good reason why the Tribunal should be in a position to consider the most recent material bearing upon the question of an agent's integrity and their fitness*** *to continue to provide immigration assistance. By this means facts such as an agent's subsequent conviction for a serious offence could be taken into account. The relevance of such a factor, to the question of an agent's integrity and fitness, is confirmed by its specification in s 290(2), as a matter which must be taken into account by the Authority in connection with their registration.*
>
> [Emphasis added; citations omitted]

81. It is clear from the High Court's decision of *Shi* that where there is a temporal element to a provision which establishes the ground for cancellation, the Tribunal must make an assessment as to whether the ground is established at a fixed point of time. When the

provision does not contain a temporal element, regard should be had to all relevant information available at the time of the decision.

82. Applying the principles enunciated in *Shi* and the foregoing conclusions on the scope of the review on remittal from the Full Court to this case, the following findings are relevant and can be made:

(1) The alleged contravention in respect of question four of the 2011 annual compliance certificate was referred to in ASIC's notice of concerns to the delegate. There was a typographical error because the notice referred to another question number but the notice extracted the question correctly and in full. Accordingly, the applicants were on notice of the allegation.

(2) The delegate made findings in respect of Ms Callychurn's answers to two of the questions but made no findings in relation to the alleged contravention in respect of question four. It is unclear from the delegate's reasons as to why no findings were made. However, it cannot be said that the delegate found in favour of the applicants on this issue simply because of a failure to refer to the alleged contravention in her reasons.

(3) Even if the delegate had made such a finding, the Tribunal is not bound by that finding.

(4) Subsections 80(1)(d) and 55(1)(a) of the NCCPA provide that the decision-maker must be satisfied a contravention *has* occurred before the discretionary power under the provisions can be exercised. This imports a temporal element which suggests that the point of time for assessing whether the ground exists to enliven the statutory discretion is fixed at some time prior to the time of the original decision. Whether the power could be exercised in respect of contraventions *after* the original decision was made and the discretionary power exercised is not the subject of dispute or active consideration in this matter because the contravention is alleged to have taken place prior to the time of the original decisions.

(5) It does not matter that this issue was not raised before the previous Tribunal. On remittal, the task of the Tribunal is to consider the matters afresh and consider all

issues in dispute that require determination.[43] It is not apparent from the orders or the decision of the Full Court that the nature of this remittal should be confined and, as already noted, both parties generally contend otherwise.

(6) On review, the Tribunal must consider the matter afresh and make the correct or preferable decision based on all the available material. ASIC may therefore rely on, and the Tribunal should have regard to, any evidence that is relevant to the issues in dispute. It does not matter that the evidence was not provided to the delegate. Nor does it matter whether the evidence was provided to the delegate and not considered or whether the evidence was provided and found to be insufficient. If relevant, ASIC can rely on new evidence to establish a contravention but *Shi* suggests a contravention must be one that is alleged to have been in existence *at the time of the decision*.

(7) In so far as the applicants contend that ASIC is not able to make new claims or to rely on new evidence that she is not fit and proper, this contention is rejected. Subsections 80(1)(e) and 55(1)(b) of the NCCPA require the decision-maker to determine whether an applicant "is not fit and proper". There is no temporal element in the wording of these provisions. The use of the word "is" obliges the Tribunal to have regard to *all* information and evidence provided by the parties *at the time of the decision* which is relevant to this issue. This includes information that may be either adverse or favourable to Ms Callychurn. As previously noted, it does not matter that these grounds and evidence were not considered by the delegate or by the previous Tribunal. The Tribunal is not bound by these previous decisions. The basis for ASIC's claims were set out in its Statement of Facts, Issues and Contentions and in submissions made during the hearing and in written submissions subsequently made to the Tribunal. Accordingly, the applicants have been afforded procedural fairness as part of the proceedings before this Tribunal.

83. The applicants also contend that ASIC should not be entitled to rely on new evidence because of the nature of this new evidence.

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[43] Refer *Allesch v Maunz* (2000) 203 CLR 172, 180-181 at [23] (Gaudron, McHugh, Gummow and Hayne JJ); *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, 203 at [13] (Gleeson CJ, Gaudron and Hayne JJ).

84. The new evidence relied on by ASIC in these proceedings is the evidence contained in and attached to the affidavit of the investigator who was involved in referring the original concerns to the delegate. The applicants submit that the investigator should not be entitled to submit evidence in this review because any material submitted by ASIC should be submitted by someone who is impartial. It is also submitted that ASIC is precluded from relying on information which was obtained by the use of compulsory powers exercised after the decision of the delegate.

85. There are two answers to these contentions.

86. First, while there is no requirement that evidence from the original decision-maker should be 'impartial', the evidence of the investigator is factual and does not comprise any statements of opinion or commentary. The investigator's evidence is not in itself controversial because the investigator merely annexes various documents on which ASIC relies and explains the process for obtaining the documents. Relevantly, the evidence relied on was served prior to the hearing and the applicants were given the opportunity to cross-examine the investigator, Mr McKinnon, which she did on the first day of the hearing.

87. Secondly, the material relied on by ASIC and referred to by the investigator was either material that was in ASIC's possession prior to the hearing before the delegate and the first proceedings before the Tribunal or was information obtained after the previous Tribunal hearing but was from sources other than by the use of compulsory powers. For instance, the documents and information referred to in the investigators first two affidavits comprised information that was publically available on the internet or in public records and information provided under notices issued during the course of ASIC's original investigation. In a further affidavit dated 23 February 2018, Mr McKinnon annexed copies of various documents including an application for incorporation for Ozwide Financial Services Pty Ltd ('Ozwide'), notices to produce issued to several organisations including Suncorp-Metway Limited, Westpac Banking Corporation, Ozwide and UMS, email correspondence between Ms Callychurn and ASIC regarding notices issued to UMS and Ozwide, documents produced in response to the notices consisting of financial information, applications for mortgage lending broker for various persons and documents relating to employees and pay. These documents were obtained as a result of the exercise of ASIC's compulsory powers as part of its investigations prior to the decision of the delegate was made.

88. In summary, ASIC is entitled to rely on the allegation that there was a contravention by Ms Callychurn in respect of the answer that she gave to question four of the 2011 annual compliance certificate. ASIC is entitled to rely on the new evidence put in support of this allegation and the Tribunal is not confined to considering the material that was available to the delegate or before the previous Tribunal. ASIC is also entitled to rely on new evidence to establish its contention that Ms Callychurn is not a fit and proper person. The evidence relied on was either obtained through compulsory powers exercised prior to the decision of the original decision-maker or after that decision but through other sources. As such, for the purpose of this review it is unnecessary to determine whether the use of information obtained by the use of compulsory powers is so constrained.

**DID MS CALLYCHURN CONTRAVENE SECTION 225 OF THE NCCPA?**

89. The Full Court found the Tribunal erred in finding Ms Callychurn contravened s 225 of the NCCPA in respect of her answers to two questions in both the 2011 and 2102 annual compliance certificates under the heading "Licences, Authorisations". The Full Court referred to these questions as the "authorisation questions". I am bound by these findings. In reaching this conclusion the Full Court had regard to an order made by the VCAT on 8 April 2011 to the effect that Mr Frugtniet was disqualified from practising as a lay associate of a legal practice in Victoria for three years for the purposes of Division 3 of Part 2.2 of the *Legal Profession Act 2004 (Vic)*.[44] Having reviewed the evidence, the Full Court observed that the answer given by Ms Callychurn to one of the other questions was "self-evidently untrue", to Ms Callychurn's knowledge, since she knew of the VCAT order made in respect of Mr Frugtniet.[45] This is not a finding which binds the Tribunal because it was not the subject of the appeal nor an issue in dispute argued by the parties. However, the observations of the Full Court on this matter were strongly worded and this is no doubt why ASIC sought to pursue this claim on review before this Tribunal following remittal by the Full Court.

90. ASIC's new contentions relate to one of Ms Callychurn's answers in the 2011 annual compliance certificate under the heading "Offences" which was raised before the delegate but not raised before the previous Tribunal, the primary Judge or in the hearing of the appeal before the Full Court.

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[44] *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137 at [18] – [19], referring to *Law Institute of Victoria Limited v Frugtniet (Legal Practice)* [2011] VCAT 596 (8 April 2011).

[45] *Callychurn v Australian Securities and Investments Commission* [2017] FCAFC 137 at [55].

91. The facts are not in dispute. On 5 February 2012, Ms Callychurn caused UMS to lodge an annual compliance certificate for 2011 with the annual compliance date of 24 December 2011. She nominated herself as a new fit and proper person and in response to the question about what industry best described her area of experience, she listed business development, credit risk assessment, finance/mortgage broking and lending. She also listed Mr Frugtniet as a fit and proper person. The form asked a number of questions under the heading "Certification for Fit and Proper People". There are five sub-headings being: "Licenses, Authorisations", "Professional Membership, Accreditation and Indemnity Insurance", "Names", "Offences" and "Solvency". There are questions under each heading.

92. The questions and answers which were the subject of the delegate's decision and the previous Tribunal's review were under the heading "Licenses, Authorisations." The questions canvassed whether any of UMS's fit and proper people had been refused or restricted in the right to carry on any trade, business or profession for which authorisation is required by law or whether they had been the subject to any disqualification action. In short, the Full Court found that Mr Frugtniet was not a legal practitioner but rather a lay associate and no authorisation was required by law to be employed as a lay associate. As such, Ms Callychurn's answers to the questions relating to this issue were found by the Full Court not to be incorrect.

93. The answer to the question which is the subject of the current dispute between the parties appears in the fourth section of the certification questions. The question is as follows:

> ***Offences***
>
> *Does the licensee certify that it has no reason to believe that any of its fit and proper people have within Australia or overseas, been the subject of administrative, civil or criminal proceedings or enforcement action, which were determined adversely to them (including by consenting to an order or direction, or giving an undertaking not to engage in unlawful or improper conduct) in any country?*
>
> [Emphasis in original]

94. In response to this question, Ms Callychurn, on behalf of UMS, stated "Yes".

95. As already noted, ASIC did not seek to rely on this answer before the previous Tribunal, the primary Judge or in the hearing of the appeal before the Full Court. As such, the contentions now raised by Ms Callychurn were not considered by the previous Tribunal or by the appellate Courts.

96. ASIC contends that Ms Callychurn contravened s 225 of the NCCPA by answering this question in the affirmative because as at the time of completing the certification Mr Frugtniet had been disqualified by VCAT from practising as a lay associate of a legal practice in Victoria for a period of three years. The order was made because Mr Frugtniet had told a barrister and a magistrate at a hearing in the Magistrate's Court of Victoria that he was a lawyer when he was not. ASIC contends that the VCAT decision fell within the meaning of "administrative, civil or criminal proceedings or enforcement action" which was "determined adversely" to Mr Frugtniet. ASIC also contends that the Supreme Court of Victoria Court of Appeal, which refused to continue a stay of the VCAT order on 17 June 2011, made adverse findings against Mr Frugtniet.[46] Ms Callychurn was aware of the orders and had read the decisions of both VCAT and the Court of Appeal, where adverse findings were made against Mr Frugtniet, at the time she completed the 2011 annual compliance certificate. Even though Mr Frugtniet had appealed the VCAT orders there was no stay in place at the time Ms Callychurn completed the 2011 certification. Ms Callychurn knew the proceedings were determined adversely against Mr Frugtniet and in answering in the affirmative she either knew or was reckless as to whether her answer was "false in a material particular or materially misleading" in contravention of s 225(2) of the NCCPA. In the alternative, Ms Callychurn did not take reasonable steps to ensure she did not give an answer that was false or misleading in contravention of s 225(5) of the NCCPA.

97. The applicants contend that the disqualification order made against Mr Frugtniet was protective in nature and was not an offence under the *Legal Profession Act 2004 (Vic)*. The order and findings therefore did not fall within the scope of the question. It is contended that the heading to the question suggests that the proceedings or enforcement action referred to must be for, or relate to, an offence. Ms Callychurn agrees she knew of the proceedings and the orders made. Ms Callychurn says that she answered in the affirmative because she did not understand the VCAT order to be within the meaning of the question. She made other checks and, after making those checks, considered it appropriate to answer the question in the affirmative. As such, she did not contravene s 225 of the NCCPA.

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[46] *Frugtniet v Law Institute of Victoria Ltd* [2011] VSCA 184.

98. Ms Callychurn provided an affidavit sworn 17 February 2018 and gave evidence at the hearing.[47] She also provided post hearing submissions and evidence. In her affidavit, Ms Callychurn stated that she was aware of the VCAT proceedings and had read the orders. Ms Callychurn also stated that prior to completing the 2011 annual compliance certificate she had discussions with Mr Frugtniet, undertook credit and police checks and searched various registers. According to Ms Callychurn, she knew that Mr Frugtniet had an appeal on foot but her understanding of the question was that the reference to "administrative, civil or criminal proceedings" referred to proceedings relating to an offence. She stated that she reviewed ASIC's guide headed "About the Credit Licence Compliance Certificate" before completing the 2011 certificate. This document is attached to Ms Callychurn's affidavit.[48] It is not a regulatory guide and simply reproduces the questions asked in the annual compliance certificate with minimal commentary. Notably, there is no commentary in relation to the question under the heading "Offences".

99. In cross-examination, Ms Callychurn gave evidence that she was aware of the findings by VCAT that Mr Frugtniet had engaged in "dishonest conduct of a serious nature" and that he had "failed to demonstrate any insight into his behaviour and fail to express any responsibility or remorse".[49] Ms Callychurn also said she had read the decisions of the Court of Appeal to firstly grant a stay and then refuse the continuation of this stay. In cross-examination, Ms Callychurn was referred to the Court of Appeal decision to refuse the stay and in particular, at [20], as follows:

> *Mr Frugtniet wilfully and consciously lied to a court and practitioner. In the face of several years of refusal for admission based upon dishonesty, and with the clear knowledge of the seriousness of appearing without being admitted, his conduct assumes a significant level of gravity, in my view. Added to 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. I refer here to his alleged use of and reliance upon a power of attorney as the justification for being permitted to appear in Court and to represent the persons who he referred to as his clients.*

100. Ms Callychurn said that she believed she would have read this. She agreed that at the time of completing the 2011 certification she knew both VCAT and the Court of Appeal had made adverse findings in relation to Mr Frugtniet and that there was no stay of those orders. Ms Callychurn knew the VCAT proceeding was an administrative or civil

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[47] Exhibit 4 - Affidavit of Meenakshi Callychurn dated 17 February 2018, including annexures MC1 to MC14.

[48] Refer to Exhibit 4 - Affidavit of Meenakshi Callychurn dated 17 February 2018 at annexure MC1.

[49] Transcript, T119.

proceeding that was determined adversely against Mr Frugtniet. She agreed that the order against Mr Frugtniet would have fallen within the wording of the question but for the heading "Offences".[50] She also agreed that she would have otherwise answered in the negative. Ms Callychurn's evidence was that she did not make any enquiries about whether the decision made by VCAT fell within the meaning of the question because of the heading. She said that she read the question as relating only to offences and did not consider that adverse findings leading to a disqualification under the *Legal Profession Act 2004 (Vic)* would fall within the meaning of the question.

101. Ms Callychurn was cross-examined extensively about this.[51] Ms Callychurn's evidence was to the effect that she did not seek any clarification about the question because she did not believe the question was ambiguous in its meaning.[52]

102. ASIC contends that Ms Callychurn's evidence is "entirely artificial and wholly unconvincing".[53] She either knew or was reckless as to whether her answer was "false in a material particular or materially misleading" in contravention of s 225(2) of the NCCP. At the very least, Ms Callychurn did not take reasonable steps to ensure she did not give an answer that was false or misleading. ASIC says that Ms Callychurn's reading of the question is at odds with the express words of the question.

103. ASIC's submission that the scope of the question in its terms is broad and, on the face of it, clear is accepted. The question focusses on adverse determinations in administrative, civil or criminal proceedings or enforcement action and does not, in itself, compel a conclusion that any adverse determination must relate to an offence.

104. Despite this, there is some force in Ms Callychurn's submission about the ambiguity of the question.

105. The part of the form dealing with the "Certification for Fit and Proper People" contains questions under five sub-headings. The questions under four of those sub-headings are directly referable to the subject matter identified in the sub-heading. In contrast, the question under the sub-heading "Offences" is broad in scope. I accept Ms Callychurn, on

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[50] Transcript, T124 and T125.

[51] Transcript, T124 - T144.

[52] Transcript, T140.

[53] Respondent's Closing Submissions dated 11 May 2018 at [24] referring to evidence of Ms Callychurn's oral evidence at Transcript, T93at lines 1-12, T124 at lines 6 – 46 and T128 at line 18 – T129 at line 45.

reading the question in conjunction with the heading, may have considered that the question was confined to adverse determinations where administrative, civil or criminal proceedings or some other enforcement action had been taken in respect of offences under legislation. Because there is some ambiguity occasioned by the heading, it is possible Ms Callychurn may have found this question difficult to understand or she may have been confused about how to answer the question. However, Ms Callychurn gave evidence that she made other inquiries about Mr Frugtniet but at no stage did she seek clarification about how to answer this question. In circumstances where Ms Callychurn knew or must have known about the importance of the certification and knew that there had been serious adverse findings made against Mr Frugtniet by both VCAT and the Court of Appeal, it is implausible that she did not have any doubts about the scope of the question or that she did not make any enquiries to satisfy herself about the correctness of her answer. Relevantly, the question sets a high benchmark and requires the responder to be certain about their answer. There must be "no reason to believe" the fit and proper person has been the subject of an adverse determination of the nature set out in the question.

106. Ms Callychurn represented herself in the review and she presented as an articulate witness and capable advocate for her contentions. Her written submissions were comprehensive. Ms Callychurn's evidence about the steps she took in completing the certification as a director of UMS and its fit and proper person was to the effect that she was careful in completing the certificate.

107. The Tribunal is therefore satisfied that, by answering that there was *no* reason to believe any fit and proper person of UMS had been the subject of administrative, civil or criminal proceedings or enforcement action which were determined adversely when serious adverse findings had been made against Mr Frugtniet by VCAT and the Court of Appeal, Ms Callychurn made a statement in the 2011 compliance certificate that was false in a material particular or materially misleading. Given what Ms Callychurn knew, the statement made was either in breach of s 225(2), because she was reckless about whether it was false or misleading, or it was in breach of s 225(5), because she did not take reasonable steps to ensure that her positive affirmation was not false or misleading.

108. Even if this interpretation of the question is in error, for the reasons that follow the Tribunal is satisfied Mc Callychurn is not fit and proper. This finding alone would be sufficient to enliven the discretion under s 80(1) of NCCPA.

**IS THERE REASON TO BELIEVE THAT MS CALLYCHURN IS NOT FIT AND PROPER?**

109. ASIC contends Ms Callychurn is not fit and proper and points to five different grounds which are said to support this contention. These matters are dealt with below.

**Did Ms Callychurn allow Mr Frugtniet to continue control of the credit activities of UMS?**

110. Mr Frugtniet ceased to be a fit and proper person on 12 January 2013 and ceased as a key person on 6 March 2013. He was permanently banned by ASIC from engaging in credit activities on 26 June 2014.

111. The relevance of this is that ASIC has criteria in respect of which it assesses whether an applicant will be issued with a credit licence or whether the conditions on the licence should be varied. The criteria is set out in ASIC's *Regulatory Guide 204: Applying for and varying a credit licence* ('RG204').[54] Relevantly, RG204 provides as follows:

> *RG 204.175* *Before we can grant you a credit licence, we must be satisfied that you are a fit and proper person to engage in the credit activities that will be covered by that licence.*
>
> *RG 204.176* *You must be a fit and proper person to engage in credit activities. In determining whether you meet this requirement, we will have regard to whether each of the people involved in managing your credit business are fit and proper people to perform the role.*
>
> *RG 204.177* *To be a fit and proper person to engage in credit activities means that the person:*
> (a) *is competent to operate a credit business (as demonstrated by the person's knowledge, skills and experience);*
> (b) *has the attributes of good character, diligence, honesty, integrity and judgement;*
> (c) *is not disqualified by law from performing their role in your credit business; and*
> (d) *either has no conflict of interest in performing their role in your credit business, or any conflict that exists will not create a material risk that the person will fail to properly perform their role in your credit business.*
>
> *RG 204.178* *To demonstrate that you have these attributes, you will need to:*
> (a) *identify the people involved in the management of your business (your 'fit and proper people');*
> (b) *specify which of those people you will rely on to demonstrate that you are competent to engage in credit activities (your 'responsible managers'); and*

[54] Australian Securities and Investments Commission, *Regulatory Guide 204 - Applying for and varying a credit licence*, February 2013.

(c) *provide us with information about each of those people, their role in your credit business and their past conduct, and, if they will be responsible managers, their knowledge and experience.*

112. It is clear from the clauses extracted above that the only persons who should be involved in managing the credit business of a credit licensee are persons who are "fit and proper" within the meaning of the RG204. ASIC seeks to monitor this by requiring credit licensees to nominate the people under each credit licence who are "fit and proper". Mr Frugtniet ceased as the fit and proper person for UMS in January 2013 and thereafter Ms Callychurn was its sole fit and proper person.

113. ASIC submits that Mr Frugtniet continued control and involvement in UMS *after* he ceased to be a fit and proper or key person and after he was banned and this is evidenced by his:

(1) role in submitting applications for credit to Australian Finance Group Ltd ('AFG') and other lenders on behalf clients of UMS;

(2) control of the UMS bank account with Westpac;

(3) continued operation of the UMS website;

(4) nomination as the UMS complaints contact for the purposes of the ASIC approved external dispute resolution scheme with Credit Ombudsman Service Limited ('COSL'); and

(5) representation of UMS in proceedings against AFG in the Federal Court.

114. It is submitted that because Ms Callychurn allowed this she did not properly perform her role as the sole fit and proper person for UMS and, as such, there is reason to believe she is not a fit and proper person.

***Mr Frugtniet's role in submitting credit applications***

115. It is not in dispute that UMS had an agreement with AFG to submit applications for credit to AFG. AFG is a mortgage aggregator and broker. It was necessary to have accreditation with AFG to submit loan applications on behalf of clients of UMS. Ms Callychurn had accreditation with AFG between 24 February 2006 and 11 January 2010, but not beyond this date. Mr Frugtniet had accreditation between 2 August 2010 and 25 September 2013.

Relevantly, Mr Frugtniet was the only person to have submitted applications on behalf of UMS in the period between 2 August 2010 and 25 September 2013. Ms Callychurn accepts that this was the position and that Mr Frugtniet was the loan writer for UMS after he ceased as its fit and proper person.[55] This is also evidenced by the loan applications submitted by Mr Frugtniet on behalf of clients of UMS through AFG as the loan originator to the Bank of Melbourne dated 29 May 2013 and to Suncorp Bank dated 12 June 2013.[56]

116. Ms Callychurn was nominated as a fit and proper person for UMS from 24 December 2011 and became its sole fit and proper person from 12 January 2013 when Mr Frugtniet ceased. Ms Callychurn says she supervised Mr Frugtniet once she became the fit and proper person for UMS but did not change the accreditation arrangements with AFG.[57]

117. In her evidence to this Tribunal, Ms Callychurn explained that she forwarded the 2012 annual compliance certificate to AFG on 29 May 2013 which recorded that Mr Frugtniet was no longer a fit and proper person for UMS. The inference was that AFG should have removed Mr Frugtniet from the accreditation register. When Ms Callychurn was questioned about this at the hearing she acknowledged that AFG may have overlooked the form and it was her responsibility to pursue it with them.[58] She did not do so and allowed AFG to continue to write loans for clients of UMS through Mr Frugtniet. Ms Callychurn said that she was "phasing Mr Frugtniet out of the company" but she "took advantage" of the fact that AFG continued to allow access to loans through Mr Frugtniet's accreditation.[59] Ms Callychurn explained this as follows:

> *MS CALLYCHURN: Yes, but Mr Frugtniet was the one with all the contacts. He was the one that had all the people he knew, nobody knew me as such that would come to me every time. Even if I would answer a phone call it would be "Can I speak to Rudy". If Rudy's not available, well, when he's available. So the way the system because he was in it for over 10 years he was the main face and I had to get rid of that and it - I couldn't get rid of him overnight without killing the business. So I had to exit him and introduce myself.*[60]

118. In her evidence, Ms Callychurn acknowledged that she should have regularised the position in relation to Mr Frugtniet's accreditation with AFG after he ceased to be a fit and proper person for UMS. She stated that:

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[55] Transcript, T143 at lines 11 - 25 and T95 at lines 20 - 21 and 44.

[56] Exhibit 7 - Affidavit of Robert John McKinnon sworn 28 February 2018 annexures RJM 6 and 13.

[57] Transcript, T143 at lines 28 and 29 and T177 - T179.

[58] Transcript, T177 at lines 5 - 24.

[59] Transcript, T177at line 26 - T178, line 6.

[60] Transcript, T179 at lines 32 - 39.

> *They didn't do it, I did not pursue it and I - look, I can make excuses under the sun and justify everything but I think we're at the point in time now let's just say, hang on, I made a mistake and I accept it.*[61]

119. ASIC criticises Ms Callychurn's submission and evidence that she supervised Mr Frugtniet and that he only acted under her supervision in his dealings with AFG. First, ASIC notes that this claim was not made when the matter came before the Tribunal in 2015 and she has not previously adduced any evidence to support this claim. This much was conceded by Ms Callychurn in cross-examination.[62] Secondly, and more significantly, ASIC submits that the documents provided by Ms Callychurn following the hearing, and which are said to be supportive of her claim, do not lend credence to this assertion. Ms Callychurn's "belated" submission and evidence should therefore be rejected.

120. There is force in ASIC's submission. When this was raised at the hearing, Ms Callychurn was given the opportunity to provide any further information in support of this claim. Ms Callychurn provided documentary evidence dated between 2009 and 2013 which she says evidenced she had access to the passwords of various lenders. She also provided copies of emails relating to UMS which disclose that Ms Callychurn was involved in some loan applications for UMS clients. None of these documents provide evidence that Ms Callychurn was supervising Mr Frugtniet after January 2013 in relation to his activities for UMS clients. For instance, the fact that Ms Callychurn had access to various lenders' accounts does not evidence supervision of Mr Frugtniet. There is evidence of email correspondence between Ms Callychurn and two clients of UMS in relation to a proposed home loan in September 2013. The clients provided information in response to this email and an application for a loan was subsequently lodged by Mr Frugtniet with Westpac. There is no evidence that this document was discussed with, or shown to, Ms Callychurn. The position is the same in respect of an application lodged for a UMS client on 16 January 2014 with Westpac. Mr Frugtniet is identified as the broker on the application form and while there is some evidence Ms Callychurn was involved in communications with the clients, there is no evidence that she reviewed or approved the application lodged by Mr Frugtniet.

121. The only document provided by Ms Callychurn which evidences that Mr Frugtniet sought her guidance was an email dated 7 August 2013 from Mr Frugtniet to Ms Callychurn. That email reads as follows:

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[61] Transcript, T172 at lines 9 - 11.

[62] Transcript, T143 at lines 28 - 46.

*Look at it carefully, there is a cross-reference but it seems to be to the business. He will have 100K tomorrow and will provide documentation to support that he has efficient funds to complete.*

*Advise whether this is a goer, need to extend finance clause.*

*Rudy*[63]

122. This email does support Ms Callychurn's contention in respect of the application referred to by Mr Frugtniet in this email but there are a number of other applications lodged after January 2013 and notably Ms Callychurn cannot point to any other evidence in support of her contention.

123. Ms Callychurn was questioned about her involvement in the applications lodged by Mr Frugtniet with the Bank of Melbourne on 29 May 2013 and Suncorp on 12 June 2013. Callychurn said that she did not write the loans, meet the clients nor submit the applications. However, she says she did "oversee" them. She explained that she oversaw the application by looking at it before they were submitted and "that was it". She did not follow-up the applications.[64] While Mrs Callychurn's recollection of the specific applications was poor, which is understandable given the length of time that has passed, she provided little detail about what she did to supervised Mr Frugtniet in relation to these applications and any other applications that were written after January 2013. Having regard to the evidence provided by Ms Callychurn, it is unclear what role she had in overseeing these applications written by Mr Frugtniet and whether she made any independent assessment about them.

124. In circumstances where Ms Callychurn was clearly on notice that Mr Frugtniet's involvement in the credit activities of UMS after he ceased to be a fit and proper person was one of the grounds relied upon by ASIC to establish that she was not fit and proper, it was incumbent upon Ms Callychurn to put forward evidence to support her contention that she was in fact supervising him at this time. This is particularly so when there is documentary evidence which, on its face, supports ASIC's contention Mr Frugtniet was undertaking credit activities after he had ceased to be a fit and proper person and where Ms Callychurn was its sole fit and proper person. Based on the evidence and submissions provided by Ms Callychurn, the Tribunal is not so satisfied.

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[63] Additional Documents lodged by Ms Callychurn on 11 April 2018 being annexure MC4.

[64] Transcript ,T152 at line 38 - T168.

125. As such, the Tribunal finds that after Mr Frugtniet ceased as a fit and proper person in January 2013, but he continued to engage in credit activities on behalf of UMS. While there is evidence Ms Callychurn had some involvement in various credit applications for UMS clients in 2013, the Tribunal is not satisfied she supervised Mr Frugtniet in respect of all of the credit activities undertaken by him after the relevant time.

***Control of the UMS bank account***

126. It is not in dispute that from 15 April 2004 until December 2014 (when Ms Callychurn opened a new bank account with Suncorp) Mr Frugtniet held a business cheque account with Westpac in the name of "Mr Rudy Noel Frugtniet trading as Unique Mortgage Services". He was the sole signatory on the UMS account. AFG paid commission for credit services into the UMS account and the account was used for UMS related expenses and other transactions personal to Ms Callychurn and Mr Frugtniet. Ms Callychurn agreed to these matters in cross-examination.[65]

127. In her affidavit sworn 17 February 2018, Ms Callychurn acknowledged that the UMS account was in Mr Frugtniet's name and that this continued until December 2014. She stated that she had login detail is well as a card linked to the account but stated as follows:

> *I have accepted that it was an error on my behalf and I have rectified it and opened up a new account with Suncorp since December 2014.*

128. The contention made by ASIC about the continued control and involvement by Mr Frugtniet in the business of UMS through his control of its bank account is made out. It does not matter that Ms Callychurn also had access to the account. It is clear from Ms Callychurn's concession in her affidavit and during cross-examination that Mr Frugtniet had access to and used the UMS account. She recognised this was inappropriate given he was no longer fit and proper person of UMS after January 2013 and that he was banned from June 2014.

[65] Transcript, T203 at line 5 - T205 at line 28.

***Continued operation of the UMS website***

129. It is not in dispute that at least until 30 October 2014 the UMS website was in operation and the contact person for the website's domain was Mr Frugtniet.[66] Ms Callychurn responded to this contention in her affidavit of 17 February 2018. She states that when the website came into effect it was mainly used by Mr Frugtniet for his migration matters and that the website never generated any business for UMS. Ms Callychurn also relies upon the finding of the delegate that the UMS no longer has a website reflecting any association with Mr Frugtniet and the way that website was managed was "not of itself improper".[67]

130. Ms Callychurn's reference to the decision of the delegate is correct although the delegate also made a finding that the evidence of Mr Frugtniet's continued control of the UMS website was "a further indication that Mr Frugtniet was in control of UMS, rather than Ms Callychurn".

131. The fact Mr Frugtniet established a website for UMS and this website continued after he ceased as a fit and proper person and after he was banned by ASIC does not necessarily establish that he was in control of UMS rather than Ms Callychurn. However, this certainly provides cogent evidence that Mr Frugtniet was involved with UMS and that UMS was advertising mortgage broking services on the website until 16 September 2013 (as referred to at [33] of the delegate's decision). When this was brought to Ms Callychurn's attention as part of the ASIC banning proceedings, it appears she initiated changes to the website. However, the fact remains that Mr Frugtniet was allowed to continue to use the UMS website. This together with the fact that Ms Callychurn did not prevent the continued use by Mr Frugtniet supports ASIC's contention that Ms Callychurn allowed Mr Frugtniet to continue to his involvement in the business of UMS after he ceased as a fit and proper person.

***Mr Frugtniet was the UMS complaints contact for COSL***

132. UMS was required to be a member of an ASIC approved external dispute resolution scheme. It was a member of the scheme operated by COSL and Mr Frugtniet was listed

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[66] Affidavit of Robert McKinnon sworn 2 February 2018.

[67] Decision of the delegate dated 27 February 2015 at [33].

as the complaint contact as at 13 October 2014.[68] In July 2013 a complaint was made against UMS by a client of UMS. There is evidence of email correspondence between Mr Frugtniet and COSL dated July 2013 about this complaint.[69] These matters are not in dispute.

133. According to Ms Callychurn, the responses by Mr Frugtniet recorded in the emails were made by him on her instructions.[70] The complaint was finalised on 30 July 2013 when a case officer for COSL advised that the complainant no longer wished to pursue the complaint. There were no other complaints received by UMS.

134. Ms Callychurn was cross-examined about this. She said that even if Mr Frugtniet was responsible for dealing with complaints, there was no requirement for him to be a fit and proper person for UMS to do so and he referred issues in relation to the complaint to her for instruction. This explanation is consistent with Ms Callychurn's submission to the delegate.[71]

135. As the sole and proper person for UMS from January 2013, it would have seemed appropriate for Ms Callychurn to amend the contact details for complaints, particularly as the existing contact, Mr Frugtniet, had also been banned from engaging in credit activities in June 2014. However, the fact she did not do so does not, of itself, evidence continued control by Mr Frugtniet of UMS. It evidences continued involvement, although Ms Callychurn submits this involvement was under her supervision or instruction. There is no evidence to the contrary.

***Representation of UMS in proceedings against AFG***

136. According to ASIC, UMS commenced proceedings in the Federal Court against AFG on 8 October 2014. Public records on the Commonwealth Courts Portal website name Mr Frugtniet as a person associated with the applicant in the proceeding. Ms Callychurn states, in her affidavit of 17 February 2018, that proceedings were commenced in Sydney because her legal representative was located there and that she was the person instructing the lawyer on behalf of UMS. In support of this statement, Ms Callychurn produced email correspondence between her and the lawyers representing UMS. ASIC

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[68] Refer T-document, T31.

[69] Refer T-documents, T32 and T33.

[70] Affidavit of Ms Callychurn sworn 17 February 2018 at [27] - [32].

[71] Refer T-documents, T12.

contends that while Ms Callychurn denies that Mr Frugtniet was representing UMS she did not give an explanation as to why Mr Frugtniet's name was on the public records. It is correct that Ms Callychurn did not give an explanation in cross-examination or in her affidavits filed before the commencement of the proceedings as to why Mr Frugtniet was referred to in the Courts Portal as the applicant but she gave evidence when questioned about this that "there was an explanation" and Mr Frugtniet was not involved.[72] This evidence was not clarified, nor was she pressed about the explanation.

137. While the evidence about Mr Frugtniet's involvement in the proceedings is unclear and Ms Callychurn's explanation (or rather absence of explanation) is not convincing, there is evidence that Ms Callychurn rather than Mr Frugtniet was involved in the settlement of the AFG proceedings. On balance, this evidence suggests continued involvement of Mr Frugtniet in the affairs of UMS but does not strongly support ASICs contention that he continued to control of the business of UMS.

***Conclusion***

138. Having regard to the evidence, the Tribunal is satisfied that Mr Frugtniet continued to be involved in the credit business of UMS after he ceased as its fit and proper person and after he was banned. While this evidence does not establish that he controlled the business of UMS to the exclusion of Ms Callychurn, there is evidence his involvement was significant. The Tribunal is not satisfied Mr Frugtniet's activities were supervised by Ms Callychurn to the extent that would have been required for her to properly discharge her role as the sole fit and proper person for UMS. Relevantly, there is evidence Mr Frugtniet submitted loan applications to AFG and other lenders on behalf of at least two clients of UMS after January 2013 and, notwithstanding Ms Callychurn's assertions to this effect, the Tribunal is not satisfied she supervised Mr Frugtniet in respect of these applications. Her reasons for failing to regularise the position with AFG are unconvincing and in themselves raise concerns. There is also evidence that Mr Frugtniet had control of the UMS bank account, was involved in the operation of the UMS website, was the nominated contact for COSL for the purposes of complaints and had some involvement, albeit unexplained, in commencing proceedings against AFG in the Federal Court.

[72] Transcript, T215 at line 9.

**The response to ASIC's notices and co-operation with ASIC's investigations**

139. ASIC commenced investigations in relation to the affairs of UMS and Mr McKinnon, an officer at ASIC who was involved in the investigations, caused notices to be issued to UMS, various lenders associated with UMS and Ozwide in 2013 and 2014. According to Mr McKinnon, he became aware of the existence of Ozwide in the course of his investigations.[73] Mr McKinnon's investigations disclosed that Ms Callychurn made an application for the registration of Ozwide on 8 July 2008 and as at 26 November 2013 she was its sole director and shareholder.[74] Ozwide was deregistered on 6 December 2019.[75]

140. On 27 March 2014, Mr McKinnon, as an authorised delegate of ASIC, issued a notice under s 267 of the NCCPA to Ozwide requiring it to produce various company books and records.[76] Section 267 provides that ASIC may give a notice to a person to produce documents in the person's possession, custody or control that relate to the affairs of a credit licensee, credit representative or other persons engaged in credit activities. The reference to a "person" includes corporations.[77] The notice issued to Ozwide was for the production of, amongst other things, all books identifying officers, employees, agents, representatives or contractors of Ozwide for the period 28 May 2010 to the date of the notice, including, but not limited to, employment agreements, engagement letters, contractor agreements, personnel records, payroll details, payslips and group certificates. The notice also requested the general ledger for Ozwide and all books relating to accounts with any bank, building society or other financial institution held by Ozwide. The notice required compliance by 4.00pm on 10 April 2014.

141. On 27 March 2014, a notice was also issued to UMS under s 266 of the NCCPA requiring UMS to produce various company books and records.[78] Section 266 provides that ASIC may give a written notice to, amongst others, a person who engages in a credit activity requiring the production of specified book relating to a credit activity engaged in by a person. As already noted, this provision includes a corporation that engages in credit activities. The notice requested that UMS provide a broad range of books for the period 28

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[73] Affidavit of McKinnon sworn 23 February 2018 at [5].

[74] T-documents, T39 and Affidavit of McKinnon sworn 23 February 2018 at [1].

[75] Affidavit of Mr McKinnon sworn 23 February 2018 at [6]

[76] T-documents, T41.

[77] Subsection 2C(1) of the *Acts Interpretation Act 1901 (Cth)* which provides that a reference in any Act to "person" includes a body politic or corporate as well as an individual.

[78] T-documents, T34.

May 2010 to the date of the notice including, relevantly, UMS client files for eight named UMS clients, the financial statements of UMS and books relating to agreements between Ozwide and UMS relating to arrangements for payments from clients of UMS to Ozwide. The notice required compliance by 4.00pm on 10 April 2014.

142. Both notices referred to suspected contraventions of the NCCPA, the *National Credit Code*, the *ASIC Act 2001* and the *Crimes Act 1958 (Vic)* by UMS, Ozwide and certain persons associated with those companies. The contraventions identified included the failure to comply with the requirement to make reasonable enquiries in relation to credit contracts,[79] a prohibition on suggesting or assisting consumers enter into unsuitable credit contracts,[80] providing misleading information[81] and criminal offences under the *Crimes Act 1958 (Vic)* for obtaining money by deception, false accounting and falsification of documents.[82]

143. It is apparent from the suspected contraventions alleged in the notices and the evidence of Mr McKinnon at the hearing,[83] that one of the issues ASIC was investigating related to the question of whether certain credit applications lodged by UMS were correct. As part of its investigation ASIC obtained loan applications directly from lenders which identified Ozwide as the employer of certain clients of UMS. The documents included loan applications for UMS clients addressed to the lender and documents purportedly from Ozwide in the form of payment summaries for the UMS clients.[84]

144. ASIC notices sought information from Ozwide about the employment details and payments to these clients. ASIC also sought copies of the UMS records relating to these applications.

145. According to Mr McKinnon, he contacted Ms Callychurn by telephone prior to the issue of the notices and made arrangements to serve the notices to produce on Ozwide and UMS

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[79] Section117 of the NCCPA.

[80] Section 123 of the NCCPA.

[81] Section 160D of the NCCPA and s 12DA of the ASIC Act.

[82] Sections 82, 83 and 83A of the *Crimes Act 1958 (Vic).*

[83] Transcript, T76 - T81.

[84] Affidavit of Robert McKinnon sworn 23 February 2018 at [8] - [11] and RJM 3 - RJM14 being copies of documents produced by Suncorp-Metway Limited, Westpac Banking Corporation and the Bank of Melbourne.

by mail and email.[85] There is no dispute that the notices were validly served on 27 March 2014.

146. On 4 April 2014, Mr McKinnon received an email from Ms Callychurn about compliance with the notices requesting an extension of time to comply. Mr McKinnon initially did not agree but after the exchange of emails on this issue between 4 and 9 April 2014, Mr McKinnon extended the time for compliance with the notices to 22 April 2014.[86]

147. On 22 April 2014, Mr McKinnon received a voicemail message from Ms Callychurn that there would be a delay in compliance to the following day. Mr McKinnon was on leave in the week of 21 April 2014 and he did not return Ms Callychurn's telephone call at that time but on his return to the office on 28 April 2014 he found five white envelopes on his desk. He recorded their receipt and allocated them an ASIC barcode. Included in the documents produced was an undated letter from Ms Callychurn extracted in part as follows:

> *Dear Mr Mckinnon (sic)*
>
> *We refer to your requests pursuant to the various notices to produce the books in respect of Unique Mortgage Services Pty Ltd and Ozwide Financial Services Pty Ltd which I produce.*
>
> *We also produce a copy of the related compliance, dispute resolution, and other plans as requested.*
>
> *Furthermore, it should be pointed out that our associated entity does not engage in credit activity, notwithstanding that it is exempt by virtue of s27, but is utilised to credit any remuneration that has been disclosed and agreed upon with the principal to be made payable to the associated entity.*
>
> *We object to you in the absence of any customer who has not complained or brought to our attention any issue with the prescribed facilities, as implemented by ASIC being used in the manner you have done so hitherto.*
>
> *We strongly object to the use of material procured or otherwise provided to you other than under a legitimate basis on which you are entitled to obtain same.*
>
> *……*

148. Mr McKinnon responded to this letter by email dated 29 April 2014 confirming he had received the covering letter, a compliance manual for UMS, a document title cash flow for UMS and documents relating to loan applications in the names of eight UMS clients. He requested confirmation about which entity had produced this information.[87]

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[85] Affidavit of Robert McKinnon sworn 23 February 2018 at [12] - [16].

[86] Affidavit of Robert McKinnon sworn 23 February 2018 at [21] - [27] and RJM 17 - RJM 20.

[87] Affidavit of Robert McKinnon sworn 23 February 2018 at [31] and RJM 23.

149. Ms Callychurn responded by email dated 1 May 2014 to the effect that the books and records produced were "pursuant to both notices and encompasses both entities". Ms Callychurn expressed concern about ASIC's investigations and stated as follows:

> *However, as previously expressed to you our concerns that notwithstanding such mechanisms that you have undertaken an investigation in the form of directly soliciting from clients and producing to them documents to the point of actively engaging them to complain and neither acceptance of any transaction which we find deplorable.*[88]

150. Mr McKinnon reviewed the documents provided by UMS on 28 April 2014 and noted that certain documents had not been produced. He sent an email dated 1 May 2014 to Ms Callychurn, identifying certain books that he believed had not been produced but which were the subject of the notices. Mr McKinnon noted that the UMS files did not include evidence of capacity to repay, such as payslips, group certificates or transaction listings/bank statements for eight of the UMS clients referred to in the notice. He also noted that ASIC had not received any books in respect of Ozwide. He stated as follows:

> *In the event Ozwide does not have any books to produce in response to the notice, please complete the form advising ASIC that the recipient it recipient of the notice holds no relevant books.*[89]

151. Mr McKinnon requested a response to his email of 1 May 2014 by 7 May 2014.

152. On 8 May 2014, Ms Callychurn responded to Mr McKinnon by email. The email contained a response to each of the matters raised by Mr McKinnon in his email of 1 May 2014. The effect of the response was that all documents had been produced in relation to UMS, ASIC could except that it already had the aggregator agreement and further financial information would be provided by 15 May 2014. In respect of Ozwide, Ms Callychurn responded as follows:

> *In relation to books relating to Ozwide Pty Ltd which I have in my earlier email confirmed does not engage in credit activity as defined under the NCCP, your request pursuant to section 267 which is exemplified even further on who is required to produce books is not applicable.*[90]

153. Mr McKinnon responded by email dated 13 May 2014 requesting that Ms Callychurn provide the outstanding financial information and all agreements with aggregators. He also sought confirmation about whether any further documents would be produced to

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[88] Affidavit of Robert McKinnon sworn 23 February 2018 at [32] and RJM 24.

[89] Affidavit of Robert McKinnon sworn 23 February 2018 at [29] - [34] and RJM 25.

[90] Affidavit of Robert McKinnon sworn 23 February 2018 at [35] - [36] and RJM 26.

ASIC under the notice to UMS. He indicated that Ms Callychurn still needed to respond to the Ozwide notice and that if Ozwide did not have any books to produce under the notice, she should complete the form advising ASIC that there were no relevant books to produce.[91]

154. Ms Callychurn responded by email dated 22 May 2014 by producing financial information for UMS, confirming that the only aggregator agreement UMS had was with AFG and by advising that there were no further documents available to be produced under the notice. She did not confirm, as requested, that Ozwide did not have any documents to produce but rather responded as follows:

> *The notice to Ozwide pursuant to section 267 as specifically requested is in inapplicable as Ozwide does not engage in nor has it ever engaging credit activities under the NCCP.*[92]

155. It is clear from Ms Callychurn's response that she did not accept that the notice to Ozwide related to the credit activities of another person or entity as she interpreted the notice to relate only to credit activities engaged in by Ozwide.

156. On 27 May 2014, an ASIC lawyer wrote to Ms Callychurn explaining that the notice issued to Ozwide required the production of books as specified in Ozwide's possession, custody or control that related to the affairs of a licensee, in this case, UMS. It was noted that the applicability of the s 267 notice to Ozwide's engagement in credit activities was not relevant for the purposes of the notice and that there was a penalty for refusing or failing, without reasonable excuse, to comply with the notice.[93]

157. Ms Callychurn responded to the letter from the ASIC lawyer on 4 June 2014. The response was to the following effect:

> *1 Ozwide does not have in its possession any existing books other than what has been produced pursuant to the notice under section 2662 (UMS);*
>
> *2 Ozwide has determined that any other books which it possesses are outside the scope of the book specified in the notice as they do not relate to the affairs as defined of the licensee UMS.*
>
> *Hence, I have signed and dated the form that confirms Ozwide Financial Services Pty Ltd does not have any books to produce an answer to the notice issued under*

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[91] Affidavit of Robert McKinnon sworn 23 February 2018 at [37] - [38] and RJM 27.

[92] Affidavit of Robert McKinnon sworn 23 February 2018 at [39] - [40] and RJM 28.

[93] Affidavit of Robert McKinnon sworn 23 February 2018 at [41] and RJM 29.

> *section 267 of the National Consumer Credit Protection Act 2009, dated 27 March 2014 but should be accepted subject to the aforementioned matters listed in this matter email being an integral part of my complete response.*[94]

158. In summary, ASIC contends that Ms Callychurn did not respond to the notices to produce and did not cooperate with its investigation. There is no dispute that ASIC did not seek to prosecute or take civil action to enforce the notices against UMS, Ozwide or Ms Callychurn. Mr McKinnon approached a number of the applicants directly to ascertain what the position was but it is apparent from his evidence that the investigation did not proceed further. In response to the question about what happened to the investigation, Mr McKinnon gave the following evidence:

> *You tell me that there was an investigation on the application involving [removed] and that there was no further action taken in relation to that?---Yes.*
>
> *Was it because you weren't able to obtain the documents from Austwide (sic) Financial Services?---In part, yes. As I discussed a little bit earlier, in this instance, I was unable to obtain witness statements from the applicants setting out this information. So, I had made attempts to contact each of the applicants, whose applications do appear in my affidavit. I did speak to a number of them. A number of them did tell me that they had never heard of Austwide (sic). They were never employed by Austwide (sic) and were not a party to the information that was on their application.*
>
> *So, that prosecution didn't proceed because the applicants wouldn't give evidence, that's what you said earlier, I think; is that right?---That is.*[95]

159. This is a serious matter because the issue of concern for ASIC was that the applications produced by the lenders referred to Ozwide as the employer for the UMS clients on the first page of the application and these documents were different from the documents produced by UMS which did not refer to Ozwide.[96] Mr McKinnon was not able to resolve these issues and gave the following evidence about the outcome of this part of the investigation:

> *Ultimately, the criminal side of this investigation fell away through the applicants being unwilling to sign witness statements in relation to these applications and proving the falsity of certain representations within them.*[97]

160. Ms Callychurn's contention in relation to this matter is that it is not open to the Tribunal to make findings about contraventions of ss 266 and 267 by virtue of s 327(1)(d) of the NCCPA. In any event, Ms Callychurn denies she failed to comply with the notices issued

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[94] Affidavit of Robert McKinnon sworn 23 February 2018 at [42] - [43] and RJM 30.

[95] Transcript, T80 at lines 27 - 38.

[96] Transcript, T86 - T88.

[97] Transcript, T78 at lines 4 - 7.

by ASIC clearly explaining why. In her affidavit filed in the proceedings, Ms Callychurn states that she did comply but did not explain how she complied, in particular in respect of the notice addressed to Ozwide. In particular, she explained in her affidavit as follows:

> *In my opinion, if ASIC was of the view that I deliberately held back documents and did not produce them, or that I did not answer to them satisfactorily, that ASIC should have found a contravention of those sections. Rather, I have been informed that ASIC does not wish to rely on the contraventions of those sections, but instead is seeking to undermine the objectives of the whole division and purpose upon which the notices were issued, trying to shift it in stating that the matter was a has a bearing on my fitness and proprietary. In my mind the matters before the Tribunal quite simple, either that I comply with the notices or I did not. My understanding is that I did. There is no evidence that has been provided or relied on that suggests that there was non-compliance.*[98]

161. At the hearing, Ms Callychurn gave evidence about documents produced by UMS. Ms Callychurn said she had been unable to locate certain documents requested by ASIC and attributed this to the fact that there was a search warrant executed by the Australian Federal Police ('AFP') at her property in relation to Mr Frugtniet in 2014. Ms Callychurn said that the AFP "took boxes of documents" and she "didn't even get half of them back".[99] However, Ms Callychurn did not raise this with ASIC at the time she produced document and she simply told ASIC that she had provided what was in her possession.[100]

162. Ms Callychurn was also questioned about the failure to produce documents held by Ozwide for its employees. Ms Callychurn made it clear that she believed the request made by ASIC in its notice was "outside scope".[101] When pressed about this issue, she said there "would have been" records held by Ozwide and that she "could locate them".[102]

163. Ms Callychurn's evidence at the hearing about her compliance with the notices was not only confusing but unconvincing. She did not give a clear explanation about what was produced and how she had complied. Ms Callychurn maintained her position that she had no documents to produce by Ozwide because it was not engaged with credit activities. It is self-evident from Ms Callychurn's various responses to the notices that she did not tell ASIC that there may have been documents responding to the notices in the possession of the AFP. At no stage in her submissions or evidence did Ms Callychurn mention

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[98] Affidavit of Ms Callychurn sworn 17 February 2018 at [45].

[99] Transcript, T155.

[100] Transcript, T156.

[101] Transcript, T189 at line 8.

[102] Transcript, T189.

documents had been seized by the AFP and this may have compromised production of documents. Ms Callychurn says she may have raised this at the hearing before the ASIC delegate but it is not referred to in her submissions to the delegate. Based on the available evidence, it is apparent that the first time Ms Callychurn raised this issue was when giving evidence to the Tribunal in these proceedings. This was not an issue raised in the previous hearing. Ms Callychurn did not explain why this issue had not previously been raised.

164. In order to give Ms Callychurn the opportunity to clarify this evidence, she was directed to provide any further evidence or document relating to the claim the AFP did not return documents to her which may have fallen with the ASIC notices. After the hearing, Ms Callychurn provided copies of search warrants issued on 21 February 2013 in respect of her residential premises, her car and the business premises of UMS. The search warrants related to Trade Recognition Australia applications, presumably arising from Mr Frugtniet's migration business, and none of the clients referred to in the warrants were the clients referred to in the ASIC notices. Ms Callychurn also provided copies of emails between Mr Frugtniet and the AFP about the search warrants but this correspondence does not record any complaint made by Ms Callychurn in relation to the documents taken. In other words, the documents provided by Ms Callychurn disclose that there were search warrants issued by the AFP over a year prior to the issue of the ASIC notices but there is nothing in those search warrants to suggest that they related to the business of UMS in respect of its credit activities. None of the documents sought in the search warrant related or referred to documents that were also the subject of the ASIC notices.

165. Having regard to the evidence, which includes documentary evidence, affidavit evidence of Ms Callychurn and her oral evidence during the hearing, the Tribunal is not satisfied that Ms Callychurn provided an adequate response to the notices issued by ASIC, that she had any explanation for why she was not able to comply or that she provided a clear and consistent explanation of whether or not she had documents in her possession, custody or control which responded to or may respond to the notices. Ms Callychurn took issue with the notice issued to Ozwide and did not produce any documents, notwithstanding ASIC clarified the scope of the notice with her in correspondence through an ASIC lawyer. At the hearing, Ms Callychurn said that the documents existed but she could not locate them and later gave evidence that the failure to produce documents may have related to the fact that they were not returned by the AFP.

166. Ms Callychurn's evidence is not credible for a number of reasons. First, Ms Callychurn did not raise this issue in her submissions and evidence prior to the hearing and she has consistently relied upon her interpretation of the notice and her view that the documents sought were "outside scope". This is particularly relevant given the compliance by Ms Callychurn with the ASIC notices was one of the central issues in the case. Secondly, Ms Callychurn's evidence about the existence of the documents and where they may be was vague and lacking in detail.[103] Thirdly, the search warrants did not refer to any documents relating to the UMS clients that were the subject of the notices and, on the face of it, it is difficult to understand why the AFP would seize documents outside the scope of their investigations.

167. The relevance of the issue of whether there was non-compliance is that ASIC wanted to establish whether there were documents responding to the ASIC notices issued to UMS and, more particularly, Ozwide, to substantiate the employment arrangements between certain UMS credit clients and Ozwide. If there were no such documents, this would tend to suggest that the information contained in the credit applications submitted to the financiers by UMS was incorrect.

168. While it is true ASIC did not seek to enforce the notices for whatever reason, the evidence of Ms Callychurn's response to those notices is nonetheless relevant to the question of whether she is fit and proper. Ms Callychurn was the sole director of UMS, the sole director of Ozwide and the fit and proper person for UMS responsible for the proper discharge of its credit activities. Ms Callychurn was served with notices by ASIC in relation to its investigations, which raised serious matters of concern. Mr McKinnon and other officers of ASIC raised a number of issues with Ms Callychurn's compliance with those notices. Her response to the UMS notice was that she had produced everything in her possession, custody or control. Ms Callychurn's response to the Ozwide notice was to take issue with the notice but then to confirm that she had nothing to produce that was in her possession, custody or control. At no stage did Ms Callychurn advise ASIC that the documents existed but could not be located or that these documents may have been seized by the AFP. Nor did she confirm that the documents did not in fact exist.

169. Overall, Ms Callychurn's various responses to the notices to ASIC, her explanation to the delegate and her explanation about this this issue in these proceedings was unclear and

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[103] Transcript, T154 - T157 and T189 - T195.

contradictory. It is apparent from the evidence of Mr McKinnon that the failure of UMS and Ozwide to produce these documents, or to at least confirm that such documents did not exist, impeded ASIC's investigation. No conclusions can be drawn from the fact that there were inconsistencies and unexplained aspects in respect of the credit applications lodged by UMS because the ASIC investigations were not finalised and there was no further information provide evidence provided by ASIC in support of these claims. Relevantly, this did not form part of ASIC's contentions in these proceedings or before the delegate. This nonetheless is a serious issue given the importance of ASIC's role in for enforcing financial services and credit laws and supervising credit activities licensees. Ms Callychurn did not co-operate with ASIC's investigations and to suggest that ASIC should have taken action to enforce its notices is inconsistent with the obligations of being fit and proper.

170. Ms Callychurn's submission that ASIC cannot raise non-compliance with the notices in these proceedings because there is no jurisdiction to do so is rejected. Subsection 327(1) of the NCCPA establishes the Tribunal's jurisdiction in respect of decisions it may review. Enforcement and compliance decisions under Part 6 of the NCCPA are specific excluded. This is not in dispute. However, the action taken by ASIC does not fall within Part 6 of the NCCPA. This is not a case where ASIC has made a finding of contravention and this decision is the subject of review. ASIC does not rely on contraventions of ss 266, 267 or 290 of the NCCPA to, for instance, enliven the discretion for the purposes of s 80(1)(d) of the NCCPA. ASIC's case is based on the contention that there is evidence Ms Callychurn did not comply with its notices, or at the least was uncooperative. The evidence of Ms Callychurn's conduct in respect of these notices is put forward by ASIC as evidence that she is not fit and proper.

171. Ms Callychurn's response to the ASIC notices and her evidence and submissions in these proceedings demonstrate that she does not fully appreciate the importance of complying with ASIC notices or in cooperating with ASICs investigations. At no stage in these proceedings did Ms Callychurn acknowledge the shortfall in her compliance. She was slow to respond to ASIC notices and when she did so she adopted a narrow and technical approach. Ms Callychurn maintained a somewhat defensive and combative response to ASIC's contentions did not provide a full and frank account about these matters.

**Ms Seyfarth**

172. Ms Callychurn appointed Ms Seyfarth as a director of UMS. In her affidavit, Ms Callychurn stated that her decision to appoint Ms Seyfarth was based on the fact that she was qualified, had previously worked with a credit licence holder and was familiar with the conduct of the business of a licensee. In the proceedings before the previous Tribunal, it was recorded that it had "somewhat belatedly" become apparent that Ms Seyfarth was the niece of Mr Frugtniet and had been bankrupt from 2004 to 2007 and was consequently automatically disqualified from managing corporations during this period. Ms Callychurn stated in in her affidavit that Ms Seyfarth no longer wish to be a director of UMS because of ASIC's attempts in the previous proceedings to discredit her.[104]

173. ASIC contends that the failure of Ms Callychurn to disclose these matters to ASIC or the Tribunal in the previous proceedings is a further reason why the Tribunal should have reason to believe Ms Callychurn is not fit and proper. This is because these are matters which would, it was submitted, have had a bearing on her suitability to undertake the role of fit and proper person for UMS.

174. The applicants contend that the fact Ms Seyfarth was related to Mr Frugtniet and had been previously made bankrupt were not matters that she was required to disclose. Ms Seyfarth previous bankruptcy was irrelevant because under ASIC's policy it was only necessary to provide details of bankruptcy within the 10 year period.[105] Because Ms Seyfarth had been appointed as a director in 2015, was being put forward as potential fit and proper person for UMS in 2015 and was made bankrupt in 2004, she was technically outside the 10 year period. ASIC submits that Ms Callychurn has taken a narrow in technical approach to her disclosure obligations.

175. The applicants also submit that it was unreasonable to impugn Ms Seyfarth simply because she was related to Mr Frugtniet as to do so would be to infer guilt by association.[106]

176. Arguably, it would have been desirable for Ms Callychurn to disclose both matters in the interests of being full and frank. However, given these matters arose during the course of

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[104] Affidavit of Ms Callychurn at [26].

[105] Transcript, T221 - T223 and Statement of Facts, Issues and Contentions dated 3 January 2018.

[106] Applicant's Closing Submissions dated 1 June 2018.

the previous proceedings and both parties submitted it was unnecessary for the Tribunal to review the previous transcript, is difficult to make proper assessment of the circumstances in which the these issues were raised before the previous Tribunal and whether Ms Callychurn's conduct was improper or unreasonable. On the face of it, there is some force to Ms Callychurn's submission. It is correct that under ASIC's own policy, the bankruptcy of a person is only relevant for the purposes of the assessment of whether the person is fit and proper if the person was made bankrupt within 10 years. Is it also correct that the fact that Ms Seyfarth was related to Mr Frugtniet should not impugn her character without more, such as, for instance, evidence she was involved in misconduct associated with Mr Frugtniet. As such, appointing Ms Seyfarth as a director and putting her forward as a fit and proper at the previous proceedings does not of itself establish that Ms Callychurn is not fit and proper.

**Alleged misleading information provided to former employer by Ms Callychurn**

177. This is a new ground raised by ASIC in these proceedings. This contention arises out of proceedings commenced by Ms Callychurn in the Fair Work Commission against her former employer ANZ. The decision of the Commission was made on 3 February 2016 and is reported in *Callychurn v* Australia *and New Zealand Banking Group* [2016] FWC 526. The decision sets out the background to Ms Callychurn's dismissal and the findings on her claim.

178. After the banning order made by ASIC was published, ANZ commenced its own investigations and decided to terminate Ms Callychurn's employment on two grounds. The first ground being that Ms Callychurn could not perform the inherent requirements of her role as a credit officer because of her banning. The second ground was based on a loss of trust and confidence because Ms Callychurn had not disclosed or sought approval in relation to her outside business interests in UMS and because she had failed to be forthright during disciplinary proceedings with the ANZ.

179. The Fair Work Commission dismissed her claim and, relevant to the issues raised against Ms Callychurn in these proceedings, found there was a breach of trust and confidence. First, Ms Callychurn had failed to disclose and seek approval to carry on business through UMS, which would have raised issues about a conflict of interest under ANZ's policies.[107] Secondly, the Commission found Ms Callychurn was not candid and truthful with the ANZ

[107] *Callychurn v ANZ* [2016] FWC 526 at [108]ff.

in the investigation.[108] Ms Callychurn appealed this decision to the Full Bench and the appeal was dismissed.[109]

180. ASIC contends that there are is no dispute, given the evidence before the Fair Work Commission and in these proceedings, that Ms Callychurn made a false statement to ANZ in response to queries made following the publication of the ASIC ban when she stated in an email to ANZ dated 27 March 2015 as follows:

> *4 I have not dealt with any applications in relation to any financial institutions hitherto or anytime in respect of ANZ let alone any financial institutions.*
>
> *5 I have not instructed or advised any clients in any capacity at any time.*

181. ASIC contends that this statement is clearly inconsistent with the evidence given by Ms Callychurn in these proceedings about her role with UMS[110] and, more specifically, with documents attached to the affidavit of Mr McKinnon which were authored by Ms Callychurn which are said to evidence such involvement.[111] The first is an email from Ms Callychurn to UMS clients asking them to complete and sign a credit check consent form. The email is dated 3 December 2012. The second document is an email from Ms Callychurn to an officer of AFG dated 29 July 2014 responding to concerns raised by AFG about Mr Frugtniet's banning by ASIC in June 2014. Ms Callychurn responded to these concerns with the following statement:

> *All transactions settled has (sic) been for and on behalf of the company and not any one individual so that I can confidently say that since 2001 besides Rudy working for the organisation, I have interviewed clients, and settled all loans in full compliance of the NCCP regulations.*

182. As already noted, the applicants contend ASIC cannot raise this issue in these proceedings. This is rejected for the reasons previously outlined. Ms Callychurn otherwise submits:

> *The Applicants refer to the emails and submit that it was in the context of one's livelihood and in so far as the email reflected assertions made by the Applicant may have been inconsistent, the Tribunal is invited to consider the Applicant's position of being unable to maintain her livelihood. Any such inconsistencies cannot in any way impact the otherwise credible distant testimony and evidence provided to the Tribunal by the Applicant.*[112]

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[108] *Callychurn v ANZ* [2016] FWC 526 at [111].

[109] *Callychurn v Australia and New Zealand Banking Group T/A ANZ* [2016] FWCFB 1944.

[110] Transcript, T179 - T180.

[111] Affidavit of Mr McKinnon sworn 1 December 2017, RJM3 and RJM4.

[112] Applicant's Closing Submissions dated 1 June 2018 at [26].

183. This submission is difficult to understand and does not provide an explanation in response to ASIC's unambiguous contention that she has provided false and misleading information to ANZ.

184. Ms Callychurn was cross-examined about the issue of whether she had made a false or misleading statement to ANZ and she gave evidence that the statement was not false "in context".[113] ASIC not only relies on the fact that Ms Callychurn gave false or misleading information to ANZ in 2015 to support its contention that she is not fit and proper but also relies on her evidence in the proceedings because it demonstrates her resistance in conceding an obvious point which "reflects most poorly on her honesty and candour".[114]

185. A review of the evidence given by Ms Callychurn in response to these issues does not reflect well on Ms Callychurn in this regard it is useful to outline some of this evidence. Ms Callychurn was cross-examined extensively on this issue, principally because her answers were either non-responsive or confusing.[115] In her earlier evidence, Ms Callychurn attempted to explain the answers given to ANZ as follows:

> *And so you don't dispute then that you said in that email, in particular at numbered paragraph 3, "I have not been a lone writer at any stage"?---Yes.*
>
> *"Or that I have not dealt with" - and this is number 4, "with any applications in relation to any financial institutions hitherto or at any time in respect of ANZ let alone any financial institution"?---That is correct.*
>
> *And at 5, "I have not instructed or advised any clients in any capacity at any time"?---That is correct.*
>
> *Now, you agree, don't you, that that's inconsistent with the picture that you painted for AFG?---Yes.*
>
> *Yes?---It is but this email is extracted as part of a chain of emails.*
>
> *Yes, so but just before - - -?---In context I do not dispute it.*
>
> *You don't dispute that you said that in an email and do you dispute that it was false?---No, not in context, no.*
>
> *You accept that what you have said there is false?---No.*
>
> *You don't accept that?---No.*
>
> *Right. Well, haven't you said earlier to the tribunal today even, that Mr Frugtniet might have written applications but you'd check them yourself?---Yes.*
>
> *So how does that gel with .2, "I have not dealt with any applications in relation to any financial institutions"?---Dealt in the sense that because this email is coming as - after a discussion with Mr Jain, so this is reinforcing the points that we*

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[113] Transcript, T227 at line 44.

[114] Respondent's Closing Submissions 11 May 2018 at [68].

[115] See generally, Transcript, T226 - T236.

*discussed. His main concern was the conflict of interest that I might have put loans through UMS and assessed those loans as an assessor of ANZ.*

*Yes?---That was the main issue they had or that I might have taken clients away from the ANZ and put them through to Unique - that was the - and that was the main conflict of the discussion we had. As a result of the discussions and text messages through which he confirmed that he has checked that I have not assessed any UMS deals while I was at ANZ and they have not found that I have done anything wrong during my time at ANZ. Those emails - nothing was sent in that context.*

*You haven't provided any of that contextual material that you describe?---No, because that was just part of the decision that was provided.*[116]

*Well, you've seen that it's ASIC - it's part of ASIC's case that you said something to ANZ?---Yes.*

*Which on its face was false?---I don't believe it's false in context.*

186. When Ms Callychurn was cross-examined about the two documents referred to in Mr McKinnon's affidavit which, on their face, are inconsistent with Ms Callychurn's statement to ANZ, she gave the following evidence:

*So again you're saying that that statement to AFG is somehow consistent with what you told ANZ?---No, it's not.*

*So what you told ANZ, it's false?---Hang on, since 2011. It appears to be incorrect, yes.*

*……..*

*MR KNOWLES: So you're saying now that you accept that what is in the email, recorded in the Fair Work Commission's decision, is incorrect?---Yes.*

*Why didn't you say that earlier? I mean it's not as though you've just struck upon this knowledge of interviewing clients?---No.*

*You would have known that earlier?---I might have - okay. When a person gets a banning order it is not a small thing. Contravention of the Credit Act is not a small thing for a person who works purely, 100 per cent, in credit activities. I would not deny that I might have glossed over a bit with my employer to save my job. Not that I - what I sent in that email is incorrect, but on the broader sense of things, if I want to go into the nitty gritty of why that was said, in what context, I accept that - the context of the conversation is not evidence. What was said in SMS text messages and discussions is not in evidence, and I have not put it forward either. Purely relying on the email that is in front of the tribunal and which is in evidence, that statement is glossed over, that it is incorrect.*

*You've said to the AFG person that you've interviewed clients and settled all loans in full compliance of NCCP regulations?---M'mm.*

*I mean it's not about a gloss. That's just straight up inconsistent with what you've told your employer?---M'mm.*[117]

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[116] Transcript, T226 - T227.

[117] Transcript, T234 at line 19 - T235 at line 2.

187. Having regard to the evidence, much of which is documented, the Tribunal is satisfied Ms Callychurn made misleading statements to ANZ as part of its investigation and that she did not give to the Tribunal a full and frank account of this issue when she was cross-examined. On the one hand, Ms Callychurn sought to maintain her earlier evidence that she supervised Mr Frugtniet and was involved in the business of UMS is its sole fit and proper person yet when responding to the ANZ investigation and, to this Tribunal in relation to her response to ANZ, she sought to reconcile the inherent contradiction between the two positions. When confronted with the statements made, in particular the statement made to AFG in email dated 29 July 2014, Ms Callychurn finally accepted that the statement made to ANZ was incorrect.

**Breach of condition on conveyancing licence of UMS**

188. This is a new ground raised by ASIC.

189. There is no dispute that the Business Licensing Authority of Victoria ('BLA') imposed conditions on the conveyancing licence held by UMS on or about 29 June 2012 as follows:

> *The licensee must not employ, contract, engage or otherwise allow the involvement of Rudy Noel Frugtniet or any company of which he is an officer or which is controlled by him, or any company or any person or company acting on behalf or in association with him, in any capacity in connection with the licensee.*
>
> *The licensee must not permit Rudy Noel Frugtniet, any company of which he is an officer or which is controlled by him, or any personal company acting on behalf of or an association with him to exercise direct or indirect control or to manage, carry on, or hold any financial or business interest in, or hold himself or itself out as being associated with the licensee.*

190. This condition was imposed following the VCAT order after which the BLA cancelled Mr Frugniet's conveyancing licence on 29 June 2011. This is not in dispute.

191. ASIC contends that Ms Callychurn allowed Mr Frugtniet to continue his involvement with UMS in contravention of this condition. Ms Callychurn contends ASIC cannot raise the alleged breach of condition in these proceedings but, in any event, contends that the condition did not prevent Mr Frugtniet from remaining at UMS as its secretary and in engaging in credit rather than conveyancing activities for UMS. She relies on a letter from the BLA dated 1 June 2011 which stated as follows:

> *Pursuant to section 28(1)(c) of the Act, the BLA invites the company to apply for permission under section 31 of the Act. The BLA understands as a result of the advice received on 22 June 2011 the company intends to make its application for*

*permission and pursuant to section 28(2) of the Act, the BLA advises that the company is required to make an application within 21 days of the date of this invitation (Thursday 21 July 2011).*

192. Section 31 of the *Conveyancers Act 2006 (Vic)* being "the Act" referred to in the letter, provides that a company may continue to hold a license despite disqualifying factors, in this case, being the fact that UMS no longer had a director who held a conveyancing licence by seeking permission to continue. The letter also notes that it was intended permission would be sought and this is consistent with Ms Callychurn's evidence. The applicants contend that given Ms Callychurn was applying for her licence and Mr Frugtniet was invited on behalf of the company to apply for permission, it is clear the BLA envisaged he could continue to be involved in the management of UMS.

193. This submission is difficult to understand given the clear terms of the condition and contents of the letter, which does not, on its terms, suggest this. Further, Mr Frugtniet was not being invited to seek permission but rather the letter was addressed to him on behalf of UMS. It is possible that the purpose of the invitation to seek permission was to provide a licensee with a transitional period to allow another director to be licenced to apply so the licence can continue. On balance, the position is not entirely clear, although we accept ASIC's submission that the terms of the condition appear to be clear.

194. The applicants also contend that this is not a matter that can be considered by the Tribunal as it relates to the contravention of a condition under an Act that is not the subject of review. She advanced a similar argument in relation to the allegation made by ASIC that UMS did not comply with notices issued under ss 266 and 267 of the NCCPA. The question of whether Ms Callychurn knew about a condition on a license prescribed by a regulatory authority and ignored or failed to comply with the condition and thereby expose a company to breach and potential contravention of an Act, is a matter that is relevant to the issue of whether she is fit and proper. For the reasons previously outlined, Tribunal does not accept that evidence of potential contravention or breaches of regulatory provisions are outside the scope of the Tribunal's review. These matters are factual issues in respect of which the Tribunal may make findings. Notwithstanding this, finding of a contravention or potential contravention of a condition or legislative provision should not be made lightly.

195. In this case, having regard to the uncertainty in this matter and the fact that the Tribunal does not have any evidence or legal submissions to clarify some of the aspects raised by Ms Callychurn, the Tribunal is not satisfied this ground is established.

**Conclusion**

196. ASIC contends that Ms Callychurn's past misconduct, being the contravention of the NCCPA and the failures and alleged misconduct particularised by ASIC in its Statement of Facts, Issues and Contentions, are serious matters. It is submitted that based on these matters, and Ms Callychurn's apparent failure to accept the significance of these concerns at the hearing of the review, Ms Callychurn lacks the necessary knowledge, skill, experience and candour and, as such, the Tribunal should have reason to believe she is not a fit and proper person.

197. Ms Callychurn denies the misconduct alleged and further contends there is no evidence before the Tribunal that she is currently not fit and proper. Ms Callychurn submits that all the matters raised by ASIC are, as at the date of the review, no longer issues as they have either been corrected or resolved. The bank account issue has been rectified, Mr Frugtniet that was removed from being listed as a contact person with COSL, the website issue has not been in operation for almost three years, the dispute with AFG has been settled and the 2012, 2013 and 2014 annual compliance certificates for UMS were completed without complaint. Ms Callychurn denies there was non-compliance with the notices issued under ss 266 and 267.

198. Both parties contend that the Tribunal should make its assessment of whether Ms Callychurn is fit and proper having regard to the circumstances at the time of the decision, although ASIC also contends that misconduct in the past is relevant and may inform such an assessment. This proposition can be accepted.

199. The expression "fit and proper" is not defined in the NCCPA.

200. ASIC's RG204 sets out what ASIC believes is the relevant standard for a person to be fit and proper for the purposes of engaging in regulated credit activities. The Regulatory Guide refers to competence, good character, diligence, honesty, integrity and judgement. These concepts are consistent with the observations of the High Court in the leading authority of *Australian Broadcasting Tribunal v Bond* [1990] HCA 33, where Mason CJ observed at [64], when considering the question of whether a person was fit and proper for the purposes of the *Broadcasting Act 1942 (Cth)*, that the statutory concept of a fit and proper licensee "takes account of qualities and characteristics of the licensee". Relevantly, his Honour stated at [66]:

> *A licensee which is a fit and proper person in the context of s.88(2)(b)(i) must have an appreciation of those responsibilities and must discharge them. Conversely, a licensee which lacks a proper appreciation of those responsibilities or does not discharge them is not, or may be adjudged not to be, a fit and proper person.*

201. Their Honours Toohey and Gaudron JJ also observed at [36]:

> *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. However, 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.*

202. The Tribunal is satisfied that Ms Callychurn contravened the NCCPA in January 2012 when she completed the 2011 annual compliance certificate by providing an answer that was false or misleading in a material particular. The Tribunal is also satisfied that Ms Callychurn allowed Mr Frugtniet to continue his involvement in the credit activities of UMS without providing adequate supervision or oversight after he had ceased to be a fit and proper person, after Mr Frugtniet had been banned by ASIC in June 2014 and at a time when Ms Callychurn was the sole fit and proper person for UMS. Ms Callychurn allowed Mr Frugtniet to submit credit applications that she did not review, she allowed him to continue as the loan writer for UMS clients with AFG because it was convenient, she allowed him to continue as the contact person for UMS with COSL and she allowed him to operate the UMS website and the UMS bank accounts. It is significant that this conduct occurred over a substantial period from January 2013 until at least late 2014 after ASIC had served its notices.

203. While this conduct took place a number of years ago, it was serious and reflects poorly on Ms Callychurn's character and judgement. It is also relevant to note that during the course of this review, namely in her evidence at the hearing and in submissions, Ms Callychurn did not acknowledge these errors. It was not until she was challenged in cross-

examination that Ms Callychurn made what seemed to be a number of reluctant concessions.[118]

204. While Ms Callychurn is entitled to put ASIC to proof of contentious matters, her failure to acknowledge matters that are clearly established by objective facts, leads the Tribunal to infer either that Ms Callychurn does not appreciate the significance of the issues raised or that she was being unnecessarily obstructive. In the alternative, it may be inferred that Ms Callychurn was lacking in candour. Any one of these explanations raises concerns about Ms Callychurn's character, judgement and fitness to manage credit activities.

205. The same can be said in relation to ASIC's allegations that Ms Callychurn made misleading statements to ANZ as part of its investigations and that UMS and Ozwide, companies that she was controlling, did not comply with ASIC notices.

206. The Tribunal is satisfied Ms Callychurn made misleading statements to ANZ in 2015 about her involvement in credit applications with financiers on behalf of UMS. This does not reflect well on her character and she did not concede the statements were incorrect until there had been extensive questioning on this issue on the second day of the hearing. The fact Ms Callychurn was not prepared to make this concession also does not reflect well on her character or candour.

207. Ms Callychurn has consistently maintained that she caused UMS and Ozwide to comply with ASIC notices. She does not concede there was non-compliance and her evidence about this is confusing and inconsistent. The Tribunal is not satisfied that there was adequate and complete compliance with these notices and, even more concerning, that Ms Callychurn gave a full and frank account about the documents held by UMS and Ozwide to the ASIC investigator, the delegate or the Tribunal. According to RG204, consistent with the leading authority of the High Court in *Australian Broadcasting Tribunal v Bond*, the good character of a person will be integral to the question of whether they are fit and proper.

208. This is not a case where Ms Callychurn says she did not understand or misunderstood her obligations. Nor is this a case where Ms Callychurn concedes errors and gives a plausible explanation or excuse for those errors. While Ms Callychurn gave evidence about the

[118] For instance, Transcript, T172, T226-7 and T234-5.

difficulties she was facing in trying to move Mr Frugtniet out of the business, Tribunal is not satisfied that Ms Callychurn approached this with any sense of urgency or that she had sufficient commitment to the important role she had taken on as the *sole* fit and proper person for UMS.

209. This is not a case where Ms Callychurn has provided detailed and credible evidence to the effect that she acknowledges her previous actions were unacceptable and that she has taken steps to ensure these matters do not arise in the future. Ms Callychurn states that she regularised the position in relation to the UMS bank statements and website but this was done after ASIC served its notice of concerns in October 2014.

210. Many consumers engage with credit providers and this will often be one of their most significant undertakings. Accordingly, it is important that those involved in providing credit activities are competent and diligent and that they undertake those activities with integrity and good judgement.

211. Having regard to the evidence, the Tribunal is not only satisfied that Ms Callychurn was not fit and proper at the time the incidents alleged by ASIC occurred but there but that there is reason to believe she is currently not fit and proper.

**IS THERE REASON TO BELIEVE THAT MS CALLYCHURN IS LIKELY TO CONTRAVENE THE CREDIT LEGISLATION?**

212. ASIC contends that, by reason of the matters set out in its Statement of Facts, Issues and Contentions and Ms Callychurn's lack of insight into the seriousness of the allegations made, the Tribunal should have reason to believe she is likely to contravene the credit legislation in the future.

213. The applicants submit that there is no evidence of a pattern of behaviour over a long period and the alleged contravention and non-compliance have been "isolated to a particular period of time".[119] It is also submitted that Ms Callychurn lodged the 2012, 2013 and 2014 annual compliance certificates for UMS and no complaint has been made by ASIC about these certificates.

[119] Applicant's Closing Submissions dated 1 June 2018 at [50].

214. The applicants rely on the decision of Deputy President Forgie in *Horwarth v Australian Securities and Investments Commission* [2008] AATA 278 at [135], where DP Forgie opined about the seriousness of the consequences of a banning order in describing the context of assessing what amounts to reasonable grounds, noting that a banning order "is a power that is exercised on the basis of the protection of the public and not for the punishment of the person banned or to penalise that person." The part of the passage extracted by the applicants focusses on issues relating to the exercise of discretion rather than whether the question of whether the ground for the exercise of the discretion exists. However, what DP Forgie is highlighting, which is undoubtedly correct and consistent with the decision of the Full Federal Court in *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93, is that in considering whether the Tribunal is satisfied there is reason to believe a person is likely to contravene, when findings of fact may have serious consequences "it may be accepted the Tribunal would exercise greater caution in evaluating the factual foundation for the decision to be reached."[120] In other words, the Tribunal should not rely on inexact proofs and speculative evidence but should be comfortably satisfied about a finding based on objective probative evidence.

215. The issue for the Tribunal is whether there is reason to believe this Callychurn is likely to contravene credit legislation in the future. This is not a subjective analysis and "the belief must rest on objective facts that would induce the relevant state of mind in a reasonable person."[121] As noted in *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 at [674] the ordinary construction of these words is "that the person in question had the relevant belief and there were reasonable grounds to cause or cause for that belief" but, according to Callinan J in *Daniels Corporation International Pty Ltd v Australian Competition And Consumer Commission* [2002] 213 CLR 245 at [130], this connotes a "relatively low threshold."

216. As observed by DP Forgie in *Superannuation Warehouse Australia Pty Ltd* v *Australian Securities And Investments Commission* [2019] AATA 88 at [56] when considering whether an entity is "likely to contravene", the issue is not whether the entity *will* do so, which requires a degree of certainty is not required under the legislative test.[122] As DP

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[120] *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93 at [120] (Flick and Perry JJ).

[121] *Power v Hammond* [2006] VSCA 25 (22 February 2006) at [106].

[122] The Corporations Act was amended in 2012 to "clarify" the statutory test under ASIC's licensing regime to provide that ASIC was not required to believe with a matter of certainty that the person will contravene obligations in the future but rather that they were likely to do so.

Forgie noted, and the Tribunal accepts, the ordinary meaning of the word "likely" in this context is "probable".

217. In this case, the Tribunal satisfied there is cogent evidence Ms Callychurn:

(1) contravened the NCCPA on one occasion in January 2012;

(2) failed to properly discharge her duties as a fit and proper person from January 2012 until at least late 2014 by allowing Mr Frugtniet to continue involvement in the credit activities of UMS;

(3) did not take steps to remove Mr Frugtniet from being involved in the credit activities of UMS until after ASIC had served its notices of concerns;

(4) failed to cause UMS and Ozwide to adequately comply with ASIC notices or, at the least, did not cooperate with ASIC's investigations; and

(5) did not give a full and frank account to her former employer, ANZ, in response to its investigations.

218. The Tribunal is also satisfied that Ms Callychurn did not give a full and frank account to the Tribunal in her evidence in this review and that she demonstrated a lack of insight about the significant of her failures. Relevantly, the Tribunal is not satisfied Ms Callychurn understands or accepts the seriousness of the role of a fit and proper person in undertaking credit activities and therefore cannot be satisfied she is likely to comply with the credit legislation in the future.

219. Accordingly, the Tribunal is satisfied that there is reason to believe Ms Callychurn is likely to contravene the credit legislation in the future.

**SHOULD MS CALLYCHURN BE BANNED AND IF SO FOR HOW LONG?**

220. Given the Tribunal's findings of contravention, its findings Ms Callychurn is not fit and proper and the findings that she is likely to contravene, ASIC has established at least three of the grounds which give rise to the discretion to make a banning order under s 80 of the NCCPA.

221. The applicants contend Ms Callychurn has suffered financially and she has lost her capacity to earn a livelihood and to take care of her children. It is submitted that ASIC's ban not only caused Ms Callychurn to lose her employment but affected her future employment prospects. She contends that there was no financial gain by her and UMS customers have not suffered any loss. Ms Callychurn also submits that she has taken steps to ensure UMS has distanced itself from Mr Frugtniet successfully for almost four years and she has demonstrated a genuine desire to comply with credit legislation.

222. ASIC contends Ms Callychurn should be the subject of a banning order and that a period of five years is appropriate. It is further contended that the Tribunal should have regard to Regulatory Guide 218,[123] which provides guidance on how ASIC uses its administrative powers and, relevant to this case, the matters that should be taken into account when exercising those powers. Table 2 of RG218 provides guidance of potential banning periods and the factors to be considered. It is submitted the Tribunal should have regard to the fact that Ms Callychurn's conduct involved the provision of false or misleading information to ASIC, inappropriate acquiescence to Mr Frugtniet's ongoing involvement with UMS, failure to comply with ASICs notices and a general lack of frankness and candour towards ASIC and the Tribunal. According to ASIC, Ms Callychurn has shown little awareness of her past shortcomings and the Tribunal could not have any confidence in her ability to engage in credit activities in a fit and proper manner in the future. Relevantly, Ms Callychurn did not present any character references. ASIC contends that it is therefore necessary and appropriate for Ms Callychurn to spend time away from the credit services industry to learn from her past mistakes and ensure that she will not repeat them. Is submitted that a five-year banning order will serve the purpose of protecting the public from risk and will send a message of general deterrence to participants in the industry.

223. According to the note to Table 2, the factors and examples set out in the table have been compiled having regard to the propositions formulated by Santow J in *HIH Insurance Limited and HIH Casualty and General Insurance Ltd; Australian Securities and Investments Commission v Adler* [2002] NSWSC 483 at [56]. *ASIC v Adler* was civil penalty proceeding commenced by ASIC against a number former directors who were alleged to have contravened the *Corporations Act 2001.* ASIC sought, among other things, disqualification orders. His Honour considered the relevant authorities and set out

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[123] Australian Securities and Investments Commission, *Regulatory Guide 218 - Licensing: Administrative action against persons engaging in credit activities,* November 2010 ('RG218').

15 factors which were considered to be relevant to the issue of disqualification. Relevantly, Santow J noted that banning orders were "designed to protect the public interest" by safeguarding consumers and investors.[124] His Honour also observed that a banning order has "the motive of personal deterrence" and "the objects of general deterrence", although it is not intended to be punitive.[125] His Honour stated:

> *In assessing an appropriate length of prohibition, consideration has been given to the degree of seriousness of the contraventions, the propensity that the defendant may engage in similar conduct in the future and the likely harm that may be caused to the public.*[126]

224. His Honour recognised that it was "necessary to balance the personal hardship to the defendant against the public interest and the need for protection of the public from any repeat of the conduct" and that "[a] mitigating factor in considering a period of disqualification is the likelihood of the defendant reforming".[127]

225. Table 2 sets out potential outcomes, factors and examples of conduct (which are stated to be indicative only) for administrative action. As stated in Table 2, it may be appropriate for a banning order of a period of 10 or more years or a permanent banning order where there is dishonesty and intent to defraud, continued knowing and wilful contraventions of the law, causing a large financial loss or making large financial gain, previous contraventions, serious incompetence and irresponsibility, likelihood that the person will engage in similar contravening contract in the future and significant adverse impact on consumer confidence. A banning order for a period of between three and 10 years may be appropriate where there is an adverse impact on consumer confidence, false, misleading, deceptive or unconscionable conduct or conduct with a lesser degree of dishonesty, conduct causing a significant financial loss or making a significant financial gain, a deliberate course of conduct to enrich themselves or others at others' expense, incompetence and irresponsibility but with the possibility that the person may develop requested skills and abilities and disregard for the law and compliance with regulations. A banning for less than three years is considered to be appropriate where there is some loss to the client but as a result of carelessness or inadvertence rather than dishonesty, an attempt to remedy the contravention and full co-operation with ASIC, no previous history

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[124] *HIH Insurance Limited and HIH Casualty and General Insurance Ltd; Australian Securities and Investments Commission v Adler* [2002] NSWSC 483at [56](ii).

[125] *Ibid* [56](v) and (vi).

[126] *Ibid* [56](ix).

[127] *Ibid* [56](x) and (xi).

of contraventions and indications of a clear intention to comply with legal obligations in demonstrated behaviour.

226. It is clear the factors listed in Table 2 are intended to provide guidance, based on the analysis undertaken by Santow J in *ASIC v Adler*, as to how the gravamen of certain conduct will be assessed by ASIC in the exercise of the discretion to ban. This guidance is consistent with Court authority and with the objects of the NCCPA. It is a generally accepted principle that the Tribunal should follow government policy unless there are cogent reasons for not doing so, in the particular circumstances of a given case.[128] Having regard to the applications under review, the Tribunal considers it is relevant and appropriate to have regard to the policy contained in RG218, including those factors set out in Table 2.

227. The shortcomings identified by the Tribunal are significant. They involve misleading statements to ASIC and ANZ, a failure to supervise the credit activities of UMS, a lack of insight about the significance of these shortcomings, the failure to adequately comply with ASIC notices and co-operate with ASIC's investigations and a lack of candour in her evidence in the proceedings. When the evidence is examined as a whole, it is apparent Ms Callychurn's conduct falls below what would be expected by a person undertaking the important role of overseeing the operations of a regulated entity. This would be likely to have an adverse impact on consumer confidence and, as such, a banning order would promote consumer confidence and serve the purpose of general deterrence. This is not a case where there has been inadvertence or carelessness. Nor is this a case where Ms Callychurn has demonstrated an understanding of the significance of the conduct and made a commitment to comply with the legal obligations into the future. Relevantly, the changes made by Ms Callychurn were made after ASIC served its notices of concerns.

228. The applicants' submission that there was no financial gain is rejected. There is evidence Ms Callychurn made misleading statements to ANZ and allowed Mr Frugtniet to continue his involvement with UMS, particularly in relation to AFG, and this was based on self-interest. While it can be accepted Ms Callychurn was in a difficult position following the VCAT orders made against Mr Frugtniet, this does not justify her conduct and the fact she raises this as an excuse does not reflect well on her character or integrity. Further, Ms

[128] *Re Drake and Minister for Immigration and Ethnic Affairs* [1979] 2 ALD 634 ('Re Drake No 2') discussed in *Tarrant v Australian Securities and Investment Commission* [2013] AATA 926 at [19] – [21] (President D Kerr and Senior Member J Redfern).

Callychurn's submission that there were no consumer losses is also rejected. While it can be accepted ASIC does not put forward evidence of consumer loss, there is no evidence to support Ms Callychurn's contention that there was no loss. At best, there is no evidence either way in relation to this matter but this cannot count in Ms Callychurn's favour.

229. The Tribunal accepts that Ms Callychurn has already been banned for a period of over four years and accepts she has suffered hardship by being unable to operate the UMS business. Ms Callychurn's employment was terminated but this was in part because of her failure to seek approval from ANZ to carry on the UMS business and for providing misleading information to ANZ as part of its investigation. Neither of these matters were a consequence of ASIC's banning action.

230. Having regard to these matters and the Tribunal's findings, the Tribunal is satisfied a banning order is warranted and that an order of at least five years is appropriate in the circumstances.

**IS THERE REASON TO BELIEVE THAT UMS IS NOT FIT AND PROPER OR THAT IT IS LIKELY TO CONTRAVENE SECTION 47?**

231. Subsection 55(1) of the NCCPA provides the power to cancel a credit licence if ASIC (or the Tribunal on review) has reason to believe the licensee is *not a fit and proper* to engage in credit activities or the licensee *is likely to contravene* an obligation under 47 of the NCCPA. A licence may also be cancelled if the licensee has contravened an obligation under s 47 but there is no such allegation in this case.

232. Subsection 55(2)(b)(ii) provides that if the licensee is not a natural person and, for instance, is a corporation (as in this case), in considering whether there is reason to believe the licensee is likely to contravene any credit legislation or is not fit and proper to engage in credit activities, ASIC *must* have regard to:

> *whether ASIC has reason to believe that any of the persons referred to in paragraph 37(2)(h) in relation to the person is not a fit and proper person to engage in credit activities;*

233. Subsection 37(2)(h)(i) refers to "each director, secretary or senior manager of the body corporate who would perform duties in relation to the credit activities to be authorised by the licence" of the body corporate.

234. The Tribunal has found that Ms Callychurn, who is director and senior manager of UMS, is not fit and proper to engage in credit activities. She is the only person who has been put forward to perform duties in relation to the credit activities to be undertaken by UMS. In their closing submissions, the applicants contend that Mr David Fu, who is an accountant and tax agent, is the secretary of UMS and has maintained this position since 2016. However, Ms Callychurn provided no evidence in support of this contention. There is no evidence about Mr Fu's current involvement with UMS nor whether he would consent to undertaking such a role. Further, there is no evidence that Mr Fu would meet the requirements to be a fit and proper or key person for the purposes of the credit legislation.

235. Accordingly, the Tribunal finds that UMS is not fit and proper to engage in credit activities.

236. UMS is not licensed. As such, a further question arises as to whether, if the licence held by UMS was reinstated, there is reason to believe UMS would be likely to contravene the general conduct obligations set out in s 47 of the NCCPA. Those obligations include doing all things necessary to ensure that the credit activities authorised by the licensee are engaged in efficiently honestly and fairly, that the licensee has in place adequate arrangements to ensure the clients of the licensee are not disadvantaged by any conflict of interests, that the licensee complies with the credit legislation and maintains the competence to engage in the credit activities authorised by the license. Given that the Tribunal has found the purported fit and proper person for UMS is not fit and proper and should remain banned from undertaking credit activities, UMS does not have an appropriate responsible manager in place to undertake these duties to ensure compliance. This being the case, there is reason to believe UMS would be likely to contravene the general conduct obligations if it was reinstated.

**SHOULD THE LICENCE OF UMS BE CANCELLED?**

237. The Tribunal is satisfied that the ground for cancellation exists, namely that UMS is not fit and proper to engage in credit activities and that, if its licence was reinstated, UMS would be likely to contravene the credit legislation. As already noted, there is no alternative fit and proper person identified to take over this role and, in the circumstances, it is appropriate for the cancellation of the credit licence of UMS to be affirmed.

**DECISION**

238. The decisions under review are affirmed.

*I certify that the preceding 238 (two hundred and thirty-eight) paragraphs are a true copy of the reasons for the decision herein of Deputy President J Redfern.*

.....[sgd].....

Associate

Dated: 25 October 2019

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| Dates of hearing: | **7 and 26 March 2018** |
| Date of last submission: | **13 August 2019** |
| Applicant: | **In person** |
| Respondent: | **In person** |

## ATTACHMENT - Extract from *National Consumer Credit Protection Act 2009*

**37 When a licence may be granted--applicants other than ADIs**

When ASIC must grant a licence

(1) ASIC must grant a person (other than an ADI) a licence if (and must not grant the person a licence unless):
- (a) the person has applied for the licence in accordance with section 36; and
- (b) ASIC has no reason to believe that the person is likely to contravene the obligations that will apply under section 47 if the licence is granted; and
- (c) ASIC has no reason to believe that the person is not a fit and proper person to engage in credit activities; and
- (d) the person has given ASIC any additional information or audit report requested by ASIC under subsection (4); and
- (e) the person meets any other requirements prescribed by the regulations.

Note: ASIC must not grant a licence to a person contrary to a banning order or disqualification order, or if a prescribed State or Territory order is in force against the person or certain representatives of the person (see section 40).

Matters ASIC must have regard to

(2) For the purposes of paragraphs (1)(b) and (c), ASIC must (subject to Part VIIC of the Crimes Act 1914 ) have regard to the following:
- (a) whether a registration under the Transitional Act, a licence or an Australian financial services licence of the person has ever been suspended or cancelled;
- (b) whether a banning order or disqualification order under Part 2-4 has ever been made against the person;
- (c) whether a banning order or disqualification order under Division 8 of Part 7.6 of the Corporations Act 2001 has ever been made against the person;
- (d) whether the person has ever been banned from engaging in a credit activity under a law of a State or Territory;
- (e) any relevant information given to ASIC by a State or Territory, or an authority of a State or Territory, in relation to the person;
- (f) if the person is not the trustees of a trust--whether the person has ever been insolvent;
- (g) if the person is a single natural person:
  - (i) whether the person has ever been disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001* ; and
  - (ii) any criminal conviction of the person, within 10 years before the application was made;
- (h) if the person is not a single natural person, whether ASIC has reason to believe that any of the following persons is not a fit and proper person to engage in credit activities:
  - (i) if the person is a body corporate--each director, secretary or senior manager of the body corporate who would perform duties in relation to the credit activities to be authorised by the licence;
  - (ii) if the person is a partnership or the trustees of a trust--each partner or trustee who would perform duties in relation to the credit activities to be authorised by the licence;
- (i) any other matter ASIC considers relevant;
- (j) any other matter prescribed by the regulations.

Note: Part VIIC of the *Crimes Act 1914* includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them.

(3) ASIC must (subject to Part VIIC of the *Crimes Act 1914* ), in considering whether it has reason to believe that a person referred to in paragraph (2)(h) is not a fit and proper person to engage in credit activities, have regard to:
- (a) the matters set out in paragraphs (2)(a) to (g); and
- (b) any other matter ASIC considers relevant; and
- (c) any other matter prescribed by the regulations;

in relation to that person.

ASIC may request information or audit report from applicant

(4) ASIC may give a written notice to a person who has applied for a licence requesting the person to lodge with ASIC, within the time specified in the notice, either or both of the following:

(a) additional information specified in the notice in relation to any matters that ASIC may have regard to in deciding whether to grant the licence;

(b) an audit report, prepared by a suitably qualified person specified in the notice, in relation to matters that ASIC may have regard to in deciding whether to grant the licence.