**DECISION AND REASONS FOR DECISION**

# Birdseye and Tax Practitioners Board [2021] AATA 1011 (20 April 2021)

Division: TAXATION AND COMMERCIAL DIVISION

File Numbers: **2020/1829, 2020/6693**

Re: **Nicholas Birdseye**

APPLICANT

And **Tax Practitioners Board**

RESPONDENT

File Numbers: **2020/1830, 2020/6694**

Re: **Claim IT (SA) Pty Ltd**

APPLICANT

And **Tax Practitioners Board**

RESPONDENT

## DECISION

Tribunal: **Mr P W Taylor SC, Senior Member**

Date: **20 April 2021**

Place: **Adelaide**

**2020/1829, 2020/1830**

Each of the Board's 20 February 2020 registration termination decisions is affirmed.

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**2020/6693, 2020/6694**

Each of the Board's 20 February 2020 five year determination decisions is set aside and in substitution for those determinations, the Tribunal determines that there is no period in which the respective review applicants may not apply for registration.

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

Mr P W Taylor SC, Senior Member

## CATCHWORDS

*TAX AGENTS – tax agent registration termination – whether applicants breached the Code of Professional Conduct – acting honestly and with integrity – conduct of personal affairs – competent provision of tax agent services – whether applicant is a fit and proper person – lodgement and payment defaults – decisions under review affirmed*

*TAX AGENTS – re-application determination – applicants ineligible to re-apply for registration for five year period – maximum ineligibility period – consideration of purpose of registration preclusion period – decisions under review set aside and substituted*

## LEGISLATION

*A New Tax System (Goods and Services Tax) Act 1999 (Cth) s 2-30, 27-5, 31-5, 31-15, 31-25, 33-3, 33-5, 162-5, 195-1*

*Corporations Act 2001 (Cth) s 203A*

*Fringe Benefits Tax Assessment Act 1986 (Cth) s 30*

*Income Tax Assessment Act 1936 (Cth) ss 8, 23L, 161, 161A, 162, 163, 166, 167, 168, 169, 252*

*Income Tax Assessment Act 1997 (Cth) ss 1-7, 5-5, 8, 28-115, 318, 355-100, 995*

*Industry Research and Development Act 1986 (Cth) s 27A*

*Superannuation Guarantee (Administration) Act 1992 (Cth) ss 17, 19, 22, 23, 33, 35, 43, 46, 49, 57, 59*

*Superannuation Industry (Supervision) Act 1993 (Cth) ss 6, 11A, 35D*

*Tax Agents Services Act 2009 (Cth) ss 2-5, 2-10, 20-5, 20-15, 20-25, 20-45, 20-50, 30-5, 30-10, 30-15, 30-20, 30-35, 40-5, 40-15, 40-25, 50-5, 60-95, 60-100, 60-105, 60-110, 60-115, 60-120, 60-125, 90-5*

*Tax Agent Services Regulations 2009 (Cth) reg 8*

*Taxation Administration Act 1953 (Cth) ss 3A, 8C, 8D, 8F, 8Y, sch 1*

**CASES**

*A Solicitor v Council of the Law Society of NSW [2004] HCA 1; (2004) 216 CLR 253*

*Aero Marine Consulting Pty Ltd [2003] FCA 1016*

*Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321*

*Carter and Tax Practitioners Board [2017] AATA 528*

*Cheng Li and Tax Practitioners Board [2014] AATA 299*

*Comino v Tax Agents' Board of NSW [2009] AATA 766*

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

*Delis v Tax Practitioners' Board [2016] FCA 570*

*Hancox and Commissioner of Taxation [2012] AATA 836*

*Hancox v Commissioner of Taxation [2013] FCA 735*

*Hughes and Vale Pty Ltd v State of NSW (No 2) (1955) 93 CLR 127*

*Phillip Same Accountants Pty Ltd and Tax Practitioners Board [2010] AATA 439*

*Proh and Tax Agents' Board of Victoria [2010] AATA 149; (2010) 78 ATR 663*

*Shmuel and Tax Practitioners Board [2019] AATA 2168*

*SRBP and Tax Practitioners Board [2016] AATA 456; (2016) 103 ATR 708*

*Stasos v Tax Agents' Board of New South Wales [1990] AATA 346; (1990) 21 ALD 437*

*Re Su and Tax Agents' Board, South Australia [1982] AATA 127; (1982) 61 FLR 1*

*The Roads and Traffic Authority of NSW v Commissioner of Taxation (1993) 43 FCR 223*

*Toohey and Tax Agents' Board of Victoria [2009] AATA 603*

*Toohey v Tax Agents Board of Victoria (No 2) [2008] FCA 1796; (2008) 106 ALD 506*

*Toohey v Tax Agents' Board of Victoria (No 3) [2010] FCA 356; (2010) 78 ATR 905*

*Wyborn v Tax Agents' Board of NSW [2007] AATA 1492*

**SECONDARY MATERIALS**

*Explanatory Paper TPB 01/2010 "Code of Professional Conduct"*

*Explanatory Paper TPB(EP) 02/2010 "Fit and proper person"*

*Information Sheet TPB(I) 28/2016*

*Notice of Requirement to Lodge a Return for the Year of Income Ended 30 June 2018*

*Practice Statement Law Administration PS LA 2011/15*

**REASONS FOR DECISION**

**Mr P W Taylor SC, Senior Member**

**20 April 2021**

1. Mr Nicholas Birdseye ("Mr Birdseye") has been a registered tax agent since about 1981. Claim It SA Pty Ltd ("Claim It") has been a registered tax agent since May 2002. Claim It is the (or a) trustee of the Nicholas Birdseye Family Trust.[1] Mr Birdseye is Claim It's public officer and sole director, as well as being a beneficiary of the family trust.

2. Consistent with their similar registration status, and close association, Mr Birdseye and Claim It operated together, under the trading name Nicholas Birdseye & Associates ("NB&A").[2] After the *Tax Agents Services Act 2009* (Cth) ("TASA") came into operation Mr Birdseye and Claim It retained their status as registered agents, and continued to operate together. NB&A had up to nine employees, including three other registered tax agents. Its client base appears to have varied over time, and been within a range from about 2,500 to something in the order of 3,000 clients. That was broadly the state of things at the time of the circumstances giving rise to the present proceedings.

3. The principal aspects of those circumstances were the decisions by the Tax Practitioners Board ("the Board"), at its 20 February 2020 meeting, to terminate the registrations of both Mr Birdseye and Claim It. The Board also decided to prohibit each of them from applying for re-registration for a period of five years . The Board made those decisions, under TASA ss 40-5(1)(b), 40-15(1)(b) & 40-25(1). The Board's 2 March 2020 letters notified Mr Birdseye of those findings and decisions. The letters informed him that the termination decisions would take effect from 1 April 2020.

4. The termination decisions were the subject of an interim, and conditional, stay ordered by this Tribunal on 31 March 2020. That stay came to an end on 8 May 2020, when the

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[1] Between March 2016 and March 2018 Claim It was the subject of a Federal Court of Australia insolvency winding up order. During that period Claim It Financial Planning Pty Ltd, a company of which Mr Birdseye was also the sole director, was appointed as a trustee of the Family Trust, either in addition to, or in substitution for, Claim It.

[2] In the review hearing Mr Birdseye estimated that he tried to conduct all the initial client interviews, and would have been personally involved in the preparation of about 80% of the client taxpayer income tax returns lodged by the combined practice. Those claims may not be completely accurate, at least in relation to past events. They seem rather extravagant claims, given that NB&A had about nine other staff members, including three registered tax agents. They involve assertions that appear to differ significantly from what Mr Birdseye told the ATO in March 2015:- *see paragraph 171(c) below*. Nevertheless, I have accepted that Mr Birdseye was a controlling and active influence in the practice and, for the sake of simplicity, I will usually simply refer to the tax agent practice entity as "NB&A" – without attempting to differentiate between Mr Birdseye's conduct and the activities of other Claim It personnel.

Tribunal's reserved decision formally refused the stay applications Mr Birdseye and Claim It had made.

**THE GROUNDS FOR THE BOARD'S TERMINATION DECISION**

5. The Board's February 2020 decisions followed investigations it had notified to Mr Birdseye in letters dated 20 September 2019. The notice letters alluded to allegations that Mr Birdseye and Claim It had failed to comply with / satisfy various TASA provisions. The specific, but unparticularised, allegations were that the two tax agents (i) had not acted with honesty and integrity as tax agents, (ii) had not complied with taxation laws in relation to their personal affairs and, (iii) were not "fit and proper" entities for registration. In the case of Claim It, the investigation notice also alleged that the company "may have" failed to ensure that its tax agent services were provided competently.

6. Although the Board's investigation notices were themselves uninformative, they followed, and were likely prompted by, three misconduct complaint referrals from the ATO. Those referrals had occurred in August 2018, November 2018 and July 2019.

7. **August 2018**:- The 29 August 2018 referral was the result of the Australian Taxation Office's ("ATO"), partially completed, audit of 53 income tax returns ("ITRs") of NB&A clients. Those ITRs predominantly related to the 2015 / 2016 tax year. The ATO's August 2018 letter explained that the particular clients had been selected for audit because they had large claims for work related expenses, and for rental property expenses. The substance of the ATO audit findings, and related assessments, was that the 31 completed client audits had resulted in:

   (a) approximately 168 audit adjustments, of which 76 involved work related expense claims, and another 76 involved property expense claims;

   (b) 42 adjustments (the majority of which necessarily involved either work related, or property, expense claims) that had been the result of voluntary disclosure by the taxpayer clients;

   (c) a total (net) value of $581,724 for all the audit adjustments, and an overall tax shortfall of $193,120.45;

(d) an overall total of 147 penalties (121 for lack of reasonable care, and only 23 for recklessness) totalling $46,815.35;

(e) only eight instances where the audit assessment had been the subject of objections – and resulted in (i) six objection decisions, (ii) three instances where all the expenses claims had been allowed and, (iii) three instances where the property expense claims had been allowed.

8. **November 2018**:- The ATO's 8 November 2018 referral related to three companies of which Mr Birdseye was recorded as being a director. Those companies, and the subject matter of the ATO's concerns, were as follows:-

(a) ***Medlow Chocolates Pty Ltd***:- The company had unpaid superannuation guarantee obligations for at least the period from 1 July 2016 to 30 September 2017, and a vaguely described, but apparently relatively modest, GST shortfall and penalty liability in relation to Business Activity Statements ("BAS") for the three quarters in the tax year ended June 2015.

(b) ***Sazzii Pty Ltd***:- The company had an outstanding tax debt of $124,189. The debt arose from an unsubstantiated research and development expense claim in Sazzii's 2013 ITR. The 2013 ITR was the only income tax return the company had lodged in the 11 year period from 2008 to 2018.

(c) ***Podpac Pty Ltd:***- The company had not lodged its 2013 ITR.

9. **July 2019**:- The ATO's 2 July 2019 referral report also related to Medlow Chocolates Pty Ltd. It identified three aspects of the company's ongoing taxation obligation defaults. They were (i) ITR lodgement default (for all the tax years from June 2015 to June 2018), (ii) BAS lodgement defaults (for the 30 month period from January 2016 to September 2018) and, (iii) superannuation guarantee lodgement and payment defaults (for the period from December 2017 to June 2018).

10. The extent of, and Mr Birdseye's activities during, the Board's investigation process are not readily apparent. At about the same time he received the Board's notice Mr Birdseye was apprised of the ATO's intention to audit his 2018 ITR, and consider the state of his lodgement compliance. Perhaps unsurprisingly, therefore, his immediate response to the Board's notice conveyed a lack of surprise, an expectation the ATO would make

submissions to the Board, and an assumption that he would have an opportunity to respond to those submissions. Shortly after that initial response he contacted the ATO, ascertained the extent of outstanding ITR lodgement obligations of entities with which he was associated, and agreed to lodge the required returns by 11 October 2019.

11. For its part the Board's investigation appears to have involved consideration of the ATO's previous referrals, obtaining further information from the ATO about Mr Birdseye's association with various entities, and their outstanding lodgement and debt obligations. In addition, in mid December 2019 the Board issued questionnaires to, but obtained only five uninformative responses from, 22 NB&A clients. Those clients had not been included in the ATO's previous referrals, but the Board knew their 2018 / 2019 ITRs had recently been audited. (The audit results were later included in the ATO's April 2020 referral).[3] This limited information indicates the Board's investigation, particularly in relation to the ATO client audits, proceeded largely as a document gathering exercise, and attached primary significance to the appearance (from the ATO's referral documents) of taxation law non-compliance by Mr Birdseye and Claim It. At least in hindsight, and perhaps not only so, this apparently limited nature of the investigation process was regrettable. The Board had ample powers of investigation (*see paragraph 32 below*), it knew that Mr Birdseye was critical of the ATO audit process and conclusions, and his response to the investigation notices indicated (clearly enough) that he expected to be afforded an opportunity to address the ATO's views about the client audit issues during the investigation process. Against that background, the miscommunication that preceded the Board's termination decisions (*see paragraph 16 below*), and the somewhat ambiguous, but essentially serious (and ultimately abandoned), adverse finding the Board made about Mr Birdseye's honesty in relation to work related expense claims (*see paragraphs 17 & 22 below*), it would have been preferable if the investigation process had fully utilised the Board's powers. Such a course would likely have diminished (and perhaps avoided) not only the questionable factual basis for some of the Board's findings (*see paragraphs 97 & 138 to 142 below*), but also the subjective perception of procedural unfairness that was detectable both in Mr Birdseye's April 2020 affidavit (*see, for example, paragraphs 206(a) & 206(b) below*) and in his submissions in the course of the review proceedings.

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[3] A sixth questionnaire response, not included in the February 2020 submissions documents, was provided with a 21 August 2020 email from the Board to Mr Birdseye's solicitor. That email also confirms that the Board neither interviewed any NB&A clients nor requested any further information from them.

12. In any event, by early February 2020 Board officers had prepared two submissions. They were provided to Mr Birdseye in early February 2020, and considered by the Board at its 20 February 2020 meeting. The Board submission relating to Claim It was a 923 page document that included a 13 page summary and 30 attachments. The summary noted the ATO's March 2016 referral to the Board, and recorded the following matters:-

(a) Claim It's BAS lodgement defaults for the period from May to November 2019:- *see paragraph 52 below*.

(b) the fact that Claim It had made no BAS payments since mid-October 2018, and that its currently recorded (GST and PAYG withholding) tax debt approximated $68,500: – *see paragraph 59 below.*

(c) the fact of a substantial tax debt, that Claim It had incurred prior to March 2016:- *see paragraph 13 below.*

(d) the ATO's referrals of December 2015 (*see paragraph 171 below*) and August 2018 (*see paragraphs 7 above & 175 below*) concerning the quality of Claim It's tax agent services.

13. In relation to Claim It's March 2016 tax debt, the February 2020 submission briefly recorded the following series of events:-

(a) ***April 2015***:- Claim It had a (GST and PAYG withholding) tax related debt of $275,814 and had received a statutory demand from the ATO.

(b) ***October 2015***:- Claim It failed to have the statutory demand set aside.

(c) ***January 2016***:- Relying on the statutory demand, the Deputy Commissioner of Taxation commenced winding up proceedings against Claim It.

(d) ***February 2016***:- By the beginning of February 2016, Claim It's tax related debt had increased to $351,430. On 24 February 2016, Mr Birdseye had been issued with a $152,130 director penalty notice. (The notice related to Claim It's unpaid PAYG withholding liabilities for substantially the whole of the three year period from September 2012 to November 2015.)

(e) ***23 March 2016***:- The Federal Court of Australia had ordered that Claim It be wound up in insolvency. At that date, Claim It's tax related debt approximated $411,000.

(f) ***March 2018***:- Claim It and Mr Birdseye had disputed the 2014 to 2016 income tax liabilities of the Nicholas Birdseye Family Trust. That dispute had been resolved by a 13 March 2018 Deed of Settlement. As part of the underlying arrangements Claim It had first been placed in administration and, in the latter part of 2018, funded by a $230,000 payment from Mr Birdseye, it then "traded" out of administration.

14. Proper understanding of that, somewhat cryptic, summary of the circumstances of Claim It's tax debt as at March 2016 requires regard to the supporting attachments to the Board's February 2020 submission document. They establish that under the March 2018 arrangements:-

(a) the Commissioner of Taxation had agreed

(i) not to disallow "carry-forward loss" claims in the Family Trust's pre 2016 ITRs;

(ii) to support a Deed of Company Arrangement for Claim It;

(iii) to release Mr Birdseye from liability under the February 2016 director penalty notice.

(b) Claim It Financial Planning Pty Ltd (as the then trustee of the Family Trust) agreed to discharge all of the Trust's 2016 to 2018 (i.e. Claim It's period in liquidation) BAS lodgement, and payment, obligations by 31 March 2018.

(c) Mr Birdseye provided $230,000 to fund the Deed of Company Arrangement.

(d) Creditors accepted their Deed rights and otherwise released their claims.

(e) The Deed Administrator was to distribute the fund between Claim It's admitted creditors.

15. The Board submission relating to Mr Birdseye himself contained a 22 page summary and 64 attachments, resulting in just over 1,100 pages of material. A substantial part of the summary addressed the ATO's December 2015 referral and its August 2018 audit. It also

outlined Mr Birdseye's apparent status, as a director or trustee, of eight different entities. In relation to those entities, the submission noted various lodgement defaults and tax debts, including instances where Mr Birdseye had received a director penalty notice.

16. As an apparent result of their sheer volume, and some miscommunication between the Board officers and Mr Birdseye's representative, Mr Birdseye did not respond to the substance of the submission documents before the Board's 20 February 2020 meeting. Perhaps unsurprisingly therefore, the Board substantially accepted the submissions, and the findings they invited. In relation to Mr Birdseye the Board found that, in the following respects, he had breached the TASA "Code of Professional Conduct" ("Code") obligation to comply with taxation laws in the conduct of his personal affairs:- *see TASA s 30-10(2)*

(a) he had an undischarged direct personal tax debt of $998[4];

(b) as a director of Claim It, he had an undischarged (GST and PAYG withholding) tax liability approximating $69,000;

(c) as a director of the corporate trustee of the Nicholas Birdseye Family Trust (relevantly, Claim It) he had failed to lodge seven BAS since about May 2019;

(d) at numerous times between about June 2014 and early 2020, he had failed to lodge ITRs and BAS for about three entities (Medlow Chocolates Pty Ltd, and the two Group (ii) superfund entities listed in Schedule 1 to these reasons) of which he was (or had been) either a director or trustee;

(e) as a former director of Sazzii Pty Ltd he had an undischarged (income) tax liability approximating $124,000, resulting from a false and misleading research and development / tax offset claim in the company's 2013 ITR;

(f) as a director of AFG Group Pty Ltd he had an undischarged (superannuation guarantee charge) tax liability approximating $56,000.

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4 This debt was not identified in the Board's February 2020 submission document. It was not included in the Board's contention document, nor in the Board's written submissions. It was not referred to in the oral evidence. In those circumstances I have assumed the asserted debt is immaterial and I have not included reference to it in the Schedules to these reasons.

17. The Board also decided Mr Birdseye no longer satisfied the TASA s 20-5(1) registration eligibility requirement (relevantly, the requirement to be of "good fame, integrity and character"). The Board's decision resulted from findings that Mr Birdseye:

(a) had "facilitated" Sazzii Pty Ltd's unsupported tax offset claim;

(b) had been "party to" AFG Group Ltd's failure to lodge / make its superannuation guarantee payments for the December 2015 quarter;

(c) as a former director of AFG Group Ltd, had an undischarged tax liability, approximating $122,000, relating to the company's superannuation guarantee obligations;

(d) as a former director, was relevantly "responsible" for various tax lodgement defaults, misleading statements, and payment defaults by another corporation - Medlow Chocolates Pty Ltd

(e) had knowingly obstructed the proper administration of taxation laws by lodging ITRs (specifically for the 2012, 2013 and "2017" tax years) that contained "unsubstantiated or false" work related expense claims;[5]

(f) had repeatedly made similar unsubstantiated claims, despite previous warnings about the client risks they presented;

(g) over a long time, had demonstrated a "pattern of dishonesty" that went beyond being merely careless or reckless;

(h) had been unprofessional and unco-operative in dealings with ATO officers.[6]

18. The Board's finding about 2012 and 2013 client ITRs relied on information contained in two ATO referrals, dated 17 September 2014 and 8 December 2015, that are discussed later in these reasons:- *see paragraphs 168 to 171 & 172 to 175*. The Board's finding about the

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5 The Board's 14 October 2020 contention document adhered to the proposition that Mr Birdseye had knowingly submitted "unsubstantiated or false" work related expense claims. However, in its oral final submissions (recorded at Transcript 202.5) the Board expressly abandoned that contention.

6 The Board did not articulate, in its letter to Mr Birdseye, his involvement in / responsibility for Claim It's lodgement and payment defaults as a reason for its adverse assessment of his registration fitness. However, it did rely on that matter in its adverse assessment of Claim It's registration fitness*: see paragraph 22 below*.

contents of client ITRs for the 2017 tax year was a misdescription. It relied on the information contained in the ATO's 29 August 2018 referral report. That report addressed client ITRs for 2014 and 2016 (not 2017), and is also addressed later in these reasons: *see paragraphs 175 to 184 below*.

19. The Board's five year registration application prohibition relating to Mr Birdseye was based on (i) its characterisation of his taxation law non-compliance as serious, (ii) its assessment of the "dishonesty" involved in the client ITR work expense claims and, (iii) its view that he had failed to heed a formal May 2013 caution relating to similar client ITR expense claims (and apparently similar "personal affairs" non-compliance):- *see paragraphs 159 & 161 below*.

20. In relation to Claim It, the Board found that it had also breached the TASA Code obligation to comply with taxation laws in the conduct of its "personal affairs":- *see TASA s 30-10(2).* The grounds for this conclusion were Claim It's:

    (a) failure to lodge seven BAS for the periods from May 2019 to November 2019;

    (b) undischarged (GST and PAYG withholding) tax liabilities approximating $69,000.

21. The Board also found that Claim It had breached the TASA Code obligation of competent service provision:- see *TASA s 30-10(7).* The grounds for this conclusion were:

    (a) shortfall and penalty assessments (approximating a combined total of $720,000) that resulted from an ATO audit of 2012 and 2013 ITRs for 46 NB&A clients;

    (b) similar shortfall and penalty assessments (approximating $400,000) that resulted from an ATO audit of various 2014, 2015 and 2016 ITRs for 48 NB&A clients;

    (c) the ATO's audit determinations that the relevant shortfalls were attributable to "a lack of reasonable care and / or recklessness".

22. The Board's ultimate finding was that Claim It no longer met the "fit and proper" registration eligibility requirement:- *see TASA s 20-5(3)(a)*. This was because of the Board's dissatisfaction that Mr Birdseye, its sole director, himself met that eligibility criterion. The Board's dissatisfaction resulted from its findings that Mr Birdseye:

(a) had been the sole director of Claim It when it incurred the $351,430 tax debt, that had led to the company's insolvency, and (temporary) winding up, in March 2016: - *see paragraphs 13 & 14 above*;

(b) had caused Claim it to fail to comply with its BAS lodgement, and related payment, obligations:- *see paragraph 18 above*;

(c) through "recklessness, lack of reasonable care and disregarding [relevant] decisions"[7] had "participated in the facilitation of a series of" unsubstantiated work related expense claims in clients ITRs, throughout a period up to 2018;

(d) had demonstrated a level of dishonesty in submitting unsubstantiated work related expense claims in clients ITRs.[8]

23. In imposing a five year registration application prohibition on Claim It, the Board seems to have considered that the prohibition would have some general deterrent effect. The Board relied on substantially the same findings on which it had based its decision relating to Mr Birdseye:- *see paragraph 18 above*. It supplemented those findings with the observation that the "consistent and systemic" (mis)behaviour involved in the submission of unsubstantiated expense claims carried with it an unacceptable risk of repetition, even if Claim It came under the control of another supervising agent. Inherent in that aspect of the Board's reasoning was the view that the registration application prohibition had some protective effect, in promoting confidence in the integrity of the "registered tax practitioner profession".

**TASA PROVISIONS RELEVANT TO AGENT REGISTRATION AND CONDUCT**

24. Evaluating the significance of the circumstances on which the Board relies as warranting the affirmation of its decisions requires an understanding of the underlying TASA purpose, and the role of the Code in the statutory TASA scheme. The TASA purpose is to ensure that tax agent services are provided "in accordance with appropriate standards of

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7 The "relevant decisions" were *Hancox v Commissioner of Taxation* [2013] FCA 735. They are discussed later in these reasons: *see paragraphs 160 to 166 below*.

8 In its oral final submissions (recorded at Transcript 202.3) the Board expressly abandoned any contention that Mr Birdseye had knowingly submitted "unsubstantiated or false" work related expense claims.

professional and ethical conduct":- see *TASA s 2-5*.[9] The TASA scheme involves the establishment of the Board, endowing the Board with registration, conduct investigation and disciplinary functions, and the enactment of a mandatory "Code of Professional Conduct" for tax agents. The Board administered registration regime is a fundamental means of effectuating TASA's stated purpose. A person must be a registered tax agent to be able to charge for providing "tax agent services" - unless they do so as a practising lawyer:- see *TASA ss 2-10 & 50-5*.

25. A threshold registration eligibility requirement is an applicant's probity and good repute. An individual registration applicant must satisfy the Board that they are a "fit and proper person":- see *TASA s 20-5(1)(a).* A corporate applicant for tax agent registration must satisfy the Board that each of its directors is a "fit and proper person":- *TASA s 20-5(3)(a).*

26. Subject to any more specific eligibility requirements, an individual applicant (and any director of a corporate applicant) will likely satisfy the Board they are "fit and proper" if they can adequately demonstrate they are of "good fame, integrity and character":- *TASA s 20-15(a).* The considerations that may inform such an assessment are not prescriptively defined:- see *TASA s 20-15(b)*; *Toohey v Tax Agents' Board of Victoria (No 2)* [2008] FCA 1796; (2008) 106 ALD 506 at [3]. They must include, but the assessment is neither limited to, nor explicitly determined by, circumstances where, in the preceding five years, the person has:-

(a) served, or has been sentenced to, a term of imprisonment:- *TASA ss 20-15(b)(i) & 20-45(f); 20-15(b)(iii)*;

(b) had the status of an undischarged bankrupt:- *TASA ss 20-15(b)(ii) & 20-45(e)*;

(c) been convicted of any offences involving fraud or dishonesty:- *TASA ss 20-15(b)(i) & 20-45(b)*; and

(d) been convicted of a "serious taxation offence"[10] or sanctioned for certain other kinds of tax related misconduct:- *TASA ss 20-15(b)(i) & 20-45(a), (c) & (d).*

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9 The expression "tax agent services" is broadly defined, and generally includes providing advice and representation services relating to Commonwealth taxation matters: see *TASA s 90-5*.

10 A "serious taxation offence" is either (i) a tax liability related dishonesty offence against the Criminal Code (specifically ss 134.1, 134.2, 135.1, 135.2 or 135.4) or, (ii) a "taxation offence" that is punishable

27. The registration eligibility criteria for an individual tax agent include appropriate qualifications, experience and professional indemnity insurance:- *TASA s 20-5(1)(b) & (c); Tax Agent Services Regulations 2009* (Cth) *reg 8*. The similar eligibility criteria for an incorporated tax agent entity include (i) not having incurred a conviction for fraud, dishonesty or a "serious taxation offence" within the preceding five years, (ii) having sufficient registered individual tax agents to provide (and supervise the provision of) competent tax agent services and, (iii) having requisite professional indemnity insurance:- *TASA s 20-5(3).*

28. An applicant who satisfies the relevant eligibility requirements, must be registered:- *TASA s 20-25*. Their registration may be subject to conditions relating to the subject matter of the services the tax agent can provide:- *TASA s 20-25(5) & (6)*. Registration must be for a minimum period of three years:- *TASA s 20-25(4).* Registration is renewable in response to a timely (or otherwise permitted) application:- *TASA s 20-50(1)*. Where an agent has submitted a timely renewal application, their registration is taken to continue until the Board determines the application:- *TASA s 20-50(2)*.

29. As a registered person, a tax agent is subject to various obligations. They include:-

    (a) compliance with any registration conditions imposed by the Board:- *TASA s 20-25(5)*;

    (b) notifying the Board "whenever" they cease to meet any registration requirements:- *TASA s 30-35(1)(a)*;

    (c) notifying the Board if they have (amongst other things) been convicted of a "serious taxation offence", convicted of any other offence involving fraud or dishonesty, or sentenced to imprisonment:- *TASA ss 30-35(1)(b) & 20-45(a), (b) & (f)*; and

    (d) compliance with the statutory Code of Professional Conduct:- *TASA ss 30-5 & 30-10.*

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by either imprisonment or a fine exceeding 40 penalty units: TASA s 90-1. A "taxation offence" includes any offence against legislation administered by the Commissioner of Taxation: *see paragraph 38 below*.

30. The TASA Code sets out basic requirements of honesty, competence, lawfulness, and client best interest. Relevant to the Board's findings, they include the following obligations:

(a) to act honestly:- *TASA 30-10(1)*;

(b) to comply with "taxation laws" in the conduct of their "personal affairs":- *TASA 30-10(2)*;

(c) to ensure that tax agent services are provided competently, and not "knowingly obstruct" the proper administration of taxation laws:- *TASA 30-10(7); 30-10(11)*;

(d) to take "reasonable care", both in ascertaining a client's state of affairs and in advising a client, "to ensure that taxation laws are applied correctly"*:- TASA 30-10(9) & 30-10(10)*;

(e) to advise clients of their taxation law rights and obligations*:- TASA 30-10(12).*

31. The Board can terminate a tax agent's registration in various circumstances. One obvious circumstance is where the agent ceases to meet a registration requirement:- *TASA s 40-5(1)(b)*. Another is where an agent has breached a condition of their registration:- *TASA s 40-5(1)(c)*. Further termination grounds include those where a tax agent has either (i) been convicted of a "serious taxation offence" (or a dishonesty offence), (ii) become bankrupt or, (iii) been sentenced to imprisonment:- *TASA ss 40-5(1)(a) & 20-45(a), (b), (e) & (f)*. Where the Board has conducted an investigation into an agent's conduct, and concluded the agent has failed to comply with the Code, there are further statutory powers to (i) impose a requirement for supervision of the agent, (ii) require the agent to undergo training or education, and (iii) suspend or terminate the agent's registration:- *TASA ss 30-15(2) & 30-20(1)*.

32. In conducting an investigation, the Board has some procedural restrictions, but significant powers. The Board:

(a) must give prompt written notice of its decision to investigate:- *TASA s 60-95(2)*;

(b) may compel any person to produce (and may itself retain) documents, and to provide information:- *TASA ss 60-100, 60-120*;

(c) may require the appearance of persons for the purpose of giving evidence on oath or affirmation, and require their response even it would tend to expose them to a risk of penalty or incrimination:- *TASA ss 60-105, 60-110 & 60-115*;

(d) must (ordinarily) make any determinative investigation decision within six months:- *TASA ss 60-125(3)-(6)*; and

(e) must notify its investigation decision within 30 days:- *TASA s 60-125(8).*

33. When the Board terminates a tax agent's registration (for reasons other than the agent's insolvency) it may also preclude the agent from applying for re-registration, for a period of up to five years:- *TASA s 40-25(1) & (2).*

34. The TASA registration eligibility criteria, and the TASA Code provisions, clearly show that probity (both as to character and repute) and lawful conduct (particularly in relation to Commonwealth taxation laws) are fundamental requirements of registered tax agents. Competence is also an important eligibility and performance requirement. That combination of considerations demonstrates that the TASA scheme involves two aspects of "public interest". One aspect is that of facilitating the general availability of competent tax agent services provided by persons who satisfy the TASA registration and conduct requirements. The other is that of establishing a supervised regime for ensuring compliance with appropriate standards in the provision of those services. A person who satisfies the requirements of competence, and is also of good character, is ordinarily entitled to registration. Conversely, a person who does not satisfy both the competence and character (i.e. fit and proper) requirements is not eligible for registration and, if registered, is liable to have that registration terminated.

**THE CONTENT OF THE TASA CODE COMPETENCE AND REASONABLE CARE OBLIGATIONS**

35. The competence and care obligations of the Code provisions in TASA s 30-10(7), (9) & (10) obviously require a registered tax agent to possess, and maintain, relevant qualifications, appropriate knowledge and skills, and to ensure that their relevant employees and contractors have correspondingly appropriate competence and skills. These general requirements are the subject of extended, and informative, exegetical guidance in several Board publications, particularly (i) the Board's Explanatory Paper TPB 01/2010 "Code of

Professional Conduct" ("TPB 01/2010") (at paragraphs 96 to 115) and, (ii) the Board's Information Sheet TPB(I) 28/2016 ("TPB(I) 28/2016") (at paragraphs 7 to 19).

36. The Board's guidance in relation to the Code obligation to ensure competent provision of tax agent services (TASA s 30-10(7)) focusses principally on the basic requirements of a tax agent's underlying integrity, knowledge and capacity:- *see TPB 01/2010 paragraphs 101 & 105 to 113*. Beyond those requirements, the Code's concerns about competence inevitably overlap with the "reasonable care" obligations expressed in TASA s 30-10(9) & (10). Competence in the provision of tax agent services necessarily requires the exercise of "reasonable care", both in the agent's own client dealings, and in the supervision and review of client services provided by the agent's employees and contractors.

37. The exercise of "reasonable care", particularly in the context of the scope of appropriate client enquiry, and the acceptance / assessment of client provided information, is clearly a matter of considerable aspirational (and practical) importance to the TASA scheme. The content of the "reasonable care" standard or requirement is not however, readily amenable to precise or inflexible prescription. That reality is readily apparent from other parts of the guidance contained in TPB 01/2010 (and the similar content in TPB(I) 28/2016). That guidance includes the following propositions:-

(a) A registered tax agent, because of their qualifications, knowledge and experience, should display a greater degree of care than that expected of an "ordinary" taxpayer:- *TPB 01/2010 paragraph 121*;

(b) The scope of a registered tax agent's "reasonable care" obligation necessarily depends on the nature of their engagement, and the particular circumstances, including the knowledge and experience of the particular client:- *TPB 01/2010 paragraphs 120 & 125*;

(c) A registered tax agent is not required to "audit" the information provided by clients, and may accept that information, without further checking where it is apparently "plausible" / consistent / complete / reliable, and the agent does not have a basis to doubt its accuracy:- *TPB 01/2010 paragraphs 122, 127 & 129*;

(d) Notwithstanding the disavowal of any "audit" requirement, "reasonable care" requires appropriate client enquiry, awareness of potential inaccuracy in / omission from, information provided by "ordinary" taxpayers (i.e. unqualified / inexperienced

clients without a sound understanding of their relevant taxation obligations), and appropriate enquiry about any such inaccuracy or omission:- *TPB 01/2010 paragraphs 123, 126 & 128*;

(e) Reasonable care enquiry may "where appropriate" require a registered agent to obtain supporting documents and records:- *TPB 01/2010 paragraph 124*;

(f) The "where appropriate" qualification (in the preceding proposition) likely depends on a "professional judgment" that takes into account the quality of the information provided, its consistency with other known information, and "the nature of the client themselves":- *TPB(I) 28/2016 paragraph 9*;

(g) Reasonable care to "ensure" taxation law compliance requires a tax agent to give "appropriately serious attention" to the relevant principle or obligation, rather than to achieve the objectively correct interpretation, or application, of the relevant law:- *TPB 01/2010 paragraphs 133 & 135.*

**THE RELEVANT TAXATION LAW OBLIGATIONS**

38. The "taxation law" compliance obligation in TASA s 30-10(2) obviously applies to the TASA provisions, and extends to require compliance with any legislation to the extent it is administered by the Commissioner:- *see TASA s 90-1(2) & ITAA 97 s 995(1)*. That legislation includes:-

(a) the *Income Tax Assessment Act 1936* (Cth) ("ITAA 36"):- *ITAA 36 s 8*

(b) the *Income Tax Assessment Act 1997* (Cth) ("ITAA 97"):- *ITAA 97 s 1-7*

(c) the *Taxation Administration Act 1953* (Cth) ("TAA"):- *TAA s 3A*

(d) the *GST Act* (i.e. *A New Tax System (Goods and Services Tax) Act 1999* (Cth)):- *GST Act s 2-30; TAA s 3A*; *TAA Schedule 1 s 155-15*

(e) the *Superannuation Guarantee (Administration) Act 1992* (Cth) ("SGAA"):- *SGAA s 43*

(f) *the Superannuation Industry (Supervision) Act 1993* (Cth) ("SISA") – in relation to self managed superannuation funds:- *SISA s 6(1)(e)(i) (ea) & (f)*.

39. ***ITR lodgement and payment obligations***:- A taxpayer's ordinary obligation to lodge an income tax return arises from the combined effect of ITAA 36 s 161(1), and the content of the annual Government Gazette notice which that section contemplates. Consistent with the ITAA 36 s 161 authority, such a notice typically describes the exempted persons, the persons required to lodge an income tax return for the income year, and the date by which their return is to be lodged. Both ITAA 36 s 161A and the notice require the return to be in the form approved by the Commissioner:- see *TAA Schedule 1 s 388-50*. Failure to lodge a required return is an "absolute liability" offence, ordinarily punishable by a fine not exceeding 20 penalty units (and, in the case of convictions for subsequent offences, potentially by a fine exceeding 50 penalty units and/or by imprisonment):- *TAA ss 8C, 8D & 8F.* The offence also gives rise to an administrative penalty liability:- *see TAA Schedule 1 ss 286-75 & 286-80*.

40. The Board (uncontentiously) proffered the 14 page *Notice of Requirement to Lodge a Return for the Year of Income Ended 30 June 2018* as an illustrative example of the usual content and timing of the ITR lodgement obligation, and the exemption criteria. That notice described 10 categories of persons required to lodge returns, and six categories of persons exempt from the lodgement requirement. Many of both the lodgement and exemption criteria are subject to conditions, and some overlap. The nature and complexity of the criteria can lead to difficulty in identifying instances of non-compliance. As a practical means of obviating those potential difficulties, a taxpayer who considers that the lodgement requirement does not apply to them can notify the ATO that their return is "not necessary". In such a case, the ATO has indicated that it is likely to accept the notification, but retains the statutory power to require an ITR lodgement:- *see Practice Statement Law Administration PS LA 2011/15 at [88] & ITAA 36 ss 162 & 163*.

41. Given the circumstances of Mr Birdseye and Claim It, the relevant ITR lodgement requirement categories (as typified in the 2018 Notice) included the following entities:-

    (a) Australian residents (other than trustees, and those who received various social security payments) whose income exceeded the $18,200 assessable threshold:- *Table B Item (1)*;

    (b) Business operators:- *Table A item (6)*;

    (c) Australian resident superannuation fund trustees:- *Table D item (1)*;

(d) Most other kinds of trustees, where they derived income during the tax year:- *Table E.*

42. The generally applicable time for lodging an ITR, where the taxpayer's year ends on 30 June, is the end of the October in the same year. Thereafter, income tax becomes due and payable only if the Commissioner makes (or is deemed to have made) an assessment: under ITAA 36 ss 166 to 169:- *ITAA 97 s 5-5(2)*. The assessed income tax amount is ordinarily payable 21 days after the required ITR lodgement date, or 21 days after any notice of an assessment made in response to a timely return or, in the case of a "self assessment entity" (ordinarily a corporation or trustee) five months after the end of the person's tax year: *ITAA 1997 s 5-5(4) to 5-5(6).* Where income tax has not been paid by the due date it becomes recoverable as a debt due to the Commonwealth:- *TAA Schedule 1 s 255-5*. The Commissioner has a general discretion to permit any "tax related liability" to be paid by instalments under a "payment arrangement":- *see TAA Schedule 1 s 255-15*.

43. ***Withholding and P(ay)A(s)Y(ou)G(o) obligations***:- Where an entity pays remuneration to any of their employees or directors they are required to withhold part of the otherwise payable remuneration amount:- *TAA Schedule 1 ss 12-35, 12-40 & 16-5*. The amount required to be withheld depends on either the withholding schedules made by the Commissioner of Taxation, or any applicable regulations:- *TAA Schedule 1 ss 15-10 to 15-35.* Failure to withhold the required amount constitutes a strict liability offence. That offence is punishable by a fine not exceeding 10 penalty units, and also renders the person liable to the Commissioner for the amount that ought to have been withheld:- *TAA Schedule 1 ss 16-25, 16-30.* An entity must pay any withheld amounts to the Commissioner. The time for making any such payment depends on whether the entity is a "large", "medium" or "small" withholder. A "medium" withholder (i.e. broadly speaking, an entity whose withheld amounts in the preceding year were more than $25,000 but less than $2 million) must typically pay the withheld amount monthly (by the end of the fourth week of the following month) and in a manner approved by the Commissioner:- *TAA Schedule 1 ss 16-70, 16-75, 16-85(2),16-95 to 16-105.* (Such a medium withholder must submit a monthly "IAS" - Instalment Activity Statement.) A "small" withholder must typically make the payment within three weeks after the end of the quarter in which the amount was withheld:- *TAA Schedule 1 s 16-75.* Any payment delay attracts a general interest charge liability:- *see TAA Schedule 1 s 16-80*; and exposes the defaulter to the risk of being subject to the Commissioner's "estimate" liability in relation to payment default:- *see TAA Schedule 1 ss 268-5 to 268-30.*

44. An entity that has business or investment income can be required, by a Commissioner's notice, to make (typically monthly) instalment payments towards their income tax liability:- *TAA Schedule 1 ss 45-5, 45-15 & 45-50*. Such an entity must provide the Commissioner with an approved form of notice of their "instalment income", and do so by the time any instalment payment is due:- *TAA Schedule 1 s 45-20*. Generally speaking, quarterly instalment payments are due 21 days after the quarter ends:- *TAA Schedule 1 s 45-61.* Notification, and payment, failures attract a monetary penalty, as well as a general interest charge:- *TAA Schedule 1 ss 45-25 & 45-80*.

45. ***BAS lodgement and payment obligations***:- Persons who carry on an enterprise and are either registered, or required to be registered, under the GST Act must submit a GST return within (broadly speaking) 21 to 28 days after the end of their applicable tax period (typically either monthly or quarterly). That GST return obligation applies irrespective of the amount of their GST liability:- *GST Act ss 27-5, 31-5*. In the ordinary case, the GST return must be in the approved form, and may be lodged electronically:- *GST Act ss 31-15, 31-25, 195-1; TAA Schedule 1 s 388-50*. Lodgement failure is another absolute liability offence, and attracts the same fine sanctions as those that apply to ITR lodgement failure:- *see paragraph 39 above*.

46. A BAS return takes effect as an assessment by the Commissioner:- *TAA Schedule 1 s 155-15(1).* Where the GST return discloses an "assessed net amount" the person must ordinarily pay that amount within the return lodgement period:- *GST Act s 33-3, 33-5*. In some limited instances (typically involving quarterly tax periods and turnovers less than $2 million) a person may elect to pay GST by instalments:- *GST Act s 162-5*.

47. ***Superannuation lodgement and guarantee obligations***:- The trustee of a self managed superannuation trust entity must give the Commissioner an annual return in the approved form, and typically within their required ITR lodgement period:- *SISA ss 11A, 35D(2)(b)*. (The approved form of annual return typically requires the trustee to disclose (amongst other things) (i) the fund income and expenses, (ii) member contributions and, (iii) a calculation of the fund's income tax liability.) Failure to comply with that annual return obligation constitutes an offence, potentially punishable by a 50 penalty unit fine (or 25 units in the case of a matter prosecuted as a strict liability offence):- *SISA s 35D(4) & (5)*.

48. An employer will have a “superannuation guarantee shortfall” where (broadly speaking), they fail to pay the required charge percentage of an employee’s quarterly salary to an approved superannuation scheme or retirement savings account provider:- *SGAA ss 17, 19, 22 & 23*. Such an employer must lodge an approved form of superannuation guarantee statement within (approximately) two months after the end of the relevant quarter:- *SGAA s 33*. The statement takes effect as an assessment of the shortfall amount, and the amount of any corresponding shortfall charge:- *SGAA s 35*. The employer is (ordinarily) required to pay the charge amount within the permissible lodgement period for the employer’s superannuation guarantee statement. Payment delay or failure attracts a general interest charge liability, and a penalty liability equal to double the charge amount otherwise payable:- *SGAA ss 33, 46, 49 & 59*. As in the case of unpaid PAYG amounts, lodgement / payment default also exposes the defaulter to the risk of being subject to the Commissioner’s “estimate” liability in relation to the superannuation guarantee:- *see TAA Schedule 1 ss 268-5 to 268-30.*

49. ***Liabilities of directors and public officers***:- Each of the directors of a company may be personally liable for any of the company’s taxation offences (i.e. lodgement and withholding offences), unless they establish that they neither assisted, nor were knowingly concerned in, the offence:- *TAA s 8Y*. Similarly, each director has an obligation to ensure / cause a company’s compliance with the withholding and payment obligations (relating to PAYG withholding instalments and superannuation guarantee payments) arising under TAA Schedule 1 Subdivision 16-B and Division 268, and under SGAA Part 3 (superannuation guarantee charge):- *see TAA Schedule 1 ss 269-5 to 269-15*.

50. Where a company fails to make the required payments, individual directors may be liable to either a “PAYG withholding non compliance tax” (*see TAA Schedule 1 ss 18-125 & 18-140*) or to a penalty, corresponding to the amount unpaid by the company, unless they either (i) reasonably took no part in company management or, (ii) took all reasonable steps to cause the company to comply or initiate administration or winding up:- *TAA Schedule 1 ss 269-20 & 269-35*. The penalty is a tax related liability that constitutes a debt recoverable by the Commissioner:- *see TAA Schedule 1 ss 255-1 & 255-5*. However, the absence of any instalment arrangement (*under TAA Schedule 1 s 255-15*) and the issuing of a “Director Penalty Notice”, are both preconditions to the Commissioner’s ability to recover a penalty amount from a director:- *see TAA Schedule 1 ss 269-15(3) & 269-25*.

51. A company must have an appointed "public officer" for income tax purposes:- *ITAA 36 s 252(1)*. The appointed "public officer" is "answerable" for all of the company's obligations (and for any corresponding default penalties) under ITAA 36, the SGAA and the GST Act:- *ITAA 36 s 252(1)(f); SGAA s 57(3)*; *TAA Schedule 1 s 444-10* & *ITAA 97 s 995-1*.

**THE ITR, BAS / IAS AND SGC LODGEMENT AND PAYMENT DEFAULT ISSUES**

52. The ITR and BAS (including IAS) lodgement defaults on which the Board ultimately relied were detailed in a schedule to the Board's review hearing submissions, and not actively contested by Mr Birdseye and Claim It. The nature and approximate duration of those defaults are indicated in the following schedules to these reasons[11]:-

(a) Schedule 1 – Birdseye entities – ITR defaults – lodgements;

(b) Schedule 2 – Birdseye entities – BAS lodgement defaults (chronological order).

53. The Schedule 1 details differentiate between (i) entities directly involved in the conduct of the NB&A tax agent business,[12] (ii) entities obviously related to Mr Birdseye, but not directly involved in the conduct of the NB&A tax agent business, (iii) other entities not directly involved in the practice business and, (iv) entities where (in the course of the review proceedings) the Board appears to have accepted that no return was in fact "necessary": *see paragraph 40 above*. In the case of the first three of those groups I have included a row to indicate, in relation to each tax year, the absence of specific information to establish the fact, or the amount, of any actual income tax liability or debt.

54. The following propositions can be extracted from the information in (and underlying) Schedule 1:-

(a) The Board's February 2020 decisions relied on a total of about 51 ITR lodgement defaults over the seven year period from 2012 to 2019;

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11 Where relevant remediating (or partly remediating) lodgements have occurred, that information is also indicated in each Schedule.

12 I have excluded Claim It Financial Planning Pty Ltd from Group (i) for two reasons. The first is that it appears to have had a limited role, acting merely as "the" trustee of the Nicholas Birdseye Family Trust during the (temporary) period of the insolvency of Claim It SA Pty Ltd. The second reason is that the Board's submission schedule recorded the notification that the company's ITR lodgement was "not necessary".

(b) The Board's review hearing submissions added a further four ITR lodgement defaults relating to Torrens Finance Brokers Pty Ltd;

(c) None of the ITR lodgement defaults related to the returns of either Mr Birdseye or Claim It;

(d) Approximately 12 ITR lodgement defaults related to three entities with which Mr Birdseye concededly had a close personal / familial association (i.e. the "Group (ii)" entities);

(e) About four ITR lodgement delays related to Medlow Chocolates Pty Ltd, a company of which Mr Birdseye was a director, but in which he disavowed any direct management participation:- *see paragraphs 102 to 115 below*;

(f) Approximately 41 ITR lodgement delays involved the seven "Group (iv)" Birdseye related entities that were the subject of "return not necessary" notifications made to the ATO, shortly after a 4 November 2019 lodgement reminder. (In the course of the review hearing and submissions the Board effectively accepted that these entities most likely had not traded, and had not actually been required to lodge an ITR).

55. In the case of the two "Group (ii)" superfund entities listed in Schedule 1, in his written statements Mr Birdseye conceded the ITR lodgement delays but said that, with one exception, they had been remedied, by returns indicating an absence of trading and income derivation in any of the relevant tax years. (In cross examination Mr Birdseye acknowledged that, despite the reminders he had received in September and November 2019, he had not lodged these returns until March and April 2020.) The lodgement exception related to the N&T Birdseye Superfund's 2019 ITR. In his 17 April 2020 written statement Mr Birdseye said the return would be lodged by 20 April 2020. In his 24 September 2020 written statement Mr Birdseye said he was "in the process" of lodging the return. Almost two months later, Mr Birdseye conceded, in the course of his cross examination, that he had still not lodged the N&T Birdseye Superfund's 2019 ITR.

56. The third "Group (ii)" entity - Torrens Finance Brokers Pty Ltd ("Torrens") – had not been alluded to in the Board's February 2020 submission document, the decision minutes or the decision notification letters. The existence of the company, and its ITR lodgement defaults, was first raised in the supplementary documents the Board provided to the Tribunal in April

2020, and was the subject of a condign allusion in the Board's 22 April 2020 submissions opposing the stay applications to which I referred earlier in these reasons:- *see paragraph 4 above*. Mr Birdseye's evidence was that the company had ceased to operate at the end of June 2012, and that its only subsequent activity was as the recipient of some small "trailing" commissions. The Board's submission schedules, and ATO records to which they refer, seem to be consistent with that proposition. This is because they indicate (i) no outstanding BAS lodgements after June 2014, (ii) except for the 2013 and 2015 tax years, an ITR was "not necessary" in any of the years from 2001 to 2015 and, (iii) the company was not noted amongst the entities the ATO identified to Mr Birdseye in September and November 2019 as being the subject of outstanding lodgement obligations.

57. In its final oral submissions the Board ultimately contended that, as a taxpayer's director, and especially because of his tax agent status, Mr Birdseye's failure to attend to Torrens lodgement obligations placed his default at the "more serious end of the spectrum". That submission echoed the proposition, advanced in the Board's earlier contention statement, that the Torrens lodgement defaults, and the delay in lodging the ITRs for the "Group (ii)" superfund entities (*see paragraph 55 above*), indicated that Mr Birdseye simply "did not take his [lodgement] obligations seriously". In relation to these entities, and ITR lodgement obligations, I regard that submission as overstated, and it is one I do not accept. First of all, as I have already observed, no complaint appears to be made about the ITR lodgement compliance of either Claim It or Mr Birdseye. Second, Torrens circumstances (and those of the two "Group (ii)" superfund entities) were exceptional – in the sense that they all appear to have been essentially, or typically, dormant entities. Third, Mr Birdseye professed to have had some (regrettable, but in my view, genuine) confusion about the ITR lodgement obligation where a company or trust (as distinct from an individual) derived no assessable income. Fourth, Mr Birdseye did respond, relatively promptly to the ITR lodgement reminder he received in November 2019 (see the ITR lodgement date for the "Group (iv)" entities in Schedule 1.) Fifth, the apparent promptness of that response in relation to the "Group (iv)" entities, lends a degree of credibility to Mr Birdseye's claim that he had at least attempted to fully respond to the November 2019 lodgement reminder, but had misapprehended his ability to submit a "return not necessary" notification in relation to the two "Group (ii)" superfund entities.

58. Notwithstanding those considerations, the apparent ITR lodgement delays and failures relating to Torrens and the two "Group (ii)" entities are regrettable. That is particularly so in

the case of the, substantially unexplained, failure to submit the 2019 ITR for the N&T Birdseye Superfund (*see paragraph 55 above*). In those, perhaps few, instances where there clearly was a lodgement obligation (having regard to the criteria summarised in *paragraph 40 above*), they would justify a finding that Mr Birdseye failed to comply with taxation laws. But, notwithstanding the unequivocal compliance obligation in TASA s 30-10(2), such a finding in relation to these (essentially dormant) entities would not contribute significantly to an adverse contemporary assessment of the registration fitness of either Mr Birdseye or Claim It. The compliance performance of Claim It should be a far more important focus of any such assessment. That performance is addressed later in these reasons:- *see paragraphs 63 to 84, 143 to 146, 236 to 242 & 264 to 265 below*.

**THE TAX DEBT / LIABILITY AMOUNTS**

59. The amount and nature of the various tax debts or liabilities on which the Board relies were also the subject of a further Schedule to the Board's review hearing submissions. That information was confined to the ultimately outstanding / undischarged liability at the time of the review hearing. That "point in time" information needs to be supplemented by an understanding of the nature of the liability, and the period to which it relates.

60. That desirable supplementation is not easy to derive accurately from the available information. Part of the reason for the difficulty derives from the combined circumstances of (a) the various lodgement delays and, (b) the ATO practice (evident in the material provided by the Board) of compiling its statements of account according to the "processing" date of individual lodgements and returns, rather than according to the actual tax period to which the lodgement or return related.

61. In the second Schedule to these reasons - "Schedule 2 – Birdseye entities – BAS lodgement defaults (chronological order)" - I have included an indication of the nature and period of the liability of each of the three entities whose BAS lodgement delays and defaults were relied on by the Board.[13] The information in the Schedule suggests that, of the three entities, only Claim It had been shown to have had a significant taxation related liability.

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[13] The BAS lodgement defaults attributed to Torrens Finance Brokers Pty Ltd had not figured in the Board's 2020 deliberations or in its decision letter notification to Mr Birdseye. For substantially the same reasons as those relating to that company's ITR lodgement default (*see paragraph 58 above*) I do not regard the company's BAS lodgement defaults as contributing significantly to any contemporary assessment of Mr Birdseye's registration eligibility.

62. The third Schedule to these reasons - "Schedule 3 – Birdseye entity – taxation liabilities" includes the five entities revealed by the evidence as having had apparently relevant taxation liabilities in the period from 2016 to 2018. The information in the Schedule suggests that the only liabilities of an apparently significant amount were those of (or attributable to) (i) Claim It / the Nicholas Birdseye Family Trust, (ii) AFG Group Pty Ltd and, (iii) Sazzii Pty Ltd. Claim It's debt principally related to unremitted GST and PAYG instalments, related penalties and general interest.

**CLAIM IT'S TAXATION LAW NON-COMPLIANCE**

63. A significant aspect of the reasoning underlying the Board's decisions involved findings that Claim It, and Mr Birdseye (particularly as Claim It's sole director and public officer) had not fully and consistently complied with their taxation law obligations. That non-compliance included the conduct underlying the (approximately) $351,000 liability that had led to Claim It's winding up in March 2016:- *see paragraph 13 above*. Although the precise nature (and perhaps the accurate amount:- *see paragraph 75 below*) of that liability is not clear, the recitals to the 13 March 2018 Deed, the schedule to Mr Birdseye's 24 February 2016 director penalty notice, and the ATO's account statement, combine to indicate that:-

(a) a substantial part of the total liability (about $100,000 as at April 2015) likely arose from Claim It's non-payment of PAYG withholding instalments after September 2012;

(b) Claim It's PAYG payment defaults continued up until at least November 2015 and then exceeded $152,000;

(c) as at the end of March 2016 (after taking into account then overdue activity statements) the total debt (predominantly attributable to GST and PAYG withholding liabilities) approximated $441,000;

(d) the 13 March 2018 Deed acknowledged the ongoing liability in relation to post March 2016 BAS lodgements and payments, and required them to be brought up to date by 31 March 2018;

(e) under the 13 March 2018 Deed, the Commissioner released Mr Birdseye from liability under director penalty notices that had been issued to him as a director of

the company (i.e. the February 2016 notice relating to Claim It's PAYG payment defaults).

64. The disputes about net income and carried forward losses acknowledged in the 13 March 2018 Settlement Deed did not expressly extend to Claim It's default in its GST and PAYG withholding payment obligations under TAA Schedule 1 Subdivision 16A:- *see paragraph 43 above*. Consequently, neither the Settlement Deed, nor the dispute underlying it, provides a readily apparent explanation for Claim It's chronic failure to comply with those GST and PAYG payment obligations. (The ATO account statement records some irregular payments at times in 2012 and 2013, but no material payments between September 2014 and March 2016.) I infer that the March 2018 settlement may have involved hindsight offsetting of those payment obligations against the recognition of Claim It's contentious carried forward tax losses. Because of that inferred likelihood, the limited evidence of the circumstances involved, and the passage of time, what would otherwise appear to have been serious and chronic non-payment of GST and PAYG withholding instalments, is not itself determinative of Mr Birdseye's contemporary fitness. Nevertheless, the respective payment obligations (*see paragraphs 43 & 45 above*) were unambiguous, and the significant period of non-payment is therefore a relevant consideration in any contemporary assessment:- *see paragraph 75 below*. An additional relevant consideration is the concurrent history of activity statement lodgement defaults and delays during the period of non-payment.

65. Comparison of the schedule to the February 2016 director penalty notice with the entries in Claim It's ATO account statement reveals that Claim It's activity statement lodgement compliance, throughout the period covered by the schedule (September 2012 to November 2015), was typically tardy, and multiple delays were periodically the subject of cathartic remedial lodgements. Furthermore, some required activity statements (i.e. for months not included in the schedule to the notice) were not lodged until March 2016, and then attracted penalties for late lodgement.

66. That dual history, of at least tardy lodgement, and chronic non-payment, was not a matter the Board sought to make the basis of positive findings of taxation law non-compliance. It does however, provide relevant background in assessing the apparent significance of any subsequent non-compliance. It is also relevant to the evaluation of the submission, advanced on Mr Birdseye's behalf, that Claim It's subsequent lodgement failures (identified

in the Board's submission and summarised in Schedule 2) were comparatively minor and immaterial to a contemporary assessment of his registration fitness.

67. The 13 March 2018 Deed between the ATO and Claim It Financial Planning indicated that the Nicholas Birdseye Family Trust had outstanding activity statement lodgement and payment obligations for the period after March 2016. The ATO account records for the Nicholas Birdseye Family Trust suggest that the last of the BAS covered by the Deed was not in fact lodged until late July 2018. After September 2018 Claim It had again defaulted in its activity statement lodgements, and lodged none until May 2019. At that time Claim It had made no payments since early October 2018 and its "integrated client account" tax debt, which was primarily made up of GST and PAYG withholding obligations (plus interest), approximated $61,000.

68. In his April 2020 statement Mr Birdseye said that "in about October 2018" he had come to an arrangement with the ATO. He claimed the arrangement satisfied all his personal and employer taxation obligations, that he had completed the requirements under the arrangement, and that he had achieved a "clean slate" with the ATO. In the course of cross examination Mr Birdseye explained that this was a reference to the 13 March 2018 Deed, and reflected Claim It's status, pursuant to that Deed, as a company in administration and subject to a deed of company arrangement. To that extent the explanation appears to be broadly correct. It is consistent with the formal ASIC company search, which records the termination of Claim It's administration in January 2019. It is also partly corroborated by fact that by mid August 2018, Claim It had complied with the activity statement lodgement and payment obligations covered by the Deed, and had achieved a modest credit balance in its ATO account. However, and despite the fact that the Board did not press for any taxation law non-compliance finding in relation to Claim It's conduct prior to October 2018, it is both simplistic and inaccurate to regard Claim It as having achieved a "clean slate", and as having satisfied all its taxation law obligations by October 2018. The inaccuracy of any such claim is patent from the previously noted lodgement and payment defaults after September 2018:- *see paragraph 67 above*.

69. In any event, Claim It's (post September 2018) lodgement defaults appear to have continued until May / June 2019. At that time Claim It had made no GST and PAYG payments since October 2018 and its tax debt, consisting entirely of GST, PAYG withholding and general interest components, had increased to about $65,000. On 22 June

2019, Claim It entered into a payment plan arrangement with the ATO, for a total debt of $67,604. The payment plan:

(a) required an initial $5,000 payment by 28 June 2019, and subsequent monthly payments of $10,000 until the end of December 2019;

(b) was expressly conditional upon timely payment of those instalments, and timely lodgement and payment of all other tax related obligations;

(c) invited Claim It to contact the ATO if its circumstances changed.

70. Claim It made none of the required plan payments. Furthermore, after June 2019, (as the details in Schedule 2 indicate) Claim It's BAS lodgement defaults re-occurred, and were not remedied until March 2020. By that time, despite the content and conditions of the June 2019 payment plan, Claim It had made no payments since October 2018, and its total tax debt, relating to GST and PAYG withholding payment liabilities, had substantially increased.

71. On 31 March 2020, shortly after attending to its outstanding activity statement lodgements, Claim It entered into a further payment plan arrangement with the ATO, for a tax debt that had increased to $188,434. The plan:

(a) required a $94,217 payment by 29 May 2020, and 11 subsequent monthly payments of $9,500;

(b) was again expressly conditional on timely payment of those instalments, and timely lodgement and payment of all other tax related obligations;

(c) invited Claim It to contact the ATO if it was unable to make any payment.

72. Claim It's registered status came to an end on 8 May 2020:- *see paragraph 4 above*. Claim It did not make that first payment required by the 31 March 2020 plan. It has not made any of the other payments. In fact, the only significant credit payments to Claim It's ATO account between October 2018 and October 2020, were the "Cash Flow Boost" credits (associated with the Government's "COVID-19" relief measures) in March, April and May 2020. By October 2020 Claim It's tax debt had grown to $210,606. Furthermore, and as Schedule 2 indicates, Claim It lodged no further activity statements until about three weeks after Mr Birdseye received the Board's 2 March 2020 decision notification letters.

73. The Board's November 2019 submission clearly placed considerable emphasis, in the context of non-compliance with the TASA s 30-10(2) Code obligation to comply with taxation laws, on Claim It's BAS lodgement defaults and its corresponding tax related liability. Despite that emphasis, neither matter was something Mr Birdseye comprehensively addressed in his pre-hearing witness statement and affidavits. His response in those documents, in relation to Claim It's lodgement defaults, was merely that they had been remedied. His response in relation to the tax debt addressed only the approximately $65,000 debt as at December 2019, and involved the combined assertions that (i) "in general terms" he had sought to ensure that taxation debts were either paid or the subject of an agreed payment plan, (ii) he had been confident of his ability to comply with the payment plan obligations and, (iii) the Board's February 2020 decisions, with the consequential removal of his ability to practice as a tax agent, were the substantial reason why Claim It had not been able to comply with its payment plan arrangements.

74. As I noted earlier (*in paragraph 66 above*) the submission advanced on behalf of Mr Birdseye and Claim It was that the company's lodgement defaults, though probative of a failure to comply with the taxation law compliance obligation in TASA s 30-10(2) were minor and, having been remedied, fell well short of meaningful contribution to a contemporary finding that neither entity was "fit and proper" for registration.

75. The Board, on the other hand, emphasised that Claim It's (post October 2018) lodgement defaults were not isolated instances, and tended inherently to demonstrate a lack of fitness for registration. In so doing, despite disavowing any contention for positive non-compliance findings in relation to matters prior to October 2018, the Board pointed to instances where Claim It had been subjected to BAS lodgement delay penalties in 2007, 2011, 2013, 2015 and 2016. Within that context the Board's written submissions highlighted the appearances that Claim It's (pre December 2018) "integrated client account" with the ATO:

(a) had typically had a substantial debit balance, relating to GST and PAYG withholding obligations, for about three years from June 2008 to June 2011;

(b) recorded no credit payments from December 2009 to June 2011;

(c) reached a total debt of about $289,000 in May 2011, before being restored to credit in July 2011;

(d) returned to a (small) debit balance in August 2011;

(e) thereafter, because of significant recurring GST and PAYG non-payments (and despite some occasional lump sum payments), progressively increased its debit balance to about $128,000 by November 2013;

(f) recorded no significant credit payments between December 2013 and March 2016, and consequently reached a total debt approximating $470,000;

(g) recorded some credit payments in mid 2016, but no further payments between August 2016 and February 2018, by which time the total debt approximated $531,000.[14]

76. I have already noted the appearance of Claim It's tardy and cathartic BAS / IAS lodgements between September 2012 and November 2015 (*see paragraph 65 above*) and the ATO account statement does record various lodgement penalty assessments. However, generally speaking the lodgement delays were only for a few months, and the penalty assessments were themselves very infrequent. That infrequency, and the appearance of periodic lump sum payments, are arguably consistent with the existence of an underlying payment arrangement, and give rise to the possible existence of other relevant considerations. In addition, the primary emphasis in the Board's February 2020 submission document, and the March 2020 decision notification letter, was on the amount of the 2016 to 2018 tax debt. The precise basis for criticism of Claim It's lodgement history related to that debt did not emerge, with any clarity, until the Board provided its November 2020 written submissions, and from some of the supplementary documents, that were provided little more than a week before the review hearing. In those circumstances, whilst the pre 2016 activity statement lodgement defaults to which the Board alluded appear to be established by the ATO records, and are relevant considerations, because they evidence a past history of BAS / IAS lodgement delay (and likely contributed to the Board's formal caution in May 2013), I am not satisfied it would be appropriate to regard them as having significant additional probative / persuasive value in a contemporary assessment of Mr Birdseye's fitness for registration.

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[14] Mr Birdseye disputed the accuracy of the debt amount in the ATO statement of account. The dispute derives some substance from the facts that (i) in March 2018 there was a substantial remission of a general interest charge, (ii) the 13 March 2018 Settlement Deed required payment of only $230,000 and, (iii) in June 2019, an amount approximating $397,000 was written off as "irrecoverable at law". It follows that there may be reason to doubt the accuracy of the $531,000 debt total. Despite that doubt, it is clear that the debt amount was significant (i.e. several hundred thousand dollars) and reflected lengthy periods of non-payment of GST and PAYG withholding amounts.

77. On the other hand, the GST and PAYG withholding debt amounts that had been accumulated by June 2011, November 2013 and March 2016 / March 2018 were significant. There was no exploration of the circumstances involved in the June 2011 debt total, but it appears to have been eliminated (presumably in a manner satisfactory to the Commissioner) by a series of payments made in June and July 2011. The March 2016 / 2018 debt was apparently addressed as part of the resolution of the prolonged income tax liability dispute resolved by the 13 March 2018 Deed of Settlement referred to earlier in these reasons:- *see paragraphs 13 & 67 above*. Despite the very limited extent of the evidence of the circumstances underlying the accumulation of those significant liabilities, the history of apparent payment default evident from Claim It's "integrated client account" is relevant, and tends to demonstrate both Mr Birdseye and Claim It's awareness of regular periodic GST, and PAYG withholding, payment obligations. That awareness is re-inforced by (i) the formal caution the Board issued to Claim It in May 2013 for a number of matters, but including its failure to comply with the "personal affairs" taxation law compliance obligation in TASA s 30-10(2):- *see paragraph 161 below*, (ii) the terms of the 13 March 2018 Deed of Settlement, (iii) the June 2019 payment plan and, (iv) the unambiguous acknowledgment Mr Birdseye made in the course of his cross examination. Against that background, Claim It's conceded (post October 2019, and particularly post June 2019) BAS lodgement defaults, and the related GST and PAYG payment defaults, assume particular significance, and require adequate explanation.

78. As I have already noted, Mr Birdseye's written evidence made no attempt at any such explanation:- *see paragraph 73 above*. In the course of cross examination he made the following assertions and acknowledgements:-

(a) He treated his lodgement obligations seriously;

(b) He was aware of those obligations, and the GST and PAYG withholding payment defaults that had led to Claim It's 2016 liquidation, and claimed to have been doing his best in 2019 "to try and fix that situation". To that end, he consistently pushed his staff to attend to the lodgement obligations;

(c) Prior to April 2019 there were no practical impediments to the timely lodgement of activity statements, but "big staffing issues", and personal illness (in September, October and November 2019), were the reasons for the lodgement and payment delays after May 2019;

(d) The activity statement lodgement defaults were also partly attributable to his personal inability (and that of the then available employees) to operate NB&A's computerised accounting system to generate the required activity statement information;

(e) Despite his, many month, awareness of activity statement lodgement and payment defaults, he never obtained external assistance to ensure compliance, nor did he convey the fact of either his non-compliance or his asserted compliance difficulties to the ATO;

(f) He had tended to prioritise addressing client interests and practice administration, despite awareness of Claim It's lodgement and payment obligations (and his related personal responsibilities as a director);

(g) He had changed NB&A's accounting software in early 2020, assertedly for the purpose of utilising his remaining staff to address and remedy NB&A's lodgement and payment obligations;

(h) In January / February 2020 Mr Birdseye arranged for another employee to undertake relevant training and then, another existing employee got involved, and they eventually attended to most of the outstanding activity statement lodgements (as is evident from the details in Schedule 2);

(i) He made no payments under the March 2020 payment plan, partly because of the drop in NB&A's cash flow after the Tribunal's 8 May 2020 stay refusal decision, and partly because of increased legal expenses associated with the review application;

(j) Notwithstanding the default in meeting any of the payment obligations under the March 2020 payment plan, until two or three days before the review hearing, he had made no attempt to contact the ATO, and renegotiate the plan.

79. The staffing issues Mr Birdseye identified were:

(a) The April 2019 departure of one employee who had assertedly been attending to the activity statement lodgements in the preceding two years;

(b) The June and August 2019 departure of two other employees to whom he had delegated responsibility for the returns;

(c) An inability to recruit new employees after September 2019 (given the Board's notice of investigation);

(d) The November 2019 resignation of a fourth staff member (NB&A's administration manager);

(e) An asserted lack of any requisite accounting software skills within the approximately nine NB&A employees who remained after November 2019.

80. Despite those asserted staffing difficulties, when he was pressed in cross examination, Mr Birdseye effectively conceded that he had believed his staff had the ability to attend to the activity statement lodgements, and would do so. But he also acknowledged he knew that activity statements were not in fact being lodged. Against that background, Mr Birdseye's apparent primary reliance on staffing deficiencies is far from persuasive. It is at least implicit in his evidence that client invoicing, and staff wage payments (including their superannuation entitlements), were timeously attended to. Up until at least November 2019 this had been done by one employee who, assertedly, operated only one of the practice's computer systems, and lacked the skills and ability to operate "the accounting system", to attend to activity statement lodgements. That explanation obviously addresses only part of the period of lodgement default. It is also an easily made, but rather implausible, explanation when proffered to mitigate lodgement and payment defaults that went on for many months. In particular it jars with other parts of Mr Birdseye's evidence, where he asserted belief in the competence and ability of the staff to whom he said he had delegated the activity statement lodgement tasks.

81. Furthermore, whatever difficulties may have existed in relation to the timely lodgement of activity statements after April 2019 can hardly explain Mr Birdseye's failure to cause Claim It to make any subsequent PAYG withholding payments after June 2019. There were two kinds of required payments. The first kind of payments were the instalments specified in the Schedule to the 22 June 2019 payment plan. No accounting skills of any kind were required to make those payments. The second kind of payments were the PAYG amounts required to be withheld from the periodic wage payments made to NB&A's employees. Since those wages were paid regularly, and were obviously part of a regularly used system in the administration of the practice, it is difficult to accept that there was any real practical impediment to quantifying and making PAYG withholding payments.

82. In his 29 October 2020 statement Mr Birdseye proffered, cash based, profit and loss statements for the NB&A practice, for the year ended 30 June 2020, and for the subsequent three months to September 2020.[15] The apparent purport of these profit and loss statements was to demonstrate NB&A's marginal profitability, and hence suggest cash flow pressures in those two accounting periods. At least implicitly, they were relied on to provide some informative background, potentially ameliorating the significance of Claim It's significant period of non-payment (that is to say, the whole period after October 2018):- *see paragraph 69 above*.

83. I have re-presented the two profit and loss statements in Schedule 4 – "NB&A - profit and loss summary (re-presented)" - to these reasons. In that re-presentation I have separately identified some particular expense items, and included a short summary of the explanations Mr Birdseye gave about them. As an end of period summary, neither statement is a particularly persuasive means of demonstrating Claim It's inability to have complied with the GST and PAYG withholding payment obligations that accrued after May 2019, or Mr Birdseye's resolve to attempt to so do. As noted in the "Evidence comments" column in Schedule 4, several aspects of the profit and loss account tend to question their probative value:- (i) the sales turnover excludes GST, (ii) there is nothing to indicate whether GST expenses have been excluded, (iii) the nature of the "tax" expense is not stated, (iv) rent and interest expenses are not "arms length" transactions, (v) Mr Birdseye gave inconsistent evidence as to whether the "Salaries & wages" expense included PAYG withholding and, (v) the superannuation expense seems overstated (as a percentage of the Salary & wages expense). Contrary to the reliance Mr Birdseye sought to place on the profit and loss statements, what emerges from an informed understanding of them are the impressions that (i) if GST had been included in the 30 June 2020 turnover, Claim It ought have been able to meet its net GST payment obligation and, (ii) as Mr Birdseye ultimately conceded in cross examination, the reality is that he chose to use the GST NB&A had received, and the PAYG amounts it had withheld, to fund NB&A's operations (including making interest payments to his wife, and rental payments to a trust of which he was a beneficiary) rather than meet its GST and PAYG withholding payment obligations.

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15 This occurred after, and presumably in response to, the Board's criticism (in its then recently served contention document (at [105]) that Mr Birdseye and Claim it had not provided any evidence to substantiate the existence of financial exigency contributing to the payment defaults.

84. The significance of that latter impression and concession, as a potent indicator of Mr Birdseye's unfitness for registration, is not diminished by his asserted (but apparently disappointed) expectation of receiving further business income sufficient to meet Claim It's commitments. That unsubstantiated generality does not justify a self interested relegation of mandatory taxation compliance obligations to a subordinate status relative to other expenses.

**THE CONTENTIOUS ISSUES OF "PERSONAL AFFAIRS" COMPLIANCE CONDUCT**

85. Mr Birdseye acknowledged that the TASA Code obligation of taxation law compliance in the conduct of "personal affairs" applied to both his individual obligations and those of Claim It. However he sought to limit the concept of "personal affairs" to those entities, and disputed or qualified his status in, or relevant involvement with, three entities that had been the subject of some of the Board's adverse findings:- *see paragraphs 16 & 17 above*.

86. The three entities, and the sections of these reasons in which I address the matters relevant to the Board's findings, are as follows:

(a) AFG Group Pty Ltd - see paragraphs 87 to 101 below.

(b) Medlow Chocolates Pty Ltd - see paragraphs 102 to 115 below.

(c) Sazzii Pty Ltd - see paragraphs 116 to 142 below.

**AFG GROUP PTY LTD AND THE AFG CHARITIES TRUST**

87. This company had been incorporated in January 2012 by four Victorian residents. They included a Mr Trevor Fiora, and his (then) 27 year old son. The company's registered office, and principal place of business, was in Victoria. Although the evidence is unclear, the company appears to have been the trustee of "The AFG Charities Trust". At least for a time the AFG Charities Trust was a registered charity with the Australian Charities and Not-for-profits Commission. The charity's registered address was in Brisbane, but it apparently conducted its main operations in Melbourne. Despite losing its formal "charity" registration with effect from 1 July 2013, the Trust lodged financial reports, and annual information statements, with the Australian Charities and Not-for-profits Commission until the end of December 2015. The ABN for the charitable trust was cancelled in August 2017, and AFG Group Pty Ltd was itself deregistered in June 2018, perhaps as the result of the cessation

of its activities. At that time, the company appears to have had a tax debt of about $114,533, relating to superannuation guarantee charge amounts. By October 2019, that liability appears to have increased to $122,256.

88. Mr Birdseye never held shares in AFG Group Pty Ltd but, with three other people, he had become a director of the company in July 2012. Those appointments brought the total number of board members to five, but only for a short time. The ASIC register for the company shows that the number of directors had reduced to three by March 2013. However, the register also recorded that Mr Birdseye continued as a director, until the company's June 2018 de-registration.

89. All of the ASIC and Australian Charities and Not-for-profits Commission registration details provide either Victorian or Brisbane addresses for the company. Nevertheless, on 17 November 2017, the ATO sent an overdue tax debt notice to "The Trustee for the AFG Charities Trust" at an (otherwise unexplained) address in Hallett Cove, South Australia. The notice related to a superannuation guarantee charge debt of $60,834, and required payment by 1 December 2017. (The notice had perhaps been prompted by the belated lodgement, earlier in November 2017, of activity statements for the nine quarterly periods from April 2015 to June 2017.) Subsequently, and nearly a year after the company's de-registration, on 7 May 2019 the ATO issued Mr Birdseye with a $60,787 director penalty notice relating to the company's superannuation guarantee charge liabilities.

90. On 25 June 2019, the ATO issued another director penalty notice to Mr Birdseye. This related to PAYG instalments, totalling $12,432, for the five month period from October 2016 to February 2017.

91. The Board's February 2020 submission document asserted that Mr Birdseye, as a director of AFG Group Pty Ltd had been a party to the company's failure to lodge superannuation guarantee statements for 18 employees (and apparently, to make superannuation guarantee payments) "by quarterly period ending 31 December 2015". Neither the basis for the assertion that AFG had 18 employees, nor the idea that Mr Birdseye had been "party to" the company's failure, nor the reasons for confining his allegedly culpable participation to the period prior to 31 December 2015, was apparent from the material included in the Board submission. The latter omission was perhaps somewhat surprising, because the apparent emphasis on the period prior to December 2015 was seemingly inconsistent with

both of the facts that (i) the $60,787 May 2019 director penalty notice related to periods up to June 2017 and, (ii) the Board submission also contended that Mr Birdseye, as a former director continued to "share the responsibility for" the (significantly higher) $122,256 superannuation guarantee liability as at October 2019.

92. Mr Birdseye's evidence contradicted the accuracy of the ASIC register. He said that he had resigned as a director of AFG Group Pty Ltd in December 2012. Consistent with that assertion, but in a perhaps surprisingly belated response to the director penalty notices of May and June 2019, on 1 April 2020 Mr Birdseye contacted the ATO and provided communications evidencing his asserted December 2012 resignation. Those communications consisted of four emails. They were variously addressed to a Queensland government body (the Charities Board of Queensland) and to "trevor@afgcharities.com.au". The emails revealed Mr Birdseye's concern about suggestions of corruption in the affairs of the charity. They also announced his resignation as a director, and requested his name be removed from both the ASIC register and from the company's website.

93. In his evidence for the review proceedings Mr Birdseye also provided a short, apparently confirmative letter dated November 2020. It was from a Ms Cherie Davenport, who claimed to have been Mr Trevor Fiora's partner, and a person jointly responsible with him for the AFG Charities Trust. She asserted a contemporary awareness of Mr Birdseye's resignation emails, a recollection of their acknowledgment by Mr Trevor Fiora, their communication to Mr Scott Fiora, one of the remaining directors of the company as at December 2012, and the latter's subsequent apparent assurance that Mr Birdseye's resignation had in fact been notified to ASIC.

94. Ms Davenport's connection with AFG Group Pty Ltd and the AFG Charities Trust depended on her own assertion, and was not corroborated by any of the available registration records of either entity. However, she was not required for cross examination. Nor did the Board dispute either the apparent contemporaneity of Mr Birdseye's email resignation communications in December 2012, his oral evidence (consistent with Ms Davenport's explanation) that Mr Trevor Fiora was the "main operator" of the AFG Group entities, or his oral evidence that he had never taken any part in the management of the company.

95. Ms Davenport's unchallenged letter provides considerable support for the proposition that Mr Birdseye had ceased to be a director of AFG Group Pty Ltd at the end of 2012, and long

before any of the defaults underlying the apparent taxation liabilities of the company, and the AFG Charities Trust, as at May 2019. Ms Davenport's letter, and Mr Birdseye's similar assertion, was supported by Mr Birdseye's apparently contemporaneous written resignation email. The likely reality of the email having been sent was strengthened by the contents of his correspondence with the Charities Board of Queensland, correspondence that appears to identify the concerns understandably likely to have prompted Mr Birdseye's resignation decision.

96. The ASIC register records that Mr Birdseye did not cease to be a director of AFG Group Pty Ltd until the company's deregistration in June 2018. In the review hearing the Board contended that Mr Birdseye had the burden of establishing his resignation, and that he had not done so by producing the December 2012 emails. The first of the Board's contentions is debatable, and reliance on mere questions of onus perhaps unhelpful. The precise grounds on which the Board advanced its second contention were unclear. They may have involved the cumulative propositions that (i) the emails were not "given" at the company's registered office (as contemplated by the "replaceable rule" in *Corporations Act 2001* (Cth) s 203A), and, (ii) having been addressed to a person named "Trevor", did not constitute notice to the company, because no "Trevor" was either a director of the company or a person "associated with AFG Group Pty Ltd at the time".

97. The Board's contentions were forensically ambitious. The "replaceable rule" in *Corporations Act 2001* (Cth) s 203A, is not prescriptive of the permissible modes of resignation by a validly appointed company director. Such a rule (which applies in the absence of any specific provision in the constitution of a company) operates as a contract and, like any contract, is capable of variation by subsequent agreement:- see *Aero Marine Consulting Pty Ltd* [2003] FCA 1016 at [41]-[50]. Indeed the Board's written submissions acknowledged that a director could effectively resign by an oral statement, if the company accepted such a statement. The Board's proposition that the resignation email recipient named "trevor" was not "associated" with AFG Group Pty Ltd, was perhaps influenced by the limited nature and scope of the Board's investigation (*see paragraph 11 above*) and is counter factual. The ASIC register for AFG Group Ltd recorded that a Mr Trevor Fiora was a founding shareholder in the company who, with his son, held 65% of the issued capital of the company. The register also indicated that Mr Trevor Fiora's son had been a director of the company since its incorporation, and that Mr Trevor Fiora had himself been a director of the company since August 2014. The Australian Charities and Not-for-profits

Commission register recorded that the formal address for the AFG Charities Trust was "trevor@afgcharities.com.au". When those details are properly evaluated, against the background of the evident corruption concerns that appear to have motivated Mr Birdseye's December 2012 resignation emails, the Board's contention that there was "no evidence" of any association between AFG Group Pty Ltd and "trevor" appears to have lacked reasonable justification. In the light of Ms Davenport's unchallenged November 2020 letter, it certainly lacked persuasive force.

98. Ms Davenport's unchallenged letter sufficiently establishes that (i) Mr Trevor Fiora was the "trevor" recipient of the December 2012 resignation email, (ii) he was also one of the controllers of the company, (iii) he communicated the resignation email to his son Scott, one of the directors of the company and, (iv) both the Messrs Fiora, and other relevant company officers, thereafter accepted Mr Birdseye's resignation as a director of the company. In those circumstances, the proper conclusion to draw is that Mr Birdseye's asserted December 2012 resignation was effective, and ended his status as a director of the company.

99. In its final oral submissions, and notwithstanding the absence of any real challenge to either the Davenport letter, or Mr Birdseye's oral evidence, the Board formally adhered to its contention (which I reject) that Mr Birdseye had failed to discharge the onus of establishing his resignation. The Board then advanced the further submission that Mr Birdseye had relevantly failed to deal appropriately with his tax obligations, because of his apparently belated tangible response (in April 2020) to the director penalty notices he had received in relation to the tax debts of AFG Group Pty Ltd. This submission I also reject. I do so for two reasons. First of all, it rests on the proposition that Mr Birdseye had a personal tax obligation in relation to the company. I have found that he relevantly ceased to be a director years before the defaults underlying the company's debts. I have also found that, as a matter of fact, the affairs of AFG Group Pty Ltd are not properly to be characterised as part of Mr Birdseye's "personal affairs". Secondly, Mr Birdseye's uncontradicted oral evidence was that, much earlier than April 2020, he had telephoned the ATO and asserted the fact of his 2012 resignation. The absence of any evidence of ATO recovery action against, or indeed relevant communication with, Mr Birdseye after the June 2019 director penalty notice, is at least consistent with the reliability of that assertion, and the apparent sufficiency of his disclosure.

100. Even if I had not been satisfied about the efficacy of Mr Birdseye's December 2012 resignation, I would not have concluded that the asserted informality / inefficacy of his resignation bore adversely on his current fitness for registration as a tax agent. Nor would I have concluded that the formal continuation of his status as a director of the company was part of his "personal affairs". There are two reasons why I would not have embraced the former conclusion. The first reason is influenced by the concerns that apparently contributed to Mr Birdseye's resignation decision:- *see paragraph 92 above*. The second reason is that any inefficacy in Mr Birdseye's asserted resignation is best regarded as the result of his genuine belief about the significance of Mr Trevor Fiora's role within the AFG Group Pty Ltd, and / or misunderstanding of the desirable degree of formality required to provide unequivocal evidence of the termination of his status as a director.

101. There are several considerations why I would not have embraced the conclusion that the merely formal continuation of Mr Birdseye's status as a director of the company, brought them within the scope of his "personal affairs". The primary consideration is that the question of what the concept of "personal affairs" includes, has to be answered as a matter of fact, and depends on the particular circumstances. Those circumstances include the realities that Mr Birdseye was never a shareholder of the company, its role appears to have been that of a "charity", Mr Birdseye was but one of several directors, he was not shown to ever have had any executive or decision making role in the company, and there was no evidentiary basis to challenge his apparent belief that he had effectively severed all ties with the company, as the intended consequence of his December 2012 email communications.

**MEDLOW CHOCOLATES PTY LTD**

102. This company had been incorporated (under a different name) in January 2014. At that time Mr Birdseye was the company's sole director, company secretary and shareholder. The company became registered for GST, originally with effect from 1 July 2015, but later altered to 1 July 2014. It changed its name in October 2015 and, in January 2016, issued 1,000 shares to each of Mr and Mrs Medlow-Smith (as joint shareholders) and to Mr Birdseye and his wife (apparently also as joint shareholders). In February 2016 Mr and Mrs Medlow-Smith became co-directors, and co-secretaries, with Mr Birdseye. Mr Birdseye remained as a director of the company, and apparently also as a co-secretary, until October / November 2018. He was, at all relevant times, the company's public officer.

103. Under its “Medlow Chocolates” name after October 2015, this was one of the companies that had been the subject of the ATO’s 8 November 2018 referral to the Board. That aspect of the referral related mainly to superannuation guarantee payment defaults from July 2016 to September 2017:- *see paragraph 8 above*. The company was also the subject of the ATO’s further referral to the Board in July 2019. That referral related to ongoing superannuation guarantee payment defaults, and ITR and BAS lodgement defaults, up to the latter half of the 2018 calendar year:- *see paragraph 9 above*.

104. The ATO’s 8 November 2018 referral letter indicated, somewhat imprecisely, that the company’s affairs had first come under scrutiny in February 2016. The referral letter included attachments that provide some additional context. One attachment was an ATO 28 October 2016 letter (addressed to Mr Birdseye as the company’s public officer). It announced an audit of the company’s quarterly BAS for the 2015 tax year. Another attachment was the ATO’s audit completion letter of 10 January 2017 (addressed to the three directors, at the NB&A office address). That letter noted that the company had indicated to the ATO that it had deferred lodging BAS for the quarters after December 2015, pending completion of the audit. The audit completion letter also revealed that (i) the company had reportedly first started its retail trading in March 2016, (ii) most of the expenses relied on to support the input tax credit claims in the 2015 tax year BAS were personal in nature and, (iii) the company had reported no significant income, including in the BAS up to December 2015. In the light of those matters the Commissioner was not satisfied the company had been carrying on an “enterprise” and was entitled to GST registration. Consequently, the audit resulted in cancellation of the company’s GST registration (with effect from 1 January 2016), refusal of the company’s input tax credit claims, imposition of “excess GST” liability (under GST Act s 142-5) for the period ended June 2015), and a shortfall penalty approximating $6,438. This penalty was imposed on the basis that the BAS contained false and misleading statements. That penalty basis, and Mr Birdseye’s personal responsibility for the contents of the BAS, was clearly relied on by the Board in its February 2020 decisions:- *see paragraph 17(d) above*.

105. The ATO’s 8 November 2018 referral letter’s reference to Medlow Chocolate’s SGC defaults for periods after January 2016 suggested that the company had indeed carried on an enterprise at some stage, and that the 10 January 2017 decision was not the last word. Given those considerations, a surprising (and frankly, lamentable) omission from the referral letter was any reference to the fact of Medlow Chocolate’s successful objection to the

January 2017 audit decision. That objection had been lodged within days of the original decision. It was the subject of an objection decision, and accompanying statement of reasons, dated 27 April 2017. The substance of the decision was to the following effect:-

(a) the company was relevantly conducting an enterprise and was entitled to maintain its GST registration;

(b) the company was entitled to some of the input tax credits that it had claimed;

(c) neither Mr Birdseye, nor his employee, had prepared or advised on, the contents of the erroneous BAS, which had been derived from data provided by Mrs Medlow Smith;

(d) the penalty assessment was reduced (from $6,438) to $1,433.60, based on Mrs Medlow Smith's failure to exercise reasonable care by seeking advice from NB&A about the BAS contents.

106. In the light of the contents of the April 2017 objection decision, and the absence of any contradictory information, there is nothing to establish that Mr Birdseye was personally involved in the BAS statements that resulted in the "misleading statement" penalty involved in the January and April 2017 decisions. On the contrary, the April 2017 objection decision reasons record and accept Mrs Medlow Smith's positive assertion that Mr Birdseye had no involvement in the preparation of the BAS, and no input to the content of the company's records on which the input tax credit claims in the BAS had been based.

107. By June 2017, in circumstances not apparent from the available material, Medlow Chocolates had outstanding SGC payment obligations. Those obligations were subject to a payment plan, with which the company had not complied. An ATO 19 June 2017 phone call record indicates both that Medlow Chocolate's SGC payments, and its ITR lodgements for 2014, 2015 and 2016, were then all outstanding. The phone call record attributes to Mr Birdseye (i) ignorance about the non-payment under the SGC payment arrangement and, (ii) an assurance that it would be paid by 20 June 2017. The phone call record also attributes to Mr Birdseye an assurance that all outstanding ITR (and BAS) lodgements would be attended to by 30 June 2017.

108. The SGC payment default reported in the ATO's 8 November 2018 referral letter to the Board appears to have been the result of an audit process that was first notified to Mr

Birdseye in the latter part of 2017. That notification was the subject of discussion with the ATO in November 2017, and resulted in the subsequent late lodgement of activity statements for the quarters from July 2016 to September 2017. Those statements indicated a total SGC payment liability of $5,079. The audit decision, which was notified in a 21 March 2018 letter addressed to Mr Birdseye, resulted in the imposition of a 35%, $1,777 penalty. That penalty amount reflected both a substantial discount, to take account of the belated lodgement compliance, and a small uplift, to take account of what was characterised as an "unsatisfactory" compliance history.

109. The ATO's 8 November 2018 referral letter had also alluded to ongoing audit activity in relation to Medlow Chocolates' SGC payment obligations from October 2017 to June 2018. That audit had been notified in the ATO's 4 October 2018 letter addressed to Mr Birdseye. That notice may have prompted Mr Birdseye's 9 October 2018 resignation as a director, as well as the belated lodgement of the SGC statements, on 30 October 2018. The audit itself was completed shortly afterwards. It resulted in an SGC payment liability of $2,753 and a 55%, $1,514 penalty. That, slightly increased, penalty percentage reflected similar considerations to those that had influenced the previous audit decision relating to SGC statements for the quarters from July 2016 to September 2017.

110. The 27 November 2018 SGC audit decision reasons (which were addressed to Mr Birdseye) indicated that whilst Medlow Chocolates had lodged its quarterly SGC statements, it had not lodged several BAS and ITRs. In particular, and notwithstanding the June 2017 reminder noted above (*in paragraph 107 above*) the company had not lodged any BAS since the December 2015 BAS that had been alluded to in the January 2017 audit decision. The company had not lodged its ITRs for any of the 2015 to 2018 tax years. (The same lodgement defaults were later noted in the ATO's 2 July 2019 referral letter:- *see paragraph 9 above*. Those significant lodgement defaults appear not to have been remedied until the numerous April 2019 lodgements noted in Schedules 1 and 2.)

111. The ATO's 5 July 2019 letter (which was not addressed to Mr Birdseye) notified the company of an outstanding $6,361 SGC liability and a BAS liability of $1,896. The former liability reflected a significant, but modest, increase from the 27 November 2018 SGC audit decision.

112. In his September 2020 witness statement Mr Birdseye acknowledged the company's many ITR and BAS lodgement defaults, but otherwise contented himself with an explanation that "for conflict of interest reasons" he had not sought to carry out any role as tax agent for Medlow Chocolates. Instead, another NB&A employee had carried out that role, assertedly without any direction or personal influence from him. Mr Birdseye did not really explain, despite being specifically asked about, the reasoning that led him to the view that his role as a director of the company exposed him to a conflict of either interest or duty in relation to the timely lodgement of accurate returns and statements in accordance with the company's lawful obligations. It is not necessary however, to scrutinise that aspect of his evidence. This is because, even if fully accepted, it falls well short of providing adequate explanation either for the company's sustained defaults, or for his own apparent inactivity in endeavouring to ensure they did not occur. That is particularly the case when one contrasts the prolonged lodgement and payment defaults with the remediation assurance that Mr Birdseye is recorded as having given to the ATO in June 2017.

113. At one point in the course of his cross examination, Mr Birdseye asserted a belief that the company had been trading at a loss, and would have had no income tax liability. (That was particularly the case during what he said was the company's total inactivity during the (pre February 2016) period of his sole directorship.) He also appeared to assert that a belated discovery of the company's PAYG and SGC liabilities was what had prompted his October 2018 resignation as a director. He denied knowledge of the ATO's 21 March 2018 audit decision. He said he had believed that the company had few, and only short term, employees and that he had only discovered the amount of the company's SGC liability at the end of the period of his involvement as a director. On his own evidence, he left "all responsibility" to the other directors, and to his employee. He even asserted a belief that all the tax returns, financial statements and BAS were being duly prepared and lodged as required.

114. As the Board's submissions noted, Mr Birdseye's assertion of reliance on others carries little weight in relation to the period (from January 2014 to February 2016) of his sole directorship of the company. However, there is little, and no satisfactorily persuasive, evidence that the company operated to any significant extent in that period. Consequently, if that period were the only consideration I would not regard the lodgement defaults that occurred in that period (principally the 2015 ITR) as having any material impact on Mr Birdseye's contemporary registration fitness. In relation to the period of his co-directorship

with Mr and Mrs Medlow Smith, Mr Birdseye's assertion that he left responsibility for all of Medlow Chocolates' taxation compliance issues with the Medlow Smiths and his employee, leaves him open to the criticism, which the Board made in its submissions, that this amounted to an unacceptable abdication of his responsibilities, at least as a director, and reflected adversely on his fitness. The Board advanced that criticism in its submissions without seriously challenging Mr Birdseye's various assertions that he had genuinely believed, or at least assumed, that his co-directors had properly attended to the company's various taxation compliance obligations. Such a challenge could well have been made, given (i) the apparent inconsistency between Mr Birdseye's assertion and the compliance remediation agreement attributed to him in the ATO's June 2017 file note, (ii) his status as public officer of the company, (iii) the instances when ATO compliance related correspondence was addressed to him personally. However, those matters were not significantly addressed in the evidence, and Mr Birdseye's asserted belief in the company's compliance during the period of his co-directorship, was not explicitly challenged. Consequently, it would not be appropriate to make a positive finding that Mr Birdseye was relevantly aware of the company's non-compliance, except at around the time of the June 2017 file note conversation. Such a finding, whilst potentially significant, would not necessarily contradict Mr Birdseye's general claim of belief in subsequent (though belated) compliance.

115. On Mr Birdseye's behalf, the submission was made that Medlow Chocolates' taxation affairs were not part of his "personal affairs". It is not necessary to reach a concluded view about that submission, but it is one that I view with scepticism. Mr Birdseye was a director, secretary, public officer and shareholder of the company. There is no evidentiary basis for concluding that he held those capacities in any merely titular capacity. As a director, a capacity which he regarded as the principal reason for his anxiety about "conflict of interest reasons", Mr Birdseye had personal obligations of care and diligence in relation to the company's affairs. In addition, as the principal officer of Claim It, Medlow Chocolates' tax agent, Mr Birdseye had an obligation to cause the company to provide competent tax agent services to Medlow. Those services would have included advising Medlow Chocolates about its compliance obligations, and the potential consequences of non-compliance. For both of those reasons, and irrespective of the "personal affairs" question, Medlow Chocolates' significant elements of non-compliance with its taxation obligations are capable of reflecting adversely on Mr Birdseye's contemporary fitness for registration. However, I am not satisfied that they actually do so to any significant extent. The factors that incline

me to that view are (i) the apparently limited extent of the company's trading activities and its actual taxation liabilities during the period of Mr Birdseye's directorship, (ii) the absence of any material evidence about the extent of Mr Birdseye's involvement in the management and administration of the company, (iii) the materially unchallenged evidence that he expected, and believed or assumed, that his co-directors were primarily responsible for attending to the company's taxation compliance, (iv) the absence of a sound evidentiary basis for rejecting that evidence and, (v) the fact of Mr Birdseye's resignation as a director in October 2018, apparently after then becoming aware of the company's outstanding compliance issues.

**SAZZII PTY LTD**

116. This was another of the companies the subject of the ATO's 8 November 2018 referral to the Board:- *see paragraph 8 above*. It had been incorporated in 2008 as Butterfly Mining Pty Ltd. Mr Birdseye was one of three shareholders and held 10% of the issued shares. (The other two shareholders respectively held 85 and five shares). Despite his status as a minority shareholder, Mr Birdseye was the company's only director until July 2012. (A few months before the company's November 2012 name change, and apparent re-styling as a "software publishing company".) After July 2012 Mr Birdseye was a co-director with the company's majority shareholder (Mr Newton). He was also the company secretary, until Mr Newton replaced him in December 2018. Mr Birdseye was, at all relevant times, the company's public officer for taxation purposes.

117. The details of the background to the Board's adverse findings about Mr Birdseye's conduct in relation to Sazzii Pty Ltd ("Sazzii") emerge mainly, but with neither complete clarity nor consistent accuracy, from both the ATO's 7 November 2016 objection decision reasons and the Board's February 2020 submission narrative. Relying largely on the ATO document, and the (comparatively few primary documents that were provided to the Tribunal) the following paragraphs set out the timing and details of relevant events.

118. ***Pre April 2013***:- In circumstances not addressed in the evidence, but asserted in the objection decision reasons, Mr Birdseye advised Mr Newton that Sazzii "could be eligible" to claim a tax offset in relation to Research and Development (R&D) activities. In March 2013 Mr Newton had discussions with, and obtained a fee proposal from, a firm of specialist

R&D tax advisers in connection with the formulation of tax offset claims relating to each of the 2012 to 2014 tax years.

119. ***12 April 2013***:- About 10 months after his appointment as a director of the company Mr Newton submitted an online registration application (under the *Industry Research and Development Act 1986* (Cth) s 27A) to Innovation Australia. That application was necessary to satisfy the registration eligibility pre-condition for a tax offset claim under ITAA 97 Chapter 3 Part 3-45, Division 355 s 355-100.[16]

120. The registration application related to the 2013 tax year and revealed the following aspects of the company:-

(a) Turnover:- $13,924

(b) Expenses claim:- $528,930 – comprising $353,500 for "core" R&D activities and $175,430 for "supporting" R&D activities

(c) Trading loss:- $515,006

(d) Total employees / employees engaged in R&D activities:- 5

(e) Nature of the R&D activities:- development of a School Management System (combining diary, database, timetabling, financial management, educational resources and professional development functions).

121. ***30 June 2013***:- The Sazzii balance sheet recorded the three Sazzii shareholders "equity" as $487,497 (Mr Newton), $236,177 (Mr Birdseye) and $125,000 (Mr Selkirk).[17] However, the objection decision reasons recorded that there was no reliable evidence substantiating their asserted equity amounts. In the case of Messrs Birdseye and Selkirk, most of their identified financial contributions had been made to another company - Typecraft Pty Ltd ("Typecraft"). Typecraft also appeared to be the source of Mr Newton's asserted equity.

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16 A registered "R&D entity" whose turnover was less than $20m could be entitled to a "refundable tax offset" for a proportion of either expenditure the entity "incurred" for "R&D activities", or the decline in value of assets used for "R&D activities". Where an R&D entity "incurred" an expense obligation to an "associate", it must have actually paid that associate during the claim year:- ITAA 1997 ss 355-1, 355-25, 355-100, 355-205(1).

17 Sazzii Pty Ltd's financial statements were not included in the material provided to the Tribunal.

Between late May and 29 June 2013, Typecraft had transferred $487,497 to Sazzii, and Sazzii had returned $333,996 back to Typecraft.

122. Typecraft traded as “BSmart”, and had assertedly carried out R&D activities for Sazzii Pty Ltd. However the arrangements under which it did so were opaque, and not the subject of any written arrangement. More significantly, Typecraft was an “associate” of Sazzii, at least because of Mr Newton’s shareholding and role in both companies. Similarly, each of Sazzii’s three shareholders was an “associate” of the company:- *see ITAA 97 s 318(2)*.

123. ***19 July 2013***:-- Assertedly via Mr Birdseye, NB&A lodged Sazzii’s 2013 ITR.[18] The ITR return included a tax offset claim, and resulted in a “refund” of $341,648.10. The components of the claim, and the refund amount to which the claim gave rise, are illustrated in the following table:-

| **Sazzii Pty Ltd - R&D activity - tax offset claim - 2013 tax year** | | |
|---|---|---|
| | | |
| **Expenditure** | $ | **Supporting explanation** |
| Designing user interface | 359,692 | "BSmart" invoices for design and programming by Mr Newton |
| Consultancy services | 119,994 | Birdseye services – not invoiced & unpaid |
| Other expenses | 101,122 | Newton's motor vehicle, office and "consumables" expenses |
| R&D entity registration | 35,000 | BSmart invoice to Sazzii |
| Wages and salaries | 143,410 | base salaries & loadings, plus $45,000 for Mr Birdseye's consulting services |
| **Total R & D activity expenses** | **759,218** | |
| | | |
| *Tax offset entitlement %* | *45%* | ITAA 97 s 355-100 |
| | | |
| **Tax offset claim amount** | **341,648** | |

124. ***November 2013***:- The ATO initiated a “client risk review” of the tax affairs of entities controlled by Mr Newton. That review subsequently escalated into an audit of Sazzii’s 2013 ITR.

[18] The contents of the 2013 tax return were outlined in the ATO’s 7 November 2016 objection decision reasons, but the document itself was not included in the documents provided by either the Board or by Mr Birdseye.

125. ***17 April 2014***:- Sazzii replied to the ATO's explanation and substantiation request. That reply contained the details summarised in the Table set out above, and disclosed that there were neither any written agreements for the asserted R&D activities, nor any accounting system for recording them.

126. ***11 July 2014***:- The ATO wrote to Mr Newton providing a position paper that outlined its reasoning for disputing Sazzii's entitlement to the R&D refundable tax offset claim under ITAA 1997 Div 355. The ATO's letter invited Mr Newton's response (including any disagreement with the accuracy and completeness of the factual understanding contained in the position paper) by 1 August 2014.[19]

127. ***14 August 2014***:- The 2016 objection decision reasons record Mr Birdseye as having sent the ATO emails, providing both wage payment and programming details supporting the tax offset claim, on 14 August 2013. However, because the ATO did not initiate its scrutiny of the tax offset claim until November 2013 (at the earliest), and only subsequently requested substantiation of the claim, it is obviously more likely (and, in the course of the review hearing, the Board accepted) that this information was actually provided in August 2014.

128. ***14 October 2014***:- The ATO issued an amended assessment to Sazzii for the 2013 tax year. No documents evidencing or explaining the amended assessment were provided to the Tribunal but, apparently informed by the 2016 objection decision reasons, the parties proceeded on the basis that the amended assessment had disallowed the offset claim, and resulted in a shortfall assessment. A related penalty assessment imposed a 25% shortfall penalty. That was imposed on the basis of a lack of reasonable care by both Sazzii and NB&A (specifically Mr Birdseye) in the formulation of the offset claim.

129. ***12 October 2015 to April 2016***:- In October 2015, NB&A lodged Sazzii's objection to the amended assessment, and provided some supporting documentation. In December 2015, the ATO requested further information, and Sazzii responded to that request in February and April 2016. These various documents were referred to in the November 2016 objection decision reasons, but none of them was included in the Board's submission document, nor otherwise provided to the Tribunal.

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[19] The Board's February 2020 submission documents contained the ATO's covering letter, but not the position paper itself. Neither was the position paper subsequently provided to the Tribunal.

130. ***7 November 2016***:- The ATO disallowed the objection and issued its decision reasons. The essential elements of the reasoning were that:-

(a) Sazzii had not relevantly "incurred" the claimed R&D expenditure – because:

(i) the obscurity of Sazzii's shareholders "equity", particularly the undocumented arrangements between Typecraft and Sazzii, and the appearance of contrived "round robin" payments related to Mr Newton's asserted equity", indicated that Sazzii had neither the means, nor the intention, of paying for the asserted services;

(ii) that indication was re-inforced by the undocumented nature of the arrangements under which "BSmart" (and Messrs Birdseye and Selkirk) assertedly provided R&D services to Sazzii, and made it unlikely that Sazzii ever actually "incurred" a payment obligation;

(b) even if Sazzii had "incurred" relevant payment obligations, each was owed to "associate" entities (including Typecraft, Messrs Newton, Birdseye and Selkirk) and Sazzii had failed to show that it had actually "paid" those entities, during the 2013 income year.

131. ***22 February 2018***:- In a letter not provided to the Tribunal, but referred to in its November 2018 referral to the Board, the ATO advised Sazzii that its (otherwise unexplained) $124,189 tax debt had been placed "on hold".

132. ***8 November 2018***:- In the November 2018 referral letter, the ATO described the 2013 tax offset claim as "unsubstantiated", but otherwise provided little information, and no informative documentation, about the claim. In addition to alluding to Sazzii's then current tax debt amount ($124,189.29) the ATO's letter noted that Sazzii's contentious 2013 document was the only ITR the company had lodged since its 2008 incorporation.)

133. ***5 to 17 July 2019***:- The ATO sent Sazzii an income tax statement of account and a notice of an overdue income tax debt. The statement of account revealed that (i) in February 2018 the whole of the $124,189 debt had been written off as "uneconomical to pursue", (ii) the debt had been "re-raised" in 5 July 2019 and, (iii) the unpaid balance of the debt was $140,321 (as at 17 July 2019).

134. ***12 August 2019***:- The Board's February 2020 submission document records that the ATO had referred Sazzii's income tax debt to a mercantile agent for collection action. However, the Board's submission attributed that referral to a letter that was not in fact included in the supporting documents, and was not otherwise provided to the Tribunal.

135. ***4 October 2019***:- The ATO addressed another income tax statement of account to Sazzii. It revealed an (otherwise unexplained) overdue debt of $142,905.84 as at 1 October 2019.

136. The details outlined in the preceding paragraphs indicate that Mr Birdseye:

(a) gave Mr Newton some advice about Sazzii's potential eligibility for a tax offset claim;

(b) lodged Sazzii's 2013 ITR – although that suggestion is unlikely to be accurate, given Mr Birdseye's uncontradicted evidence of lack of involvement with the claim prior to the ATO's later review and audit (*see paragraph 137(c) below*);

(c) provided some information about the claim, particularly the breakdown of the various claims, and the absence of substantiating documentation and financial records, during the ATO's review / audit process;

(d) in a 16 May 2014 letter[20] to the ATO, acknowledged or asserted a personal conflict of interest in relation to Sazzii.

137. Those indications nevertheless provide little clear evidence of either the fact or the extent of Mr Birdseye's personal involvement in the formulation of the tax offset claim. Consistent with the paucity of such evidence, Mr Birdseye disavowed any such involvement. He said that another of Claim It's employees carried out all the taxation services work for Sazzii, and, because of his conflict of interest perception, did so without any controlling supervision or direction from him. Mr Birdseye further stated that:

(a) Typecraft had itself successfully claimed an R&D tax offset in the 2012 tax year;

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[20] This was another, potentially relevant, document that was neither included in the Board's submission documents nor provided to the Tribunal.

(b) The 2013 tax offset claim was made by Sazzii Pty Ltd, on the basis of advice from the Federal Department of Industry, Science, Energy and Resources, because of Sazzii's apparent ownership of the relevant intellectual property;

(c) He had not been personally involved in the formulation of the 2013 tax offset claim;

(d) He only became aware of the deficiencies in the tax offset claim during the course of the ATO review and subsequent audit;

(e) He was not directly involved in the subsequent objection to the amended assessment;

(f) Before lodging the tax offset claim, Mr Newton had obtained advice from both an independent tax agent and from a specialist firm of tax advisors.

138. The Board's February 2020 submission had summarised the substance of the matters that could be derived from the ATO's 2016 objection decision. The Board's October 2020 statement of facts, issues and contentions in the review proceedings contained a similar summary. But the summary in both documents obscured, rather than highlighted, the factual basis for any specific complaint about Mr Birdseye's conduct. Furthermore, the Board's contention statement made no attempt to justify the Board's 20 February 2020 finding that Mr Birdseye had "facilitated" the unjustified 2013 tax offset claim, nor to contradict Mr Birdseye's asserted lack of direct personal involvement in the formulation, and submission, of that claim. Consistent with that absence of contest, the Board's subsequent written submissions of November 2020 made no positive assertion of impropriety by Mr Birdseye in relation to Sazzii's tax offset claim.

139. Despite that absence of any clear basis for criticism of Mr Birdseye's conduct in relation to the tax offset claim, during the review hearing Mr Birdseye was subjected to desultory cross examination to the effect that (i) if he had in fact provided any information to the ATO during the course of the review / audit, he had merely passed on, without checking, information that had been provided by Mr Newton, (ii) in the course of the 2014 review / audit process he had not disavowed payment to him by Sazzii, and had "left it to the ATO to find out for themselves whether or not the money had been paid" and, (iii) he had promised, but in fact failed, to provide his bank statements to the ATO, during the review / audit process. The latter two points were then said, in the Board's final oral submissions, to evidence Mr

Birdseye's failure to be frank with the ATO. They were relied on as providing a "stark example" of why Mr Birdseye was not a person who was "fit and proper" for registration.

140. There is considerable incongruity, and no persuasive force, in the Board's final oral submission. Their incongruity lies in the consideration that no such findings had figured in the February 2020 submission, in the minutes of the Board's February 2020 meeting, in the Board's 2 March 2020 letter to Mr Birdseye, nor even been contended for in any of the Board's pre-hearing submission documents. More significantly, the submission was unpersuasive because it rested on problematic foundations.

141. In relation to the absence of "checking", apart from the matters alluded to earlier (*see paragraph 136(c) above*) there was no clear evidentiary basis for identifying any information Mr Birdseye had provided. Nor was there a basis for concluding that any information Mr Birdseye did provide had been relevantly inaccurate. Finally, there was no adequate basis for concluding that Mr Birdseye had any personal responsibility for the adequacy, sufficiency or materiality of the information, he did provide. In relation to Mr Birdseye's asserted failure to provide his bank records to the ATO, this was a point that uncritically pursued an observation that had been made in the ATO's 2016 objection decision reasons. But that observation appears to have been a gratuitous irrelevance. The point being addressed in the objection decision reasons was that Mr Birdseye had acknowledged to the ATO that he had not issued any invoices to Sazzii. That part of the reasons betrayed an understanding, and perhaps implied an assertion, that Mr Birdseye had in fact been paid. But there was no specific evidence that Mr Birdseye had made such an assertion. Moreover, it tended to be inconsistent with his disavowal of having rendered any invoices. Finally, it was a proposition Mr Birdseye emphatically denied it in the course of his cross examination.

142. Overall, except in the Board's unjustified finding that he had "facilitated" the tax offset claim, and the equally unjustified propositions advanced in the Board's final oral submissions, the criticism of Mr Birdseye's conduct in relation to Sazzii's 2013 R&D tax offset claim was never clearly articulated. That absence of clarity was compounded by the absence of apparently relevant documentation (e.g. the 2013 ITR, the 2014 ATO position paper, and the amended assessment documents) despite references to it in the 2016 objection decision reasons and in the Board's submission documents. In the light of that absence of clarity, and Mr Birdseye's uncontradicted disavowal of personal involvement in, and responsibility for the

content of, the 2013 tax offset claim, there is no acceptable basis for any adverse finding being made against Mr Birdseye in relation to Sazzii's taxation non-compliance.

**OVERVIEW OF THE "PERSONAL AFFAIRS" COMPLIANCE ISSUES**

143. I have rejected the Board's criticisms of Mr Birdseye's conduct in relation to AFG Group Pty Ltd, and Sazzii Pty Ltd. I have similarly rejected the Board's finding that Mr Birdseye was relevantly responsible for any misleading statements relating to Medlow Chocolates. I have refrained from an express finding that Mr Birdseye's "personal affairs" extended to Medlow Chocolates' taxation compliance. I have concluded, despite that restraint, that Mr Birdseye's apparent inaction in ensuring Medlow Chocolates' taxation compliance is capable of reflecting adversely on his registration fitness, but I have concluded that it does not do so to any significant extent.

144. Those conclusions and assessments point to a return to the views I previously expressed. These were that Mr Birdseye's conduct (principally in relation to lodgement defaults by Torrens and the Group (ii) entities in Schedule 1) is capable of influencing a contemporary assessment of his registration fitness, but that Claim It's compliance performance, and Mr Birdseye's conduct in relation to Claim It, ought be the far more important focus of any such assessment:- *see paragraph 58 above*.

145. In relation to Claim It's non-compliance, the Board contended for non-compliance findings only in relation to lodgement and payment defaults after October 2018. However, the Board also contended that a proper assessment of Mr Birdseye's contemporary registration fitness had to have regard to a history of apparently similar non-compliance, prior to October 2018. I have agreed with that aspect of the Board's contention and expressed the view (to which I adhere) that any favourable assessment of Mr Birdseye's contemporary registration fitness largely depends on the adequacy of his explanation for Claim It's lodgement and payment non-compliance after October 2018 (and more particularly, after May 2019, in relation to lodgement defaults):- *see paragraphs 75 to 84 above*.

146. Mr Birdseye's explanation was not adequate. In relation to the conceded lodgement defaults, I do not accept that Mr Birdseye's vaguely described staffing and personal difficulties provide any real explanation, and certainly no justification, for Claim It's activity statement lodgement defaults. The belatedly asserted practical limitations on timely compliance with activity statement lodgement requirements were unpersuasively

insubstantial. Indeed, they gave rise to the impression of Mr Birdseye's disregard of the importance of timely lodgement compliance by Claim It. That impression, is contributed to by the history of Claim It's lodgement defaults, both prior to March 2016, and between March 2018 and prior to May / June 2019. It is further, and significantly, contributed to by the very significant GST and PAYG withholding payment defaults which appear to have long been a part of Claim It's history. Mr Birdseye's assertion that the most recent period of payment defaults (i.e. since the 22 June 2019 payment plan arrangement) are explained, or at least relevantly ameliorated, by cash flow exigencies was not established with any persuasive force:- *see paragraphs 79 to 84 above*.

**BACKGROUND TO THE BOARD'S CLIENT CARE AND COMPETENCE CONCERNS**

147. There is a long background to the Board's findings about Claim It's non-compliance with the TASA Code obligation of competent service (*TASA s 30-10(7)),* and its further findings of knowing obstruction and dishonesty, relating to the inclusion ("over a long period of time") of unsubstantiated "work related" expense claims in client ITRs:- *see paragraphs 17(e)-17(g), 18, 21 to 23 above*. The details of that background are a little difficult to extract, with confident precision, from the underlying series of reports. They appear to involve the matters summarised in the following paragraphs.

148. ***May 2009 to May 2013***:- At some stage prior to May 2009, the ATO had identified Mr Birdseye as a "high risk tax agent". That characterisation was based on a profile where about 25% of NB&A's 3,600 clients were defence personnel whose work related expense claims totalled approximately $5 million. The ATO had determined that, over a period of years, the average work related expense claim by those clients had been more than three times greater than what was typical for agents with a similar client base.

149. By May 2009, the ATO had conducted audits of the 2007 and 2008 income tax returns of 35 of NB&A's clients (i.e. approximately 70 ITRs). That audit had focussed on the "work related" expense claims in labels D1 to D5 of the approved ITR form. The audits found a lack of "work" nexus and / or a lack of expense substantiation. Consequently the audits had resulted in the rejection of a large number of those expense claims, and the substantial reduction of others. Those audit results prompted the ATO to write to Mr Birdseye in June 2009, and to foreshadow a referral to the Board.

150. In 2010, the ATO carried out further NB&A client ITR audits. They involved 36 NB&A clients and approximately 52 ITRs for the 2008 and 2009 tax years. On 2 August 2010, the ATO wrote to Mr Birdseye to "highlight the compliance issues" arising from the audits, and to inform him that they would be the subject of a referral to the Board. The highlighted issues covered perceived inaccuracies in a range of income and expense disclosures and claims, but mainly focussed on claims for work related expenses, and for property related expenses. The ATO letter opined that those claims were not reliably / sufficiently (i) substantiated by appropriate records, (ii) demonstrated to have an appropriate connection to income generation or, (iii) accurately calculated to reflect a proper apportionment / differentiation between private and "income producing" expenses. The letter further opined that these expense claim irregularities were primarily attributable to the following kinds of tax agent errors:-

(a) erroneous understanding, or application, of the relevant taxation law provisions;

(b) inadequate enquiry of clients;

(c) failure to sight substantiating clients records and information (with particular observations about log book maintenance and adequacy where the log book method was relied on to substantiate ITR Label D1 – Motor vehicle expense claims);

(d) inadequate enquiry about, and assessing the availability of substantiating client records.

151. The audits referred to in the 2 August 2010 letter appear to have been the subject of an updated internal ATO report in November 2010. The 5 November 2010 report addressed both the audits for the 2007 and 2008 tax years, and those for the 2008 and 2009 tax years. The report opined that there had been minimal change in the previously observed trends and stated that the expense claims for work related expenses "continued to be an issue". The broad nature of the concern about these expenses is indicated by the following table, which summarises the audit results relating to them.

| **ITR Label** | **2007 & 2008 ITR audit (35 clients)** | | | **2008 & 2009 ITR audit** (36 clients) | | |
|---|---|---|---|---|---|---|
| | WRE adjustments | | | WRE adjustments | | |
| | ST 293 ~112 to 120 - 5 Nov 2010 | | | ST 293 ~108, 121 to 130 - 5 Nov 2010 | | |
| | ***ITR claims*** | ***Adjusted / [Rejected]*** | | ***ITR claims*** | ***Adjusted / [Rejected]*** | |
| | "n" | "n" | "n" | "n" | "n" | "n" |
| | | | | | | |

| | | | | | | |
|---|---|---|---|---|---|---|
| D1 - Motor vehicle | 56 | 54 | 42 | 40 | 40 | 23 |
| D2 - Travel | 15 | 15 | 15 | 15 | 15 | 11 |
| D3 - Clothing | 34 | 34 | 25 | 22 | 22 | 9 |
| D4 - Self-education | 8 | 9 | 7 | 2 | 2 | 2 |
| D5 - Other WRE | 62 | 61 | 50 | 40 | 40 | 17 |
| | | | | | | |
| **Totals ("n")** | **175** | **173** | **139** | **119** | **119** | **62** |
| ***Percentages*** | ***100%*** | ***99%*** | ***79%*** | ***100%*** | ***100%*** | ***52%*** |

152. Without indicating the actual reason for any particular audit adjustment, the 5 November 2010 report provided an overview of the adjustments that were typically attributable to a lack of documentation to support either the "work related" basis for, or the actual amount of, the expense claim. The report again opined that the claim errors were primarily attributable to one or more of the four alternative kinds of tax agent error described in the August 2010 report:- *see paragraph 150 above*. The 5 November 2010 report asserted the audit results evidenced that "much" of the agent's behaviour (in submitting unsubstantiated claims) "tended to be reckless".

153. The 5 November 2010 report also addressed the penalty assessments, the status of assessment objections, and the overall tax shortfalls arising from the client audits. The substance of the report relating to those matters was to the following effect:-

(a) Penalty assessments had been made in relation to 67 clients, and 65 of those clients had been characterised as reckless.

(b) Assessment objections had been lodged by 30 of the 71 audited clients. Only one client's objection had been wholly successful. A further 21 clients had either been partly successful in their objections, or were awaiting objection decisions.

(c) Few (i.e. about 18) of the 71 audited clients had lodged objections to the penalty assessments, but in only seven instances had the penalty been reduced.

(d) After taking into account both the post audit assessment adjustments, and the objection decision outcomes, the audit adjustments totalled $2,186,878 and reflected the following averages:

(i) ***2007 / 2008 returns***:- $34,578 per client (indicating an average of $17,289 for the 70 audited ITRs)

(ii) ***2008 / 2009 returns***:- $27,128 per client (indicating an average of $18,781 for the 52 audited ITRs).

154. In 2011, the ATO carried out audits of the 2010 income tax returns of a further 50 NB&A clients. The focus of the audits appears again to have been on claims for work related expenses. The audit results, and those of subsequent objection decisions, were summarised in a 20 December 2011 letter sent to Mr Birdseye, with an accompanying detailed spreadsheet. (That information was apparently also conveyed to the Board).

155. The report narrative did not specifically quantify either the total or average assessment adjustments. Those values could (with effort) have been derived from the itemised summary table attached to the report. As stated in the May 2012 report (referred to later in these reasons) the total audit adjustments approximated $743,277, and the average adjustment for each return was about $14,866.

156. The material substance of the individual audit results is summarised in the following table:

| **ITR Label** | **2010 ITR audit** (50 clients) | | | | |
|---|---|---|---|---|---|
| | WRE adjustments | | | | |
| | ST 293 ~90 &136 - 20 Dec 2011 | | | | |
| | ***ITR claims*** | ***Adjusted / [Rejected]*** | | ***Penalty - basis*** | |
| | "n" | "n" | "n" | Reckless | Reas care |
| | | | | "n" | "n" |
| D1 - Motor vehicle | 38 | 35 | 30 | 6 | 29 |
| D2 - Travel | 11 | 11 | 9 | 4 | 6 |
| D3 - Clothing | 28 | 28 | 17 | 2 | 24 |
| D4 - Self-education | 5 | 4 | 3 | 1 | 3 |
| D5 - Other WRE | 44 | 42 | 16 | 6 | 27 |
| | | | | | |
| **Totals ("n")** | 126 | 120 | 75 | 19 | 89 |
| ***Percentages*** | ***100%*** | ***95%*** | ***60%*** | ***15%*** | ***71%*** |

157. The summary table indicates that a very significant proportion of all claims, and particularly the motor vehicle and travel expense claims, were wholly rejected. However, in most instances the related penalty assessment (for both adjusted and rejected claims) had been quantified on the basis of a lack of “reasonable care” rather than recklessness. In this respect the audit results reflected an apparently less pejorative assessment than had been typical of the previous audit assessments for the 2007 and 2008 tax years. Nevertheless, the report repeated the previously expressed opinions that the audit results were

"attributable primarily" to the previously identified kinds of tax agent error:- *see paragraph 150 above*. It particularly recorded an absence of satisfaction that clients had adequate records (including adequate log books and motor vehicle expense receipts) of work related expenses.

158. The 20 December 2011 letter also addressed the status of client objections to the 2010 tax year audit assessments. The information conveyed in the letter was to the following effect:-

(a) ***Assessment objections*** – total 29:- Objections had been partly allowed in nine instances, five matters were pending, and all other objections had been unsuccessful.

(b) ***Penalty objections*** – total 11:- Only one penalty assessment had succeeded, one matter was pending and all other penalty objections had been unsuccessful.

159. In May 2012, the ATO provided the Board with a formal referral report containing, what appears to have been, a comprehensive summary of the ATO's audit results and activities, relating to NB&A clients, for all of the tax years from 2007 to 2010. The report provided an overview of the audit results, brought a specific focus to work related expense issues identified in the 20 December 2011 letter, and included an analysis of overall NB&A client lodgements for each of the income years from 2008 to 2011. The additional material information contained in the May 2012 report was to the following effect:-

(a) The overall percentage of NB&A clients claiming work related expenses broadly corresponded with that of clients of "peer" tax agents – however:

(i) the percentage of NB&A clients claiming motor vehicle expenses was more than double that of "peer" agent clients, as was the median value of the claim;

(ii) the percentage of NB&A clients claiming travel expenses was half as much larger than that of "peer" agent clients, and the median claim value was typically more than triple the value of "peer" agent client's claims;

(iii) total work related expense claims of NB&A clients typically exceeded those reported by clients of "peer" tax agents – by multiples that ranged from 6.32 (2008 income year) to 4.84 (2011 income year) times.

(b) Over the 2008 to 2011 tax years:

(i) total NB&A client income tax return lodgements decreased from 3,623 (2008 tax year) to 2,374 (2011 tax year);

(ii) after clients severed their relationship with NB&A their total work related expense claims decreased by between about 50% (2008 income year) and 30% (the 2011 tax year);

(iii) after taxpayers became new NB&A clients their total work related expense claims increased by between 180% (2008 tax year) and about 98% (2011 tax year);

(iv) where clients remained with NB&A their total work related expense claims significantly decreased (by a little over 10%) only in the 2009 and 2010 income years.

(c) Matters of specific concern included:

(i) lack of substantiating records to demonstrate the income producing relationship (and the corresponding amount) of asserted work expenses;

(ii) inadequate log books, and diary entries, to substantiate motor vehicle expense claims (including instances where log book entries appeared to have been created retrospectively;

(iii) incorrect treatment of employer reimbursed expenses, and living away from home allowances.

(d) the identified income tax return errors were considered to be the kinds of inadequate tax agent practices that had been consistently identified in previous reports:- *see paragraph 150 above*.

(e) There were eight matters (four involving the 2010 tax year, and four apparently involving pre 2007 tax years) that had been the subject of review applications to the Tribunal. One of the review applications had been withdrawn, four had been settled, one had succeeded and one had failed. One other review application, relating to a 2009/2010 tax year assessment (the *Hancox* matter) was still current.

160. The *Hancox* review application was heard in the latter part of 2012, and resulted in a 27 November 2012 Tribunal decision. The principal matters in contest in the *Hancox* matter were (i) whether an employer designated $18,000 "living away from home" allowance was assessable income, (ii) the corresponding deductibility (under ITR Label D2 as "travel expenses") of accommodation and sustenance expenses (approximating $36,000) and, (iii) the appropriateness of imposing a shortfall penalty on the basis of recklessness. The Tribunal's decision affirmed the Commissioner's adverse determination on all of those matters. The substance of the Tribunal's reasoning was to the following effect:

(a) the employer's characterisation of the allowance as one for "living away from home" (rather than for "travel") was consistent with Mr Hancox's employment agreement, consistent with the guidance in Miscellaneous Taxation Ruling MT 2030, and determinative of its character:- [2012] AATA 836 at [18]-[22], [26]

(b) such an allowance was not assessable income, having regard to the *Fringe Benefits Tax Assessment Act 1986 (Cth)* ("FBTAA") s 30 & ITAA 1936 s 23L(1):- [2012] AATA 836 at [28]

(c) the non-assessable character of the allowance precluded the deductibility of the accommodation and sustenance expenses, having regard to ITAA 1997 s 8(2)(c) & ITAA 1936 s 23L(1):- [2012] AATA 836 at [29]

(d) Mr Birdseye should have appreciated the significance of the employer's characterisation of the allowance, and the consequential non-deductibility of the accommodation expenses. By proffering a return that characterised the allowance as income, and claimed the "travel expense" deductions, he had recklessly made a false or misleading statement:- [2012] AATA 836 at [35].

161. At least partly as a consequence of the ATO's May 2012 referral, in December 2012 (and apparently also April 2013) the Board formally notified Claim It of an investigation into its conduct, and the Board's concern about Mr Birdseye's ongoing fitness for registration. After receiving responsive representations to those notifications, on 8 May 2013 the Board determined that Claim It had failed to comply with three Code obligations (i) "personal

affairs" taxation law compliance (TASA s 30-10(2))[21], (ii) ensuring competent provision of tax agent services (TASA s 30-10(7)) and, (iii) "reasonable care" enquiry in ascertaining client affairs (TASA s 30-10(9)). In a 20 May 2013 letter addressed to Claim It, the Board determined that the appropriate sanction was to issue Claim It with a formal caution (under TASA s 30-15(2)(a)). The Board also made a direction (under TASA s 30-20(1)(a)) that Mr Birdseye (as Claim It's sole director) nominate, and undertake, an appropriate "course of education dealing with taxation administration".

162. In a separate 20 May 2013 letter addressed to him, the Board acknowledged Mr Birdseye's previous response to its concerns about his fitness. It also noted that the Tribunal decision in the *Hancox* matter was the subject of a pending appeal to the Federal Court. The Board informed Mr Birdseye that it would defer further consideration of his registration fitness until after the resolution of the appeal. It directed him to notify the Board of the appeal outcome.

163. In July 2013, Besanko J dismissed the appeal from the Tribunal's decision:- see *Hancox v Commissioner of Taxation* [2013] FCA 735. His Honour's reasons reveal (at [30]) that the critical matter in contest was whether the accommodation and sustenance costs (claimed as "travel expenses" under ITR Label D2) would be deductible expenses, under general taxation law concepts. (If the expenses were deductible, the employer's allowance would not be a "living away from home" allowance for the purposes of FBTAA s 30(1).) In rejecting the asserted deductibility, and accepting the application of FBTAA s 30(1), Besanko J's reasoning involved the following propositions:-

(a) the general law strongly favoured the conclusion that accommodation and food costs were not deductible expenses:- [2013] FCA 735 at [52]

(b) there was a possible argument that "additional" food and accommodation costs would be deductible where they had been incurred because of a workplace location,

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21 The review hearing evidence revealed that Claim It had entered into a payment arrangement in late April 2013, and was compliant with the arrangement at the time of the Board's 20 May 2013 letter. The evidence does not reveal the nature of either the debt or the taxation law non-compliance that was the subject of the Board's finding. However, Claim It had incurred a penalty for BAS lodgement delay in 2011, and by 27 April 2013 had accumulated a significant (approximately $94,000) GST and PAYG related debt. In addition, between 29 April and 1 May 2013 Claim it made three payments (totalling $21,000) in relation to that debt. It is therefore reasonable to infer, and I find, that the Board's May 2013 "personal affairs" non compliance finding related to Claim Its BAS / PAYG lodgement delays and non-payments in the period prior to May 2013.

but the claimed expenses were neither merely "additional" nor had they been incurred because of the workplace location:- [2013] FCA 735 at [50] and [53]

(c) whilst the reasoning of Hill J in *The Roads and Traffic Authority of NSW v Commissioner of Taxation* (1993) 43 FCR 223 at 233 provided a basis for a shortfall penalty assessment on "a lesser fault characterisation than recklessness", the Tribunal's finding had not involved an error of law:- [2013] FCA 735 at [58].

164. Careful reading of Besanko J's reasons reveal that His Honour did not regard Mr Hancox's employer's "living away from home" description of the allowance as determinative of its proper characterisation for the purposes of FBTAA s 30(1). Indeed, Besanko J accepted that, at least in relation to sustenance expenses, difficult questions about deductibility (and hence the application of FBTAA s 30(1)) could arise. In these respects, and notwithstanding the dismissal of the appeal, there was a notable difference between Besanko J's approach and that in the Tribunal's 27 November 2012 decision.

165. Following the resolution of the *Hancox* appeal, the Board revisited the question of Mr Birdseye's ongoing registration fitness. In a September 2013 letter, it drew attention to the Tribunal's finding, to the outcome of the appeal, and requested Mr Birdseye's response. His substantive response, in early November 2013, was to provide a barrister's opinion about the merits of the *Hancox* matter. In that opinion the barrister, who had acted for Mr Hancox in the appeal proceedings, undertook a thorough examination of a number of authorities. He noted that they evidenced the kind of difficult characterisation question to which Besanko J had referred, and some corresponding differences of view. The opinion concluded with the statement that, "even after the decision of the Federal Court" the barrister remained of the view (which appears to be consistent with a fair reading of Besanko J's reasons) that the deductibility asserted in the Hancox income tax return had been reasonably arguable.

166. Whilst the position is not entirely clear, the Board seems to have regarded the appeal outcome as not detracting from the significance of the Tribunal's finding in relation to the *Hancox* penalty assessment – despite both the barrister's opinion and Besanko J's similar observation:- *see paragraph (c) above*. Nevertheless, in a 20 November 2013 letter the Board informed Mr Birdseye that (i) it was prepared to accept the finding as involving a "one-off occurrence" and, (ii) it was satisfied of his ongoing fitness for registration.

167. ***February 2014 to December 2015***:- In mid February 2014, the ATO informed Mr Birdseye of further audits of another 50 NB&A clients in relation to their 2012 and 2013 ITRs. The audits would place particular emphasis on the Labels D1 (vehicle), D2 (travel) and D5 (other) aspects of work related expense claims, where NB&A clients had a history of appearing to make abnormally frequent and large claims.

168. The initial 2012 and 2013 ITR client audits (involving 46 NB&A clients, and 84 ITRs) had been completed by around mid 2014. They were the subject of a 17 September 2014 ATO report to Mr Birdseye. That report, together with a supplementary report of 8 December 2015, provided the basis for one of the Board's specific (but ultimately disavowed) findings about Mr Birdseye's "pattern of dishonesty" and having "knowingly obstructed" proper administration of taxation laws:- *see paragraphs 17(e) & 17(g) above*.

169. A spreadsheet accompanying the 17 September 2014 report detailed the adjustment and penalty assessments that had been made as a result of the audit. In a very small number of instances the actual expense claims had been increased. In most instances the claims had been wholly rejected. Very often the, briefly stated, reason for the audit assessment was the fact that the client / Claim It had not responded to audit queries. In other instances the typical stated reasons for the claim adjustment were either an apparent lack of "work" connection, or a lack of evidence to substantiate the claimed expense. Despite those reasons, and in apparent contrast to the approach taken in previous client audits, the typically stated basis for the penalty assessments was a lack of reasonable care, rather than recklessness. That general description of the audit results is consistent with the abbreviated presentation in the following table:

| **ITR Label** | **2012 & 2013 ITR audit** (46 clients) | | | | |
|---|---|---|---|---|---|
| | WRE adjustments | | | | |
| | BTdoc ~1071, 1073 | | | | |
| | ***ITR claims*** | ***Adjusted / [Rejected]*** | | ***Penalty - basis*** | |
| | | | | Reckless | Reas care |
| | | | | "n" | "n" |
| D1 - Motor vehicle | 62 | 57 | 47 | 0 | 47 |
| D2 - Travel | 49 | 49 | 39 | 0 | 39 |
| D3 - Clothing | | | | | |
| D4 - Self-education | 2 | 1 | 1 | 0 | |
| D5 - Other WRE | 33 | 33 | 16 | 0 | 15 |
| | | | | | |
| **Totals ("n")** | 146 | 140 | 103 | 0 | 101 |

| ITR Label | 2012 & 2013 ITR audit (46 clients) | | | | |
|---|---|---|---|---|---|
| | WRE adjustments | | | | |
| | BTdoc ~1071, 1073 | | | | |
| | ***ITR claims*** | ***Adjusted / [Rejected]*** | | ***Penalty - basis*** | |
| | | | | Reckless | Reas care |
| | | | | "n" | "n" |
| ***Percentages*** | ***100%*** | ***96%*** | ***71%*** | ***0%*** | ***69%*** |

170. The narrative within the 17 September 2014 report contained the following assertions by the ATO:-

(a) Car expenses were not reliably justified as income producing, and often simply involved travel to work.

(b) Car expenses were not properly substantiated, sometimes because the claim relied on a log book that was either not provided or had not been properly maintained.

(c) There was often no reliable differentiation between, or apportionment of, expenses (e.g. household expenses, interest, and capital costs) that were either essentially private, or related to both private and income producing activities.

171. The ATO's 17 September 2014 report acknowledged that some of the 2012 and 2013 ITR audit assessments had been the subject of objections by NB&A clients. Part way through the objection process, in March 2015, a senior ATO "compliance manager" visited Mr Birdseye, for the purpose of summarising the objection outcomes, and gaining a better understanding of NB&A's practices. Relevant points that emerge from the notes of the meeting discussion include the following:-

(a) Mr Birdseye's awareness of the ATO's concern about the level of NB&A work expense claims, particularly in relation to vehicle expenses, and his view that some ATO audit personnel had a personal hostility that had resulted in unjustified rejection of many expense claims;

(b) NB&A had approximately eight employees (three registered tax agents, three other employees who prepared tax returns, and two administrative assistants);

(c) Mr Birdseye would typically not check the returns prepared by registered tax agent employees, but would check those prepared by other employees;

(d) The ATO's review would not be finalised until all assessment objections had been determined;

(e) There were differing views about the justification for some client's claims, principally in relation to (i) travel apparently to, or between, workplaces, (ii) travel with work equipment, (iii) travel expense claims where employer allowances were not fringe benefits for the purposes of the FBTAA[22] and, (iv) the asserted sufficiency / insufficiency of log book entries.

172. The ATO's final evaluation of the overall audit result apparently resulted in the ATO's 8 December 2015 referral letter to the Board. Attachments to the referral letter included summary tables of those of the audited 2012 and 2013 ITRs that had been the subject of subsequent objections. The letter itself opined that Claim It and Mr Birdseye may have contravened the Code obligations of competent service and reasonable care enquiry (i.e. TASA ss 30-10(7) & 30-10(9)), but that diffident "may have contravened" conclusion was not the subject of any specific illustrative examples, nor was there any overall interpretative summary.

173. The main summary table accompanying the 8 December 2015 referral letter listed the 23 clients who had lodged objections, detailed their audit assessments, the nature of the objections, and the objection results. Scrutiny of that main summary indicates that four clients lodged objections only to the lack of "reasonable care" penalty assessments. In three instances those objections succeeded, because of the "safe harbour" provisions in TAA Schedule 1 s 284-75(6).[23] In relation to the substantive objections to the primary tax audit results, the overall effect of the objection decision outcomes is indicated in the following table:

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22 The notes record that Mr Birdseye challenged the application of the reasoning in the *Hancox* decision to the circumstances of other clients, who received short allowance periods that were not classified as "fringe benefits". The objection decisions had disallowed those claims, and Mr Birdseye foreshadowed review applications to the Tribunal.

23 The "safe harbour" penalty protection applies where (i) a taxpayer has engaged a registered tax agent, (ii) the taxpayer has provided the agent with all relevant information and, (iii) the agent has neither intentionally nor recklessly incorrectly applied a taxation law.

| ITR Label | 2012 & 2013 ITR audit objections (23 clients) | | | |
|---|---|---|---|---|
| | WRE adjustments | | | |
| | BTdoc ~1088 to 1091 | | | |
| | ***ITR claims*** | ***ITR obj'ns*** | ***Objn's Adj'd / [Rejected]*** | |
| | | | | |
| D1 - Motor vehicle | 33 | 27 | 13 | 14 |
| D2 - Travel | 23 | 13 | 4 | 9 |
| D3 - Clothing | | | | |
| D4 - Self-education | | | | |
| D5 - Other WRE | 12 | 9 | 4 | 5 |
| | | | | |
| **Totals ("n")** | 68 | 49 | 21 | 28 |
| ***Percentages*** | ***100%*** | ***72%*** | ***31%*** | ***41%*** |

174. That table suggests that the two most contentious claims were for motor vehicle and travel expenses. In relation to those two items it is pertinent to make some additional observations:-

(a) ***Car expense claims*** – The total of 27 objections included nine claims where the ITR claim had been reduced (rather than rejected). In six instances the objection decision favoured the NB&A client and resulted in a lesser claim reduction. Correspondingly, comparatively few of the car expense claims that had been rejected at audit (a total of 47 – *see paragraph 168 above*) were the subject of objections. The preponderance of those claims were similarly rejected in the objection decisions (14 of those 18 objections).

(b) ***Travel expense claims*** – The total of 13 objections included 11 instances where the audit had wholly rejected the claim. The objection decisions partly allowed two of those claims, and also increased audit assessment of two other claims. In three instances where the client had been paid an employer allowance, the claims were wholly disallowed, despite the attempt by Claim It and Mr Birdseye to distinguish the *Hancox* decision:- *see paragraph 171(e) above*.

175. The second supplementary table accompanying the ATO's 8 December 2015 referral letter listed five instances where car and travel expense claims in 2012 and 2013 ITRs had been rejected, either on the "*Hancox*" basis (i.e. the receipt of a living away from home allowance) or because they were not related to income production, but the NB&A client had made a similar expense claims in their 2014 ITRs. The apparent purpose of this short table was to demonstrate that knowingly untenable claims were being repeatedly submitted. The table

information was however, inconclusive. Certainly, in two instances the 2014 ITRs repeated claims when no objection had been taken to the prior audit outcomes but that bare circumstance might be explained by many considerations other than knowing pursuit of untenable claims. A different, but similarly considerable, obstacle confronts any such adverse conclusion in the remaining three instances. It is that each of those client's 2014 ITRs had been lodged before resolution of their client's objections to the prior year assessments.

176. ***October 2016 to August 2018***:- In early October 2016, the ATO began the audit process relating to NB&A's clients that culminated in the August 2018 referral report whose features I summarised earlier in these reasons:- *see paragraph 7 above*. I have also noted that the ATO's audit findings relating to NB&A client's 2016 ITRs provided part of the basis for the Board's "knowingly obstructed" and "pattern of dishonesty" findings against Mr Birdseye:- *see paragraphs 17(e) & 18 above*.

177. Even though the ATO had sent the last of its "audit completion letters" to the taxpayers by mid October 2017, the August 2018 ATO report indicated that only 31 audits had been finalised. (A further five of the originally selected clients had been categorised as low risk, and removed from the audit program.) The report asserted that Mr Birdseye may have breached the TASA Code "in relation to false and misleading ITR claims" and that he "may not" be providing a competent tax agent service. (The report did not specify, but may have been alluding to, the competence and reasonable care obligations in TASA s 30-10(7) and 30-10(9).) It noted that 42 of the 168 audit adjustments involved instances where the NB&A clients had made a "voluntary disclosure" reducing the particular expense claim. The report relied on that circumstance as an indication that Mr Birdseye had been "compliant" in "non-substantiation of the claims". Those observations were either inherently ambiguous (because of the imprecision of the expressions "in relation to" and "compliant") or essentially speculative (in the case of the "may not" statement, and in opining that the absence of a voluntary audit disclosure was informative about the circumstances of an agent's conduct in relation to the preparation of a contentious ITR). The imprecision of these various comments was not materially reduced by regard to the contents of the summary tables that accompanied the referral report.

178. One summary table provided a broad overview, and was the source of the information I summarised earlier in these reasons:- *see paragraph 7 above*. A second table listed the

31 completed client audits. It was in a spreadsheet format but (at least in the form it appeared in the printed version submitted to the Tribunal, and presumably to the Board) it was, for all practical purposes, unreadable. I had the pdf version of the document printed in an A3 page format, and relied on that version of the document to extract the following overview information in relation to the work related expense claims.

| **ITR Label** | **2014 - 2016 ITR audit** (31 clients) | | | | |
|---|---|---|---|---|---|
| | WRE adjustments | | | | |
| | BTdoc ~141 | | | | |
| | ***ITR claims*** | ***Adjusted / [Rejected]*** | | ***Penalty - basis*** | |
| | "n" | "n" | "n" | Reckless | Reas care |
| | | | | "n" | "n" |
| D1 - Motor vehicle | 28 | 10 | 13 | 2 | 18 |
| D2 - Travel | 13 | 2 | 11 | 2 | 9 |
| D3 - Clothing | 11 | 5 | 6 | 1 | 9 |
| D4 - Self-education | 2 | 0 | 2 | 0 | 2 |
| D5 - Other WRE | 27 | 22 | 5 | 4 | 20 |
| | | | | | |
| **Totals ("n")** | 81 | 52 | 37 | 9 | 58 |
| ***Percentages*** | ***100%*** | ***64%*** | ***46%*** | ***11%*** | ***72%*** |

179. That information permits the following observations:-

(a) ***The "work related expense" proportion of the adjusted claims***:- The 76 work related expense claim adjustments involved just under half of the total number of audit adjustments:- *see paragraph 7(a) above*.

(b) ***The "work related expense" proportion of the penalties***:- The 67 penalty assessment for work related expense claim adjustments were predominantly based on a lack of reasonable care and involved less than half of the total number of penalty assessments:- *see paragraph 7(d) above*.

(c) ***Car expense claims*** – Only about 18% of those claims (five instances) had been wholly accepted. Almost half the claims had been wholly rejected in the audit process. However, in only two instances was the penalty assessment based on recklessness.

(d) ***Travel expense claims*** – Almost all claims had been wholly rejected in the audit process. However, there were only two penalty assessments based on recklessness.

(e) ***Other work expense claims*** – Only five of these claims had been rejected in the audit process. In the other 22 instances the claim had typically been reduced. In only four instances was the penalty assessment based on recklessness.

180. In addition to the details of the various ITR labels, the second summary table contained two columns headed "Reason for adjustment" and "Intelligence". The "Reason for adjustment" column used a range of brief descriptions which, in the case of expense claim adjustments, were typically either (i) "nexus", (ii) "nexus & substantiation", (iii) "substantiation" and, (iv) "voluntary disclosure". The "intelligence" column contained some additional exegetical comments in relation to each audited client. Some of those comments indicated that the "voluntary disclosure" involved a conceded absence of substantiating records. A few comments specifically indicated (conceded) tax agent error (e.g. in relation to the depreciation of capital expenditure). Other comments suggested the agent utilised a standard practice of claiming $10 per week, where a home office expense claim was being made. Another comment suggested that (on one occasion) the agent had relied substantially on a mere telephone call conversation, and had not submitted the draft ITR to the client prior to its lodgement. In one matter, the client asserted to the auditor that they had not known their lodged ITR included the maximum mileage claim for car expenses. With the possible exception of the "standard practice" claim in relation to quantifying "home expense" claims, none of these audit comments provides a reliable basis for an affirmative assertion that Mr Birdseye had been knowingly involved "in relation to" submitting false and misleading expense claims.

181. By the time of the 4 February 2020 submission document, that it addressed at the 20 February 2020 decision meeting, the Board had been provided with audit completion letters, and related assessments, for all 48 of the audited NB&A clients. The submission included a table listing the audit result for 48 ITRs for the 2016 tax year, and four additional returns (relating to the 2014 and 2015 tax years). The table information can be condensed to provide the following overview:-

| **Deductions - 2014 to 2016 Tax years - 48 clients - 52 ITRs** | | | |
|---|---|---|---|
| ***As lodged*** | ***As Assessed*** | ***Tax Shortfall*** | ***Penalties*** |
| | | (46 ITRs only) | (40 ITRs only) |
| 3,716,664 | 2,785,203 | 317,293 | 86,643 |

182. The submission to the Board noted that the deduction adjustments covered claims for both work related expenses, and investment property expenses. It also noted that the majority

of the penalties had been imposed for either lack of reasonable care or for recklessness. However, neither the table, nor the few (and essentially brief) additional observations in the claim submission were, in reality, particularly informative in identifying the precise respects in which the conduct of either Claim It or Mr Birdseye had been suggested by the ATO, or were otherwise asserted, to be deficient. There are a number of reasons why the summarised submission information was not materially informative. They included the following:-

(a) ***Insufficiently explained derivation of the tax shortfall***:- The submission suggested (somewhat imprecisely) that the tax shortfall figure had been derived from "the audit report" and / or from ATO records available to the Board. However, the only audit report, and records, specifically identified in the submission were the ATO's August 2018 report of the incomplete audit, and the individual audit completion letters and related assessments. Those documents indicate that (i) at least some of the audit adjustments related to claims that had merely been mis-allocated in the ITRs, (ii) the adjustments included income, work related expenses, investment property expense claims, and some other matters. Whilst the size of the shortfall merited attention, without a proper understanding of the actual derivation of the shortfall in each client matter, the overall total amount was essentially uninformative about the quality of the conduct of Mr Birdseye and Claim It.

(b) ***Lack of categorisation and analysis of the adjusted expense claims***:- The "Reason for adjustment" used stylised descriptions that tended to overlap in their connotations. The tendency was inherent in the descriptions (i) "nexus", (ii) "nexus & substantiation", (iii) "substantiation". It was also evident from the exegetical "Intelligence" comments about "voluntary disclosure", that those comments often involved a conceded absence of substantiating records. It is at least a problematic proposition that audit adjustments made on the grounds of a lack of either "nexus" or "substantiation" are necessarily attributable to the (mis)conduct of the client's tax agent.

(c) ***Conflation of "reasonable care" and "recklessness" penalties*** – The observation in the February 2020 submission that the majority of the penalties had been imposed for "either" lack of reasonable care or for recklessness contained two potentially significant shortcomings – namely the imprecision of (i) the asserted relative proportions of those two assessment bases and, (ii) of the basis for

attributing either recklessness or lack of care to the tax agent rather than the client (perhaps particularly where the absence of "substantiation" was the principal reason for the assessment adjustment or rejection).

(d) ***Inadequate recognition of objection decisions***:- The Board submission noted that eight clients had lodged successful objections to the audit assessment decisions. Those clients were listed in the submission, with notations characterising the object result as allowed – either in full or part. It also indicated the "new" penalty assessment. This summary table was inaccurate in some respects, and misleading in others. One objection was wrongly stated to have been "allowed in full". Other objections stated to have been "allowed" included matters where there was either no objection to work related expenses, or the objection relating to those matters had been wholly disallowed. In relation the penalty assessments, in some instances the table appeared to indicate that no penalty had been imposed, whereas it had merely been reduced, as a consequence of the partial success of the primary tax objection.

183. For the purpose of attempting to glean a better understanding of the detail of the audit findings and results, I reviewed the 48 individual client audit reports included in the attachments to the February 2020 submission, with a primary focus on their treatment of work related expenses. I have relied on that review to derive the following overview summary of those claims:

| **ITR Label** | **2014 - 2016 ITR audit** (48 clients) | | |
|---|---|---|---|
| | WRE adjustments | | |
| | BTdoc ~549 to 834 | | |
| | ***ITR claims*** | ***Adjusted / [Rejected]*** | |
| | "n" | "n" | "n" |
| | | | |
| D1 - Motor vehicle | 43 | 16 | 18 |
| D2 - Travel | 19 | 4 | 12 |
| D3 - Clothing | 15 | 10 | 5 |
| D4 - Self-education | | | |
| D5 - Other WRE | 47 | 33 | 11 |
| | | | |
| **Totals ("n")** | 124 | 63 | 46 |
| ***Percentages*** | ***100%*** | ***51%*** | ***37%*** |

184. That overview indicates that almost 90% of the work related expense claims were either rejected or subject to some kind of downwards adjustment. That percentage is a matter

that merits attention, and requires some closer scrutiny of the reasons for the various adjustment and rejections. In relation to those matters, I derived the following understanding of the work related expense claims from my review of the individual client audit reports:-

(a) ***Car expense claims*** – total (about) 43:- In 30 instances the claim was a mileage based claim of $3,300, and two other claims were for a lesser amount. Those claims were wholly allowed in seven instances, allowed under a different deduction category in one instance, and wholly rejected in 12 other instances. (In one of those instances the client asserted Mr Birdseye told him the claim could be justified on the basis that he carried in his vehicle an "Esky" that he used at work.) In the remaining 12 instances, the claim was substantially reduced, principally on the basis that the originally asserted mileage could not be categorised as work related.

(b) In the 11 other instances only two claims were wholly accepted. Five claims were wholly disallowed, primarily on the basis of positive satisfaction that the use of the vehicle was not work related (in two cases the reasons recorded the absence of a log book). Two claims were partly accepted, based on a "mileage" expense, and the two other claims were substantially reduced. One because of a voluntary disclosure.

(c) ***Travel expense claims*** – total (about) 19:- In three instances the claim had been allowed (or increased). In 12 instances the claims had been wholly disallowed. In three of the remaining four instances, the claim had been almost entirely abandoned, as a result of a "voluntary disclosure" that was not meaningfully detailed in the audit decision reasons.

(d) ***Clothing expense claims*** – total (about 15):- In five instances the claim was wholly disallowed. In the other instances the claim was substantially reduced, typically because of an unspecified "voluntary disclosure", perhaps related to the absence of substantiating records.

(e) ***Other work expense claims*** – total (about) 52:- In 11 instances the claim had been wholly disallowed. In three instances it had been wholly allowed. In the other 38 instances the claim had been reduced, very often by several thousand dollars. The frequent explanations for the audit reduction were (i) a lack of substantiation and, (ii) voluntary disclosure (perhaps again suggestive of a lack of substantiating records).

185. ***April 2019 to April 2020***:- A few months after the August 2018 referral report the ATO advised Mr Birdseye that it would be conducting further NB&A client audits, relating to both the 2018 and 2019 tax years. Altogether the audit involved about 71 NB&A clients and approximately 87 ITR's. The last of those client audits appears to have been completed in March 2020.

186. The ATO's 27 April 2020 letter to Mr Birdseye disclosed that the audit activity involved two NB&A client groups, which were detailed in two Appendices. (The first Appendix listed 56 clients and ITRs for both the 2018 and 2019 tax years. The second Appendix listed the 2018 ITRs of 25 clients.) The 27 April 2020 letter summarised the audit results, in two overview tables included in the body of the letter, and in the two Appendices. The overview tables in the body of the letter listed the range of ITR income and expense categories, and the corresponding number and value of the audit adjustments to each of them. The two Appendices listed each NB&A client, and detailed the income and expense elements that had been the subject of audit and adjustment (Appendix 1 – 20 ITR labels; Appendix 2 – 13 ITR labels). In order to condense the report's overview tables into a simplified overview, I have concentrated on the audit results relating to "work related expenses", combined the information in the two tables (and adjusted some misdescription / mislabelling errors in the tables). That process leads to the following depiction of the material audit information:

| | **2018 - 2019 ITR audit** **(73 clients - 87 ITRs)** | | |
|---|---|---|---|
| | **ITR labels - audit adjustments** | | |
| | ***ITR labels*** | ***Adjusted*** | |
| | ***"n"*** | ***"n"*** | ***$*** |
| | | | |
| **WRE (ITR) labels** | | | |
| D1 - Motor vehicle | 68 | 68 | 236,943 |
| D2 - Travel | 31 | 31 | 159,084 |
| D3 - Clothing | 60 | 60 | 41,369 |
| D4 - Self-education | 6 | 6 | 11,663 |
| D5 - Other WRE | 87 | 87 | 348,701 |
| | | | |
| | | | |
| **Total WRE (ITR) labels** | **252** | **252** | **797,760** |
| *Other (ITR) labels* | *105* | *105* | *131,834* |
| ***Total (ITR) labels*** | ***357*** | ***357*** | ***929,594*** |
| *Vehicle, Travel & Other as % of Total* | *52%* | *52%* | *80%* |
| *WRE labels as % of total* | *71%* | *71%* | *86%* |
| *Vehicle, Travel & Other as % of WRE* | *74%* | *74%* | *93%* |
| | | | |
| **Total ITR shortfall** | | | **371,353** |

| | 2018 - 2019 ITR audit (73 clients - 87 ITRs) | | |
|---|---|---|---|
| | ITR labels - audit adjustments | | |
| | *ITR labels* | *Adjusted* | |
| | *"n"* | *"n"* | *$* |
| | | | |
| **Total penalty assessments** | | | **82,038** |
| *Penalty as % of shortfall* | | | *22%* |
| | | | |
| **Total shortfall & penalties** | | | **453,391** |

187. The preceding depiction readily illustrates that, whilst the audit adjustments were not confined to them, work related expense claims, and more specifically vehicle, travel and "other" work expenses, account for the greatest proportion of both the number and value of the audit adjustments. Both that proposition, and the potential significance of the other categories of audit adjustments, were readily apparent to the ATO. In the 27 April 2020 report letter to Mr Birdseye, the ATO made 12 recommendations. Three of those were in the nature of general exhortations about an agent's "reasonable care" obligations, and encouragement to have regard to advisory resources available on the respective web sites of the Board and the ATO. Two recommendations related respectively to donations and property income and expense claims. Five of the remaining six recommendations related to work related expense claims. They variously emphasised (i) the need to "ensure" vehicle expense claims were both work related and properly calculated, (ii) the desirability of sighting log books, and establishing that they had been sufficiently completed, where vehicle expenses were claimed on the log book basis, (iii) the importance of sighting "written evidence" of transport expenses and, (iv) the importance of only including home office expenses that were supported by activity log / diary evidence and receipts.

188. The content of those recommendations, the number of work related expense claims, and the total tax shortfall amount, could be regarded as conveying the ATO's serious dissatisfaction with Claim It's, and Mr Birdseye's, overall standards of care and competence. Indeed, the ATO's overall audit finding was that the ITR errors were "attributable primarily" to the kinds of "tax agent error" that had been outlined in previous referral reports to the Board:- *see paragraphs 150, 152 & 157 above.* However, the ATO's actual narrative report can also be regarded as having a less pejorative tone. First of all, despite the apparent specificity of some of the recommendations referred to in the preceding paragraph, the ATO's letter also contained the following less specific, and arguably equivocal, guidance:-

> *It is not essential to sight all the receipts and records but, if they are available, they should be examined as part of the tax return preparation process. It is good professional practice to request from a client all relevant documentation relating to their claims, noting both what you have seen and what evidence the client advises you he/she has, but not produced to you.*

189. Secondly, in dealing with the various work related expense claims the ATO commented that (i) car expense claims were "not always" connected with work, (ii) in "some" cases clients did not have, or did not produce, log books, (iii) in "several" cases travel expenses were sought to be substantiated merely by bank statements, (iv) in "a few instances" work related clothing claims were not substantiated, (v) in "several instances" home office expense claims were not substantiated by log book or diary entries. The understated language of these various comments, perhaps implies a recognition of the background (and potentially significant) realities that (i) the audit involved only a small percentage of the (several thousand) NB&A client base, (ii) the penalty assessment percentage was apparently modest (*see paragraph 186 above*) and, (iii) the audit conclusions might be affected by the final outcome of the assessment objection process.

190. Thirdly, the ATO report was explicitly diffident as to whether the asserted ITR claim errors were likely to merit any form of disciplinary sanction. It advised Mr Birdseye that the audit conclusions "may" be the basis of a referral to the Board, for it "to consider potential breaches" of the TASA Code. The language of those observations tends to convey the impression that the ATO itself had not then reached a concluded view that the audit errors it had identified were relevantly probative of either dishonesty, or of a characteristic lack of care on the part of Mr Birdseye or Claim It.

191. The evidence does not establish that, after its April 2020 report, the ATO did actually make a formal misconduct referral to the Board in relation to either Mr Birdseye or Claim It. Nevertheless, in October 2020, little more than a month before the scheduled hearing of the review applications, the Board lodged with the Tribunal approximately 1,200 pages of supplementary documents, mostly comprised of the audit completion letters, and related assessment notices, relating to the (approximately 73 clients and 87) ITRs that had been the subject of the April 2020 audit report.

192. The arguably opaque content of the ATO's April 2020 report, and the absence of any specific decision making consideration of this material by the Board, makes it difficult to be satisfied that the relevance and materiality of the 2018 / 2019 audit program has been

properly articulated. Furthermore, the provision by the Board of such a large volume of material, involving so many NB&A clients, so close to the scheduled hearing detracts from any satisfaction that Mr Birdseye has had a meaningful opportunity to address it.

193. Against that background, I do not think it would be appropriate to rely on such belated, and uninformatively presented, material to provide, or to contribute to, a foundation for adverse findings against either Mr Birdseye or Claim It. Perhaps in an implicit recognition of that proposition, the Board's 14 October 2020 contention document specifically adverted to only three of the individual clients involved, in attempting to articulate the allegedly deficient conduct of Mr Birdseye and Claim It. One of those clients had made motor vehicle expense claims that had been wholly disallowed. The two other clients had made other kinds of work related expense claims, which had been either rejected or substantially reduced, typically because of a lack of substantiating evidence. Mr Birdseye had responded briefly to these particular matters in his 29 October 2020 statement, broadly to the effect that each client had informed him that they did have appropriate substantiating records. Mr Birdseye was not cross examined about any of his responses. Mr Birdseye's unchallenged responses only confirm the view I expressed in the first sentence of this paragraph.

194. On the other hand, I have considered it necessary to undertake some examination of the material relating to the ATO's April 2020 referral. I have done so for the purpose of endeavouring to assess whether it is fairly capable of advancing the position of either Mr Birdseye or that of Claim It, in relation to either of the termination or preclusion decisions that are the subject of the present proceedings.

195. As a means of endeavouring to achieve a better understanding of the ATO's April 2020 audit concerns, and their potential significance, I have reviewed the two summary appendices attached to the ATO's 27 April 2020 letter.[24] I have also examined most of the audit outcome letters, particularly where the appendix summary table indicated that penalty assessments had (i) not been made, despite a tax shortfall, (ii) been wholly remitted or, (iii) been substantially reduced, despite being the subject of a finding of recklessness in relation to the content of the ITR. That review and examination has resulted in the following

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[24] In undertaking that review I have noted that (in a few instances) some of the details in the summary tables either do not include, or do not precisely correspond with, the ATO audit letters that were provided by the Board.

observations about the work related expense claims in the 2018 and 2019 ITRs that were the subject of the ATO's April 2020 letter:-

(a) ***Car expense claims*** – total (about) 68:- Only 12 claims exceeded the maximum "mileage" based claim limit (i.e. $3,300 or $3,400). All of those claims were reduced, most substantially, but only three of the claims were wholly rejected. About half of the claims (34) were for the apparent mileage based limit, almost two thirds of those claims (20) were wholly rejected, and the majority of the remainder were substantially reduced. The audit result of the balance of 22 claims resulted in four claims being increased (by comparatively minor amounts), a further nine claims being wholly disallowed, and the remainder being reduced by varying amounts, of which some were comparatively significant.

(b) ***Travel expense claims*** – total (about) 31:- Approximately 20 of the claims were wholly disallowed as a result of the audit. Two claims were actually increased.

(c) ***Clothing expense claims*** – total (about) 60:- Thirteen of the claims were wholly rejected. Although the remaining claims were at least partly allowed, the total claim value accepted at audit was only about 25% of the amount originally claimed.

(d) ***Other work expense claims*** – total (about) 87:- About 18 of these claims were wholly rejected, and 10 were accepted for amounts less than $100. Overall the claim value accepted at audit was only about 20% of the amount originally claimed.

(e) ***Shortfall penalties*** – In a number of instances there was no penalty assessment, either because the NB&A client had no overall shortfall, the shortfall was minor (less than $1,000) or because the client's audit co-operation justified an entire remittal of the penalty. There was also a significant number of instances where the base penalty amount was the subject of an 80% remittal, primarily because of the client's voluntary disclosures and co-operation during the audit process. There was also a small (but disconcerting)[25] number of instances where the ATO audit letters rejected reliance on the "safe harbour" TAA Schedule provisions, because the client was said to have engaged an unregistered tax agent. Leaving aside those matters, the audit

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25 The reference was disconcerting because the audits were of NB&A clients, and there does not appear to be any justification for the proposition that (until the Board's February 2020 decisions), either Claim It or Mr Birdseye was unregistered.

letters (i) typically (but apparently erroneously) asserted that a 50% penalty rate applied to errors resulting from both recklessness and lack of reasonable care,[26] (ii) rarely asserted that client taxpayers had provided complete information to Mr Birdseye or Claim It, (iii) typically, but ambiguously, attributed the ITR errors to "you and/or your agent" and, (iv) in a rather marked contrast to the approach evident in previous audit report assessments (*see paragraphs 168 & 178 above*) invariably characterised the ITR errors as resulting from recklessness.

196. Those propositions contribute to two impressions. First of all, the apparent ambiguities and inaccuracies in aspects of the ATO audit letters (particularly in relation to penalty assessments) reinforces my reservations about relying on the April 2020 ATO audit report as a basis for contributing to adverse findings against either Claim It or Mr Birdseye. Conversely, despite the apparent inaccuracies and ambiguities, I do not think that the apparent results of the audit process provide a basis for a contemporary assessment of Claim It and Mr Birdseye's registration fitness that is more favourable than what would follow from the other similar evidence (i.e. relating to pre 2018 ITRs and audit outcomes).

**CLAIM IT AND MR BIRDSEYE'S ITR PREPARATION PRACTICES**

197. The ATO's critical observations about Claim It and Mr Birdseye's ITR practices spanned the decade from 2010 to 2020. The thrust of them was perceived inadequacies in the content and, perhaps alternatively, the consistent application of, NB&A's ITR preparation practices:- *see paragraphs 150, 152, 157, 159(d) & 188 above.*

198. Both the ATO's December 2011 and 27 April 2020 letters acknowledged Mr Birdseye's claim that NB&A advised clients they must have, and retain, receipts to support their deduction claims. In neither instance had the ATO directly disputed the advice claim but, perhaps indicating some scepticism about it, commented to the effect that "our audit results do not support that your clients are doing this".

199. Mr Birdseye described NB&A's typical ITR preparation practice as involving the following:

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[26] The Taxation Administration Act 1953 ("TAA"), Schedule 1, Chapter 4, Part 4.25 Division 284, Subdivision 284-B, s 284-90 (at Table Items 1, 2 & 3) imposes a penalty tax shortfall rate of 75% for intentional disregard of a taxation law, a rate of 50% for recklessness, and a 25% rate where the shortfall is the result of a failure to take reasonable care.

(a) The preliminary execution by clients of both a “privacy authorisation form” and a form of “client substantiation” reminder;

(b) A face to face, or telephone, meeting (usually with Mr Birdseye himself) at which the client provided initial instructions;

(c) Standard types of enquiry, dependent on the individual client circumstances, about the nature of their employment, travel and vehicle use requirements, related employer provided assistance, and log book / expense recording;

(d) General advice about record keeping and retention requirements;

(e) Not requiring clients to provide (or produce) all substantiating records;

(f) Requiring clients to sign all ITRs;

(g) Obtaining a signed “Substantiation Declaration” in relation to the completed return.

200. Subject to one qualification, the few brief questionnaire responses the Board received from NB&A clients (*see paragraph 11 above*) tended broadly to corroborate the enquiry, advice and acknowledgement elements of the general practice Mr Birdseye asserted. That one qualification related to ITR clients who gave their instructions other than in a face to face meeting. Perhaps understandably, those clients answered “no” to the Board’s (ambiguous) questionnaire enquiry whether the NB&A interviewer had asked to see any receipts or paperwork during “our” meeting.

201. Mr Birdseye provided examples of both the client substantiation reminder form and the “Substantiation Declaration”. The examples of signed client substantiation reminder forms, which appeared to be identical in content, were dated between 2007 and 2019. In some respects, as forms that Mr Birdseye said clients completed before their first meeting with him (or other NB&A personnel) these “reminders” were unhappily worded. This is because they purported to record advice and instructions that had already been given. Most incongruously they contained an acknowledgment that (i) all the ITR deduction claims are “based on my specific instructions” and, (ii) the client had read and understood “the return prepared for me”. If these forms were the totality of NB&A’s substantiation practices, they would be readily amenable to characterisation as a substitution of form for substance. However, no such challenge was made, and the reminder notices were not the only NB&A

substantiation practice evidence. That other evidence was illustrated by the form of "Substantiation Declaration". Two (similarly worded) versions of this document (relating to the 2016 and 2020 tax years) were provided. The document was said to be a software generated form that was provided to clients as part of their completed ITR and, as a matter of usual / typical practice, executed by them. The Substantiation Declaration form specifically addressed work related expenses, including car and travel expenses. The form provided for a client's dated signature and, once signed, recorded the client's acknowledgement and awareness of various matters, including the following:-

(a) The dual requirements of work related purpose, and appropriately detailed receipted substantiation, for work related expense deduction claims;

(b) Potential interest, penalty and prosecution liabilities for incorrect ITR information;

(c) Acknowledgement of (i) understanding the "Substantiation schedule" that should be completed for all work, car and travel expense claims, (ii) having appropriate records sufficient to permit verification of apportionment between business and private expenses, (iii) specific instructions to prepare the ITR on the basis of the client's capacity to produce those records for the purpose of any ATO audit and, (iv) having read and understood the ITR prepared by NB&A;

(d) A formal declaration of:

(i) Full income disclosure;

(ii) Specific instructions for all expense deduction claims;

(iii) Confirmation that all the substantiating receipts existed, and would be made available to any ATO auditor;

(iv) Having received advice clarifying the written evidence that might be required to be produced to the ATO in the event of any ITR audit.

202. In its 11 November 2020 written submissions, the Board complained (justifiably) that Mr Birdseye's statement did not provide any information about the circumstances in which clients signed their Substantiation Declarations. But that complaint was not subsequently actively pursued. Apart from extracting a limited concession that a Substantiation Declaration was not certainly signed by clients in every instance, Mr Birdseye was not

significantly challenged about any of the elements, circumstances, or real significance of his asserted general practice in relation to the conduct of NB&A's business activities.

**THE PROBATIVE VALUE OF THE 2012 AND 2013 AUDIT RESULTS**

203. The primary audit records (reasons, related assessments and objection decisions) relating to these 46 NB&A clients and 84 ITRs, were not included in either the Board's February 2020 submission documents or amongst the documents the Board subsequently provided to the Tribunal. Nevertheless, the audit results were the subject of the ATO's September 2014 and December 2015 referrals, and I outlined earlier in these reasons the content of the summary tables that were included in the referrals:- *see paragraphs 167 to 175 above*. The ATO's referral comments, and the contents of the summary tables, apparently provided the basis for the Board's (ultimately abandoned) finding that Mr Birdseye had "knowingly obstructed" taxation law administration in connection with the lodgement of the audited ITRs:- *see paragraph 17(e) above*.

204. The Board's 14 October 2020 contention statement, in addressing the 2012 / 2013 ITR audit results, included complaints that (i) the assessed tax shortfalls included lack of substantiation for expenses relating to rental property, self education, travel and motor vehicles, (ii) "many" clients claims for work related and travel expenses had been "completely disallowed", (iii) Mr Birdseye should have known the expense claim made in the *Hancox* matter was unjustified and, (iv) he considered the *Hancox* decision was wrong, and had disregarded it in subsequently lodged client ITRs. The Board's contention statement did not, however, particularise those complaints in relation to any particular client or ITR.

205. At least in the absence of specific particularisation, there are a number of difficulties with the Board's complaints about the 2012 / 2013 audit outcomes. First of all, the *Hancox* decision related to the 2009/2010 tax year:- *see paragraph 159(e) above*. Second, the Federal Court decision, conclusively rejecting the claim, was not published until July 2013:- *see paragraph 163 above*. Third, contrary to the proposition advanced in the Board's contention document, Mr Hancox's employer's characterisation of the contentious allowance as a "living away from home allowance" was not determinative:- *see paragraph 164 above*. Fourth, careful examination of both the Federal Court reasons for decision, and the opinion subsequently provided to the Board, tended to contradict the basis for any

finding that Mr Birdseye's pursuit of the claim was in any sense indicative of impropriety or unfitness:- *see paragraphs 163(b), 163(c) & 165 above*. Fifth, the Board had previously addressed the matter and, despite the caution it had issued to Mr Birdseye in May 2013, in November 2013 the Board specifically accepted Mr Birdseye's ongoing fitness for registration:- *see paragraph 166 above*. Sixth, the Board's reference to Mr Birdseye's February 2014 statement was inaccurate. What Mr Birdseye actually said was that he had legal advice the decision was incorrect, and that statement was consistent with the advice he had earlier provided to the Board:- *see paragraph 165 above*. Seventh, the Board failed to point to any particular matter that had occurred after the Federal Court's *Hancox* decision, and was said to involve circumstances probative of Mr Birdseye's subsequent improper "disregard" of it.

206. Despite the absence of particularisation of the basis for the Board's findings and contentions, and the essentially limited primary record information available, Mr Birdseye addressed the ATO referral contents, and the Board's findings, in his September 2020 statement. In so doing he understandably focussed on the motor vehicle and travel expense claims that had been addressed in the ATO audit. In his comments Mr Birdseye made the following points:-

(a) The Board's submission documents, principally the ATO referral letters and audit summary spreadsheets, provided no real explanation for the ATO's audit adjustments, nor the substantive basis for the Board's findings.

(b) Without further investigation / information, it was analytically unsound to rely on the ATO's audit results to infer tax agent impropriety, as distinct from either an error of judgment, misunderstanding or client default.

(c) In various instances the ATO audit outcomes, and the Board's corresponding reliance on them in reaching its adverse conclusions, were either contradicted, or qualified, by subsequent events.

207. Mr Birdseye included in his September 2020 statement a specific response relating to each of the individual ATO audit outcomes summarised in the spreadsheet report that accompanied the ATO's 17 September 2014 referral: - *see paragraph 169 above*. Those responses varied (understandably) in their subject matter and detail. Those variations necessitate some arbitrary distinctions in any attempt to provide an overall descriptive

summary of Mr Birdseye's response. Nevertheless, such a summary is necessary, and involves the following propositions:-

(a) ***Successful review proceedings***:- At least three instances involved clients who had achieved more favourable outcomes (including in some instances, complete success) in post objection review proceedings.

(b) ***Ultimately favourable objection / post audit outcome***:- In four instances Mr Birdseye asserted that the initial audit outcome had subsequently been altered, by a substantial acceptance of the expense claim, in a manner not reflected in the referral report contents.

(c) ***Expense claims relating to the contentious Hancox decision***:- As indicated by the discussion earlier in these reasons (*see paragraphs 160 to 166 above*) the *Hancox* decision involved a point of some difficulty, and the underlying basis for apparently similar claims arguably admitted of nuanced, differing, assessments. In six instances Mr Birdseye's response indicated that the principal expense claim involved application of reasoning similar to that involved (albeit unsuccessfully) in the *Hancox* matter.

(d) ***Audit outcome disputed with apparently substantial reasons***:- In eight instances Mr Birdseye's response indicated substantial disagreement with the ATO audit outcome, and contained apparently arguable reasoning supporting his disagreement.

(e) ***Cryptic responses – no meaningful additional information***:- In 10 instances there was no specific information (additional to the content of the September 2014 and December 2015 referral contents[27]) that elucidated either the client's circumstances, NB&A's conduct, or the reasons for the audit conclusion.

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[27] At least in some instances, Mr Birdseye's responses appear not to have taken into account the objection results indicated in the December 2015 referral report. This had two consequences. First his responses to the initial audit outcome did not consistently address instances where the claim basis had been rejected in a subsequent objection decision. Second, in other instances, where the objection outcome arguably accepted the expense claim, Mr Birdseye's audit outcome responses provided no information additional to what was otherwise apparent from the December 2015 referral report.

(f) ***Absence of client substantiation***:- In 11 instances Mr Birdseye attributed the audit failure principally to the client's possible dishonesty, or their inability to provide substantiating documentation.

208. In comparison to the number of NB&A clients and ITRs involved, the Board's cross examination of Mr Birdseye about the 2012 and 2013 audit results was limited. The cross examination focussed on the ATO's previous repeated generic criticisms of lack of enquiry about, and assessment of, client claims:- *see paragraphs 150, 152, 157, 159(d) & 188 above*. In particular, the cross examination tested Mr Birdseye on his and NB&A's practices in relation to reliance on the log book method of substantiating car expense claims. In that cross examination the Board extracted from Mr Birdseye a qualified response that, despite his awareness of those criticisms, he had neither significantly changed, nor commissioned any independent assessment of, his client ITR preparation practices. The qualifications to his response were to the effect that (i) he did not agree with the ATO's criticisms (particularly about the sufficiency of log book travel descriptions), and believed that his ITR enquiry practices were not only adequate, but actually thorough, (ii) he had, however, re-emphasised to clients their personal responsibility for the accuracy of their ITR contents, including possession of receipts substantiating expense claims, (iii) where new clients who claimed vehicle expenses attended in person, they were asked to produce their log book, (iv) he regarded himself as bound to reflect client's instructions in the contents of their ITRs but, (v) he had never knowingly submitted client ITRs that contained false information.

209. Taken on its own, Mr Birdseye's statement about reflecting client's instructions appears inconsistent with a proper understanding of his "reasonable care" obligations as a registered tax agent:- *see paragraphs 35 & 36 above*. However, the statement was made in the context of a client's specific expenditure claim, where the only contentious matter was whether the client actually provided supporting records. In any event, the Board's cross examination of Mr Birdseye did not pursue that (arguable) inconsistency, and specifically addressed only four of the NB&A clients whose 2012 / 2013 ITRs had been the subject of the ATO's September 2014 and December 2015 referrals. Those clients, the particular aspects of their expense claims that were pursued in cross examination, and the substance of Mr Birdseye's relevant comments, are briefly outlined in Schedule 5 – Part 5.1 of these reasons. That summary, understood against the background of the underlying evidence (also indicated in Schedule 5), permits the following observations:-

(a) In several instances the adverse audit assessment appears to have resulted from the absence of a timely response, and was later contradicted by the ultimate outcome of the objection / review process, to an extent not otherwise apparent from the material considered by the Board, and provided by it to the Tribunal.

(b) The asserted inadequate substantiation of log book based car expense claims was a significant feature of both the ATO's adverse audit assessments, and of the Board's criticism of NB&A's client enquiry practices.

210. The first of these observations is significant. It tends to demonstrate the proposition that the impressionistic, and untested, findings made by (essentially unidentified) ATO officers in imprecisely known circumstances, are not necessarily determinative of either the underlying merits of the client's expense claim, or of a tax agent's relevant culpability for any inadequacy of the claim. The fact of adverse audit findings, particularly a multiplicity of similar findings over a period of time, may well justify anxious scrutiny of an agent's practices and honesty. But any ultimate conclusion about the adequacy of those practices, and of an agent's underlying overall fitness and competence, must be based on (i) an accurate understanding of the relevant taxation law obligations, (ii) knowledge of the actual circumstances of the particular client claims and, (iii) assessment of the comparative significance of any identified agent deficiencies, having regard to the agent's overall conduct and circumstances. Contrary to that desirable focus, the Board submitted that the audit outcomes lead to "the inevitable conclusion" that the practices of Mr Birdseye and Claim It were "seriously flawed and not competent". Neither the Board's submission documents, its decision notification letters, nor the cross examination of Mr Birdseye addressed, with any specificity, either the general "substantiation" requirements for relevant expenses,[28] or the particular provisions relating to the "log book" method of motor vehicle expense claim substantiation.[29] The Board's written submissions contended, without reference to the limitations of the "reasonable care" guidance in the Board's Explanatory Paper TPB 01/2010 (*see paragraph 37 above*) that Mr Birdseye should have insisted on clients providing at least

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28 For example, it was at least potentially relevant to have regard to the "time limit" provision in ITAA 97 s 900-110. That provision arguably operates to allow a taxpayer to obtain "written evidence" substantiating expense deduction claims, within a reasonable time after lodging their return.

29 In this context it was potentially relevant to understand the reasoning underlying audit decisions where log books were regarded as invalid because entries were assessed as insufficiently descriptive, and to reconcile that reasoning with the apparent statutory requirement – that the entry need only specify "why the journey was made":- see ITAA 97 s 28-125(2).

examples of expense substantiation. The Board's cross examination of Mr Birdseye basically pursued a broad thesis that he should have significantly changed NB&A's client enquiry practices in deference to the ATO's repeated general criticisms following the various client ITR audits it had undertaken. The persuasive force of that thesis depended on a clear identification of the substance of the particular matters on which the ATO criticisms were based. That clear identification was not apparent from either the Board's contention document[30] or the underlying material relied on by the Board. Neither was it apparent from the very limited cross examination of Mr Birdseye, particularly against the background of his detailed responses to, and further information about, a significant number of the 2012 / 2013 audit assessments.

211. The second observation (*in paragraph (b) above*) highlights the potential significance of the first. The Board's cross examination paid particular attention to the adequacy of Mr Birdseye and Claim It's practices in relation to expense claims based on log book existence and content. The Board noted that, as far back as its 2 August 2010 referral report, the ATO had complained that Mr Birdseye / Claim It appeared not to have considered the validity of client log books. The Board also noted Mr Birdseye's acknowledgement, in the course of the March 2015 interview (*see paragraph 171 above*) that some client log books were not valid. However, the Board never specifically asserted either that Mr Birdseye / Claim It ought to have sighted client log books in the course of the preparation of a client's annual ITR, or that he had acted improperly in relying on a client's log book substantiation, where particular log book content was assertedly inadequate.

212. The legislative substantiation requirement is only that a logbook must be completed for the first income tax year where it is relied on for a motor vehicle expense claim (see ITAA 97 s 28-115(1)). However, the log book content requirements are specific and it may be that an agent's "reasonable care" obligation (*see paragraph 36 above*) does require an agent to examine a client's log book entries at least at the beginning of its (ordinarily four year – see ITAA 97 s 28-115(2)) permissible period of validity. However, Mr Birdseye's asserted practice suggests he recognised the prudence of such a practice, and generally implemented it, except in the case of "new" clients who did not attend in person and only dealt with NB&A over the phone. Consequently, apart from a suggestion that an agent

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30 The Board's written submissions of 11 November 2020 merely asserted reliance on the earlier contention document, and provided no further specificity.

should always examine a “new” client’s log book (or perhaps, give specific advice about their required content) there was no specific identification of particular log book inadequacies. That absence made it difficult for Mr Birdseye to respond to the general criticisms made by the ATO and the Board. It was correspondingly difficult to arrive at positive satisfaction that his conduct had, in any respect, been relevantly deficient. That point may be made by reference to the limited evidence relating to the motor vehicle expense claims made by the clients Brown and Kuchel, about which Mr Birdseye was cross examined.

213. In the March 2015 ATO interview (*see paragraph 171 above*) Mr Birdseye had acknowledged that some client log books were not correctly maintained, and that Mr Brown, in particular, recognised the insufficiency of his log book. However, that generality was inherently ambiguous about both the timing of Mr Birdseye’s awareness of the inadequacies, and about their nature and significance. When he was cross examined specifically about Mr Brown’s circumstances, Mr Birdseye indicated that he only became aware of the inadequacy after the return had been lodged (implicitly, as a result of the audit). In the detailed comments about Mr Brown, in his September 2020 statement, the thrust of Mr Birdseye’s explanation was that the log book deficiency related to discrepancies between the content of some log book entries and the details of other receipts. Those comments, which were not the subject of any cross examination, suggest that the operative log book deficiency was in relation to a matter of detail, and one whose detection by Claim It (in the process of ITR preparation and lodgement) may have been problematic. A similar suggestion arises from the content of Mr Birdseye’s comments about the car expense claim in the 2013 ITR of the client Opie – comments which again were not the subject of specific cross examination.

214. Overall, the audit assessment responses that Mr Birdseye made in the Table forming part of his September 2020 statement did indicate a degree of assertiveness in pursuing client’s claims, and (in many instances) bluntly expressed disagreement with the accuracy and fairness of the ATO’s audit assessments. That assertiveness was however, inherently ambiguous as to whether it indicated (i) exceptional competence, (ii) the pursuit of contentious, but genuinely arguable, claims, (iii) the honest, but careless, pursuit of unreasonable claims or, (iv) merely colourable claims, disingenuously made. Without careful analysis of the circumstances of particular claims, there was no adequate factual

basis for a conclusion that Mr Birdseye had either "knowingly obstructed" the administration of taxation laws, or failed to ensure / take reasonable care to ensure compliance with them.

**THE PROBATIVE VALUE OF THE 2014 AND 2016 ITR AUDIT RESULTS**

215. The audit results for these 48 NB&A clients and 52 ITRs were the subject of the 29 August 2018 ATO referral. The referral contained a spreadsheet summary listing the individual clients, the relevant ITR income and expense labels, and the corresponding audit and assessment adjustments and penalties. I summarised that information in earlier parts of these reasons:- *see paragraph 7 above (re the August 2018 referral) and also paragraphs 176 to 182 (re the audit results)*. The primary audit records (reasons and related assessments) were included in the Board's February 2020 submission documents. However, the narrative part of that submission included a table with a condensed listing of each client's total adjusted deductions (which the ATO spreadsheets indicated were not in fact limited to "work related expenses), the overall tax shortfalls, and related penalties. It also included a smaller, similarly condensed, table indicating the result of nine ITR assessment objections. The three sets of summary tables, together with the ATO referral comments, rather than the particular contents of any specifically identified client ITRs, again appear to have provided the basis for the second part of Board's finding that Mr Birdseye had "knowingly obstructed" taxation law administration:- *see paragraph 17(e) above*.

216. In neither the February 2020 submission document nor the Board's decision notification letters of March 2020, was that finding particularised by reference to any particular client ITR. However, the Board's 14 October 2020 contention statement listed 10 matters involving disallowed vehicle and travel expense claims (including two matters where reliance was placed on the fact that the clients had made a "voluntary (audit) disclosure" reducing their claim), and one matter involving a disallowed self education expense claim.

217. Notwithstanding the client identification apparent from the Board's submission documents, the audit outcome responses Mr Birdseye included in his September 2020 statement did not extend to any of the 2014 and 2016 ITRs. There appear to have been three reasons for this shortcoming. One was Mr Birdseye's reasonable criticism of the lack of particularisation in the Board's submission document and findings:- *see paragraph 206(a) above*. A second reason was a lack of information about the details of the audit adjustments. (This was perhaps attributable to the essentially unreadable form of the

printed spreadsheet summary:- *see paragraph 178 above*.) A third reason, which Mr Birdseye revealed in the course of his cross examination, was that, despite having prepared some handwritten responses, he had simply become overloaded and unable to complete them for inclusion in his September 2020 statement.

218. After the Board provided its 14 October 2020 contention statement (with the limited particularisation I described above) Mr Birdseye responded in his 29 October 2020 statement. There he complained about a lack of information and recollection sufficient to provide a substantive response in relation to three of the 11 clients. He made a similar complaint about one other matter, where he said he was unable to discern the reason for the audit adjustment, and could not independently recollect the client's circumstances. In relation to five other clients Mr Birdseye offered specific reasons for disagreeing with the audit assessment.

219. With one arguable exception Mr Birdseye was not cross examined about any of those particular client matters, nor about his responses to them. That absence of explicit challenge to what he said, against the background of the Board's imprecisely articulated contentions, itself provides a reason to hold back from embracing positive conclusions of either knowing obstruction, or lack of reasonable care, on the part of either Mr Birdseye or Claim It. Nevertheless, in order to derive a more complete understanding of the contentions the Board cryptically articulated in its 14 October 2020 contention statement, and to assess the apparent significance of Mr Birdseye's (only marginally more detailed) responses, I have read the audit decision letters relating to each of the ITRs to which the Board specifically referred. As I result of that exercise, I broadly agree with Mr Birdseye's reservations about some of the proffered audit decision reasons. In at least four instances (including the matters where the Board's contention statement relied on "voluntary disclosure" by the NB&A client) the factual considerations underlying the reasons for the decision, and / or the disclosure, were far from apparent. In one instance, the audit decision was explicitly based on the client's failure to provide requested documents, but such a failure is, of itself, not at all probative of relevant tax agent impropriety. In another instance the audit letter was either internally inconsistent, or at least confusing, in proffering different reasons (private education expense and / or no log book) for disallowing a motor vehicle expense claim. In other instances, where motor vehicle expense claims had been rejected, the point at issue seemed to involve issues such as (i) whether the taxpayer should be assessed as travelling

"to work" or "between workplaces"[31] and, (ii) whether the vehicular travel was dictated by a work related need to transport significant items. Overall, the combined effect of my consideration of the imprecise articulation of the Board's contentions, the absence of specific findings in either the Board's submission or decision letters, the contents of Mr Birdseye's responses, the absence of challenge to those responses, and my impression of the apparent effect of the audit decision letters, was my conclusion that there was no basis for an affirmative, and fairly reached, finding adverse to Mr Birdseye in relation to the matters to which he had responded.

220. The arguable exception, about the absence of cross examination, to which I referred in the preceding paragraph concerned the client whose audit decision letter contained the apparently differing reasons for disallowance of his motor vehicle expense claim. Mr Birdseye had not specifically addressed this matter in his September 2020 statement, because of a lack of information and recollection. However, he was taken to the audit decision letter in his cross examination. This was done in the context of the audit complaint of log book absence, and an implied agent deficiency of having failing to sight the asserted log book. However, the actual question put to Mr Birdseye was the auditor's (inherently ambiguous) observation that "your agent" had failed to produce the log book to the auditor. Mr Birdseye's response to that question conceded that he may not have sighted the look book, but that concession was accompanied by both a lack of actual recollection, and an absence of any other objective evidence of the actual circumstances involved. Such imprecisely postulated circumstances do not provide a basis for any adverse finding to be fairly made in relation to Mr Birdseye's conduct.

221. Although they had not been matters particularised in the Board's 14 October 2020 contention statement, nor addressed in Mr Birdseye's various pre-hearing statements, three other clients were the subject of brief questioning in the course of Mr Birdseye's cross examination. Those clients (and the client referred to in the preceding paragraph) are listed in Schedule 5, Part 5.2, together with a brief indication of the ITR expense label involved, the basic nature of the reason for the audit adjustment, the uncertain information about the ultimate assessment outcome, and Mr Birdseye's asserted absence of recollection (and available information about) the particular circumstances. This limited information, even

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[31] For the purposes of ITAA 1997 s 28-90(4) "business kilometres" includes travel "between workplaces".

when assessed against the background of the primary information from which it was derived, again provides no fair and adequate basis for affirmative adverse findings in relation to the conduct of Mr Birdseye or Claim It.

**CONCLUSION ON THE BOARD'S "REASONABLE CARE" AND COMPETENCE CONTENTIONS**

222. The ATO's repeatedly expressed assertions about tax agent default in the context of the outcomes of its ITR audits of NB&A clients justify concern about the adequacy, accuracy and honesty of NB&A's practices. However, it will be apparent from what I have already written that, with one possible exception, the currently available material does not provide a basis for appropriate positive satisfaction that those practices involve conduct that contravened the Code obligation of competence in the provision of tax agent services:- *TASA s 30-10(7)*. The possible exception concerns Mr Birdseye's acknowledgement that where "new" clients claimed motor vehicle expenses relying on the log book method, but did not attend in person, he did not sight their log books. But that was not a matter explicitly articulated in the Board's February 2020 submission, its decision notification letters nor in the October 2020 contention statement. Consistent with that lack of articulation, it was not a matter the Board pursued in the review proceedings in any detail, and certainly not in the context of any particular client or ITR. In those circumstances, I am not satisfied that there is a sound factual basis for concluding that Mr Birdseye's acknowledgement provides a sufficient basis for an adverse finding in relation to the Code's competence obligation in TASA s 30-10(7).

223. Despite my view that the presently available material does not provide a basis for positive conclusions about a failure to comply with TASA s 30-10(7), I should not be regarded as foreclosing further examination, and supplementation, of that material. The nature, and the similarity, of the ATO's repeatedly articulated concerns, merit thorough investigation and fully informed assessment. It will be readily apparent from some of the observations I have made, that I have significant reservations as to whether that thorough investigation and assessment has been undertaken:- *see e.g. paragraphs 11 & 210 above*.

**UNPROFESSIONAL AND UNCO-OPERATIVE COMMUNICATIONS AND DEALINGS WITH ATO PERSONNEL**

224. The Board's February 2020 submission document set out part of a 24 July 2019 email Mr Birdseye sent to an ATO officer, following a request for working papers relating to three

clients, whose 2018 / 2019 ITR audit results were later included in the ATO's 20 April 2020 referral report:- *see paragraphs 185 & 186 above*. The contents of that email was the only material in the narrative part of the submission that provided a basis for this aspect of the Board's finding relating to Mr Birdseye:- *see paragraph 17(h) above.* It was also the only such matter relied on in the Board's October 2020 contention statement. However, the Board's 11 November 2020 submissions sought to rely on other communications (in December 2010, November 2011 and February 2014) to advance the proposition that Mr Birdseye's 24 July 2019 was illustrative of his propensity to indulge in "inflammatory, inappropriate and abusive" correspondence.

225. There is no doubt that what Mr Birdseye said in part of his July 2019 email was both intemperate, insulting and entirely inappropriate. Mr Birdseye made no attempt to justify, and apologised for, this aspect of his conduct. He said that the context for his, concededly inexcusable, communication was, in effect, pent up anger, frustration and resentment, as a result of the ATO's concern about NB&A's practices and his view of its overt perception of him (at least in referrals to the Board) as a "crooked tax agent".

226. The content of Mr Birdseye's email is so inappropriate that I have paused in assessing whether it is properly to be dismissed as a merely aberrant expostulation, or meaningfully informs an adverse assessment of Mr Birdseye's contemporary fitness for registration. In that pause I have considered not only the 2010 and 2011 correspondence to which the Board belatedly referred in its written submissions, but also the email communication of February 2014, and the record of the exchanges between Mr Birdseye and the ATO compliance manager during the March 2015 meeting:- *see paragraph 171 above*. The earlier set of communications certainly evidences Mr Birdseye's combative opposition to the ATO's audit conclusions, and a degree of disdain for the competence of some of the ATO audit personnel. But I am not satisfied that their robust content transgresses into the field of professional impropriety, or materially informs any contemporary assessment of Mr Birdseye's fitness. I am re-inforced in my conclusion to the contrary by (i) the long period since the earlier set of correspondence, (ii) the absence of complaint about communications in the intervening period, (iii) my assessment of the condign content of both the February 2014 email and the March 2015 meeting record and, (iv) Mr Birdseye's fulsome (though unavoidable) recognition of the inappropriate content of his July 2019 email.

**THE JOHNSTONE MATTER**

227. The Board's October 2020 contention statement included details of a complaint that had been received from one of NB&A's former clients, about the circumstances of her dealing with Mr Birdseye, between August and September 2020, in connection with the lodgement and processing of her 2020 ITR. On 14 October 2020, the Board provided 1,228 pages of supplementary Tribunal documents. They included a copy of Ms Johnstone's 2020 ITR, and various records of her communications with Board officers. The thrust of the Board's concerns, as indicated by the communication records, was that Mr Birdseye and Claim It were continuing to provide remunerated tax agent services, despite the termination of their registration. Subsequently, the contents of the October 2020 contention statement were supplemented in the Board's November 2020 written submissions. They were then qualified in the course of the Board's cross examination of Mr Birdseye, where the Board explicitly abandoned any assertion that, after the termination of his registration Mr Birdseye had provided remunerated tax agent services to Ms Johnstone.

228. As that history of the evolution of the Board's concerns suggested, the precise nature of the asserted relevance of Ms Johnstone's complaint to the matters at issue in the review proceedings was left in a state of some obscurity. As ultimately pursued, it appears to have involved propositions that:

(a) Claim It / Mr Birdseye had not disclosed to Ms Johnstone the termination of their tax agent registration status, and had not properly informed her of the true identity of the tax agent on whose behalf those services were being provided;

(b) By virtue of the content of NB&A's office window signage (and web-site), Claim it and Mr Birdseye continued to assert their tax agent status;

(c) After receiving it from the ATO, Mr Birdseye had delayed payment of Ms Johnstone's tax assessment refund amount.

229. Mr Birdseye responded to the Board's contention document in his 29 October 2020 statement. In this statement he (i) acknowledged that his post termination notifications to clients may not have reached Ms Johnstone, because she had changed her email address, (ii) asserted a general "post termination" practice of invariably verbally informing clients of his loss of registration, (iii) professed a lack of recollection of specific disclosure to Ms Johnstone, (iv) provided a copy of an "estimate" document that had been provided to Ms

Johnstone in early August 2020, and stated unambiguously both that he was "currently not a Registered Tax Agent" and the name of the tax agent who would lodge the return and, (iv) asserted having removed some relevant office signage, but acknowledged having overlooked other (arguable less specific) signage, after losing his status as a registered tax agent.

230. In the light of the contents of Mr Birdseye's statement the Board faced considerable difficulty in making good any proposition that he had not disclosed to Ms Johnstone the true status of his tax agent registration, or relevantly misled her about the actual identity of the tax agent she was engaging to lodge her return. Those difficulties were perhaps not insuperable, in the light of some apparently irregular references to Claim It in the lodgement form that Ms Johnstone signed. But the contents of the express disclosure on the "estimate" form, together with Mr Birdseye's evidence of his usual "post termination" practice in dealing with clients, tend to contradict the asserted non-disclosure of his actual tax agent status. In those circumstances there is no adequate basis for any relevant adverse finding to be made against Mr Birdseye.

231. Mr Birdseye's relevantly unchallenged evidence of his general post termination practice of disclosure to clients also detracts from the significance of the references to registered tax agent status in part of his office signage and on the NB&A website. Those references were irregular and inappropriate, but given the other elements of Mr Birdseye's post termination conduct they do not contribute materially to any adverse contemporary assessment of registration fitness.

**NON-COMPLIANCE WITH THE STAY CONDITIONS**

232. The conditions of the Tribunal's 31 March 2020 interim stay order included requirements that, by 7 April 2020, he notify his active clients of the termination decision, and not accept any new clients without having made a similar written disclosure to them.

233. In the 17 April 2020 affidavit he relied on to support continuation of the interim stay order, Mr Birdseye conceded his failure to comply literally with the stay conditions. In particular he acknowledged he had not complied with the 7 April 2020 time limit for notification to current clients, but asserted that he had done so by 20 April 2020. He attributed the delay to (i) the initial unavailability of a complete and accurate client contact list, (ii) delay in

compiling such a list and, (iii) delay, caused by technical difficulties, in effecting the transmission of the, approximately 2,500, required client emails.

234. The question of irregular or tardy compliance with the stay conditions was not a matter the Board raised in its October 2020 contention statement. However, the Board's 11 November 2020 submissions, provided after Mr Birdseye's September and October 2020 witness statements, detailed the deficiencies Mr Birdseye had previously disclosed, (including an initial merely verbal disclosure to one new client), and complained that Mr Birdseye had not addressed an assertion (in the Board's April 2020 stay submissions) that the company had become the tax agent for six taxpayers, including three new clients, during the course of the interim stay. The Board characterised Mr Birdseye's explanation of the previously asserted deficiencies as "problematic", and relied on them as contributing to an adverse contemporary assessment of Mr Birdseye's fitness. This was on the basis they demonstrated he was "at best careless and at worst, economical with the truth and only provides information when caught out".

235. Careful regard to the actual content of the stay conditions reveals that they did not absolutely preclude either Mr Birdseye or Claim It from acting as a registered tax agent, even for "new" clients. Furthermore, the ATO records relied on in relation to these six taxpayers were far from self explanatory. Consequently, and certainly without some further particularisation by the Board and exegetical background, there was no fair basis to postulate, in relation to these clients, any relevant non-compliance by Mr Birdseye with the stay conditions. Despite that absence of particularisation and background, Mr Birdseye was not cross examined on this topic. Neither was any attempt made to provide an informed basis for choosing between the Board's postulated alternatives of carelessness and the tendentiously euphemistic characterisation of Mr Birdseye's conduct as having been "economical with the truth". Even if the carelessness alternative were to be embraced, there was no proffered factual basis for regarding the conduct involved as properly influencing an adverse assessment of Mr Birdseye's contemporary fitness.

**FIT AND PROPER PERSON**

236. The minutes of the Board's February 2020 meeting, and its March 2020 notification letter to Mr Birdseye, did not expressly rely on Claim It's lodgement and payment failures as contributing to its dissatisfaction about Mr Birdseye's fitness for registration. On the

contrary, the Board's specifically stated reasons included serious findings of dishonesty in relation to the content of client ITRs, and findings of personal responsibility for the taxation related misconduct and defaults of Sazzii Pty Ltd, AFG Group Pty Ltd and Medlow Chocolates:- *see paragraph 17 above*. The Board ultimately abandoned any assertion of dishonesty in relation to the content of client ITRs, and I have reached a different conclusion from the Board about the sufficiency of the currently addressed evidence to establish Mr Birdseye and Claim It's lack of competence in relation to the content of those ITRs:- *see paragraph 222 above*. I have also reached views contrary to those of the Board in relation to each of Sazzii Pty Ltd (*see paragraphs 138 to 142 above*), AFG Group Pty Ltd (*see paragraphs 99 to 101 above*) and Medlow Chocolates (*see paragraphs 114 & 115 above*).

237. In its November 2020 written submissions, the Board contended that Claim It's "personal affairs" Code breaches alone justified the February 2020 termination decisions. This was an apparent development of a proposition advanced at one point in its October 2020 contention document, where the Board incorrectly cited two decisions of this Tribunal as endorsing the proposition that "any" Code breach "is prima facie evidence" of unfitness.[32]

238. The Board minutes, and its March 2020 notification letter relating to Claim It's registration, did rely on Claim It's BAS / IAS lodgement defaults, and its related payment failures, in reaching an adverse conclusion about Mr Birdseye's registration fitness. In so doing the Board said that Claim It's lodgement failures provided an additional (and not a sole) reason for its finding that Mr Birdseye was not a fit and proper person for registration. That position appears to have been adhered to in the Board's ultimate submission in the review proceedings. It was that Claim It (and thus Mr Birdseye's) breaches of the Code obligation of "personal affairs" taxation law compliance, "combined with other factors" demonstrated Mr Birdseye' unfitness for registration. However, this reference to "other factors" was not specifically identified and the real substance of the Board's position was that Claim It's lodgement and payment defaults were of a nature and extent that demonstrated Mr Birdseye's unfitness. That was because it was the tax agent he controlled, and that conducted the NB&A practice. Claim It's defaults, and the history relating to them, indicated

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[32] In *Cheng Li and Tax Practitioners Board* [2014] AATA 299; 141 ALD 201 at [47] SM Redfern actually said only that it was relevant to consider "the "nature and extent" of Code breaches, and that repeated or serious breaches "may" demonstrate absence of good fame, integrity and character, and thus unfitness. In *Carter and Tax Practitioners Board* [2017] AATA 528 at [22] DP Humphries, after referring to the Board's Explanatory Paper, said that Code breaches "may" be evidence of unfitness – and cited SM Redfern's comments in *Li* as supporting that view.

that Mr Birdseye lacked an appropriate professional commitment to, and a reputation for, compliance with taxation laws.

239. There is no doubt that the TASA s 30-10(2) Code obligation is a matter of particular importance. Confidence in the personal integrity, and the lawful conduct, of tax agents is an important part of the proper and efficient administration of Australia's taxation laws. Registration confers on tax agents the right to charge for their services, and correspondingly imposes on them significant obligations in relation to both the quality of the services they provide to their taxpayer clients, and their personal affairs taxation law compliance. A registered tax agent's failure to comply with any aspect of taxation laws will necessarily involve a failure to comply with the Code, but the mere fact of such a failure will not itself necessarily warrant termination of their registration.[33] That latter proposition is consistent with the fact that the TASA registration eligibility and termination criteria explicitly address only convictions for "serious" taxation offences, and even then neither preclude registration nor require registration termination:- *see TASA s 20-15(b)(i), 20-45(a), 40-5(1)(a)*. It is also consistent with the fact that the TASA provisions confer on the Board a broad range of discretionary sanctions (not limited to termination) where it is satisfied of an agent's failure to comply with the Code:- *see paragraph 31 above*.

240. In the present case, although Mr Birdseye acknowledges Claim It's (and thus his own) breach of the Code obligation of "personal affairs" taxation law compliance, there is no evidence that he has been convicted of any taxation law offences. Moreover, none of the lodgement failures, and thus the elements of Code non-compliance, that he acknowledges would constitute a "serious taxation offence":- *see paragraphs 26(d), 39, 43 & 45 above*. Consequently, the better view is that the appropriate sanction for Mr Birdseye's failure to comply with the Code obligation in TASA s 30-10(2) falls for consideration in the potentially broader context of assessment of Mr Birdseye's contemporary fitness for registration. The

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[33] Mere non-payment of a taxation law related debt illustrates this proposition. In *Wyborn v Tax Agents Board of NSW* [2007] AATA 1492 at [120] & [121] DP Hack questioned whether mere non-payment could be relevant to an assessment of fitness. The Deputy President expressed the view (in the context of ITR and BAS liabilities) that non-payment attributable to genuine financial exigency would not adversely affect assessment of a person's fitness for registration. Nevertheless, it is readily apparent from the "Relevant taxation law obligations" section of these reasons that payment is an aspect of taxation law compliance. Non-payment can therefore constitute a breach of the Code, and can contribute an adverse assessment of fitness for registration.

Code breaches properly influence, but are not necessarily adversely determinative of, that assessment.[34]

241. They are not necessarily determinative of an agent's contemporary fitness because proven past failure to comply is just one aspect of the considerations relevant to the assessment. Other aspects include (i) Mr Birdseye's long held registration status, (ii) the absence of prior determinative adverse findings about compliance (apart from the Board's 2013 formal caution – *see paragraph 161 above*), (iii) the absence of specific (or, in the case of the audit criticisms I have addressed, justified) challenge to his general qualifications and competence, (iv) the apparent regularity of his practices (based on his descriptions of his usual practice, their apparent consistency with the limited questionnaire responses obtained by the Board, and the content of NB&A's "Substantiation Declaration"), (v) the apparently substantial size of NB&A's taxation client base and, (vi) absence of evidence indicating any significant client complaints about his competence or conduct.[35]

242. The periods of lodgement and payment non-compliance in relation to which the Board contended for positive findings (October 2018 to March / April 2020) was relevantly substantiated as significant only in relation to one entity (Claim It – see Schedule 2). Moreover, in the light of the findings I have made, that period of Claim It's non-compliance in that period provides the only substantial immediate basis for calling into question Mr Birdseye's registration fitness. Nevertheless, Claim It's non-compliance in that period is determinative of an adverse assessment of Mr Birdseye's contemporary fitness for registration. This is because of the nature of the non-compliance, its apparently intentional nature and self interested motivation, its duration, its apparent similarity to other previous significant non-compliance, and the absence of any meaningful ameliorating explanation.

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34 Observations, contained in some decisions (e.g. *Shmuel and Tax Practitioners Board* [2019] AATA 2168 at [23]) that taxation law non-compliance is, of itself, sufficiently serious to warrant a finding of unfitness should be understood in the context of the particular circumstances involved. The observation in *Shmuel* cited the earlier Tribunal decision in *Comino v Tax Agents' Board of NSW* [2009] AATA 766 at [35]. However, *Comino* dealt with convictions for "serious" taxation offences. Furthermore, in *Comino* the Tribunal clearly evaluated the nature, extent and duration of the offences, as well as the underlying capacity of the agent. Careful regard to the reasoning and circumstances in *Comino* show that any general statement about the disqualifying effect of taxation law offences should be treated with some reserve – because it is difficult to reconcile such a statement with the emphasis (i) in TASA s 20-45(a) on "serious" taxation offences and, (ii) in the Board's Explanatory Paper, on regard to the totality of relevant considerations.

35 Mr Birdseye included in his October 2020 statement two client emails supporting his competence and honesty.

## CONTEMPORARY FITNESS FOR REGISTRATION

243. The Board's Explanatory Paper TPB(EP) 02/2010 sets out the Board's views about the meaning and application of the "fit and proper person" registration requirement. The contents of the Explanatory Paper do not prescribe a formulaic approach to the assessment of a tax agent's fitness for registration. They emphasise that the assessment "will depend on a weighing of … considerations in the context of the particular facts and circumstances of the relevant case":- at [8] & [56]. The Explanatory Paper notes (at [22] to [24] & [47]) that the wording of the TASA s 20-15 fit and proper criterion requires regard to "good fame, character and integrity" without dictating the conclusion that an absence of one or more of those qualities precludes a favourable assessment. However, the Board's actual compilation (at [48]) of permissibly relevant considerations tends to highlight the potentially determinative relevance of "good fame, character and integrity". Those factors include:

(a) The stated objective of the TASA scheme and the associated primacy of the public interest in ensuring the proper functioning of the tax agent and adviser professions;

(b) The breadth of tax agents' functions and the conduct standards they are required to observe;

(c) The extent of the person's compliance with their own "personal" taxation obligations;

(d) The standard of the person's conduct in relation to their dealings with clients, the Commissioner of Taxation, and with the Board;

(e) The nature of the person's behaviour in relation to circumstances of apparent misconduct; and

(f) The person's conduct history.

244. In relation to the first of those points, the Explanatory Paper emphasises (at [59]) that the principal purpose underlying the TASA scheme is "to protect the public and maintain public confidence in the tax agent … professions". It then declares (at [60]) that TASA's protective purpose is achieved by "ensuring that only those individuals that possess the requisite knowledge, ability, good fame, integrity and character are registered as tax practitioners". Later (at [70]-[71]) the Board emphasises that the Board, the Commissioner, the agent's clients, and the public in general, should be confident of the agent's competence and integrity.

245. Conduct involving dishonesty is said (at [74]) to have an inevitable relevance to any assessment of "good fame, integrity and character". On the other hand, less serious misconduct is recognised (at [75]-[76]) as potentially contributing to dissatisfaction, at least where it has occurred on multiple occasions and / or over a sustained period.

246. It is implicit in TASA s 20-15's references to the "five year" recency of certain events as potentially disqualifying that past misconduct is not an insuperable barrier to registration. However, (as stated at [60] & [62]) a person whose past misconduct has been established must at least satisfy the Board that it "was merely temporary or isolated and … unlikely to recur in the future". Necessarily, apprehensions about the risk of repetition will be influenced by the particular circumstances in which the impugned conduct occurred.

247. The discussion in the Explanatory Paper (at [77]-[83]) of the potential significance of the extent of a person's compliance with their personal tax obligations is principally directed at lodgement and payment obligations, including obligations relating to PAYG instalments and superannuation guarantee obligations. It points to a primary enquiry as to whether the person's personal non-compliance is inconsistent with confidence of their reliability to provide competent and adequate services to clients (see especially [80] & [82]). But the assessment of a person's fitness is not exclusively confined to considerations involving the competence and propriety of the person's interaction with clients. At paragraph [92], perhaps implicitly acknowledging the inherent difficulty of regarding a person as "fit and proper" where they lack "good fame", "integrity" or "character", the Explanatory Paper notes that making false or misleading statements to the Board "could be sufficient for a finding that the agent does not possess the competence, good fame, integrity and character, ***and therefore*** (my emphasis) the fitness and propriety, for registration".[36] In paragraph [97], the Explanatory Paper goes on to state that the reason for that possibility is because the past misconduct may "weighs against perceptions of the practitioner's ability to act in accordance with the tax practitioner's professional obligations in the future". Consistent with the emphasis on perceptions of the practitioner's ability to act appropriately, later parts of the Explanatory Paper contemplate the possible relevance of conduct not involving dishonesty (though related to the person's professional activities) and of other conduct actually

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[36] In support of this proposition the Explanatory Paper cites the decisions in *Su*, *Carbery* and *Re Bouffiere v Tax Agents Board of NSW* [2007] AATA 1978 – a matter in which an applicant had sought to be registered under a false name and had not disclosed a prior conviction for misconduct relating to the management of a corporation.

unrelated to tax agent services. In the former case, and even in the latter, the impugned conduct may demonstrate the person's unfitness because it would be "inconsistent with the standards and expectations to practice as a registered practitioner" (at [108]) and/or "detrimental to any professional body to accommodate the practitioner" (at [107]).

248. None of the passages in the Explanatory Paper is authoritative in its own right. But they are consistent with a number of Judicial and Tribunal decisions. In *Hughes and Vale Pty Ltd v State of NSW (No 2)* (1955) 93 CLR 127, the "fit and proper" person criterion governed eligibility for a motor vehicle licence under state transport legislation. In that context, the principal judgment in the High Court observed that whilst the "fit and proper" criterion was a familiar one for particular vocations or appointments the purpose of its use was:

> *"… to give the widest scope for judgment and indeed for rejection. 'Fit' (or 'idoneus') with respect to an office is said to involve three things, honesty, knowledge and ability: 'honesty to execute it truly without malice, affection or partiality; knowledge to know what he ought duly to do; and ability as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it' – Coke."*

249. A following part of the reasons referred to the purpose of the assessment as informing the permissibly relevant considerations. This led on to the observation that the "fit and proper" criterion had no definite ambit of relevance and "in truth involves a very wide discretion". That width was again expressly acknowledged in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321. That case involved the provisions of the *Broadcasting Act 1942* (Cth), and the limitation of licence eligibility to a "fit and proper" corporate entity. In the contentious decision, the Broadcasting Tribunal had relied on findings that Mr Bond was not personally "fit and proper" to conclude that the corporate licensee (which he was in a position to control) was similarly unfit. This raised questions about the permissible scope of the fit and proper criterion in the particular statutory context. That question was most fully addressed by Toohey and Gaudron JJ – in the following passages:

> *"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."*

*Whether the fitness and propriety of a licensee to hold a commercial licence are sufficiently ascertained by reference to its character or reputation, or must be ascertained by reference to the conduct of its affairs and activities, is a question the answer to which must be found by implication from the provisions of the [relevant legislation] … and from the activities to be undertaken pursuant to the licence. (at 170 CLR 380)*

*A commercial broadcasting licence thus carries with it an obligation to the community. It also carries with it the potential for powerful influence. The community is entitled to confidently expect that a licensee will discharge its obligation and, in particular, that the potential for influence will not be abused. Within this context it is necessarily sufficient to ground a finding that a licensee is not a fit and proper person to hold a commercial licence that the community could not or would not have confidence that the licensee would discharge that obligation. Equally it is sufficient to ground a finding that the licensee is no longer fit and proper that the community could or would no longer have that confidence. Those questions are apt to be answered by reference to the character and reputation of the licensee. (at 170 CLR 382)*

250. The observations in these three paragraphs, despite the obviously different subject matter, resonate with the public interest objectives in the TASA registration and regulation scheme. Those objectives include promoting confidence in tax agents' dutiful discharge of their obligations and proper use of their status. Consistent with those objectives, and as Toohey and Gaudron JJ were at pains to emphasise, confidence of those kinds may be materially influenced by the person's apparent character, by their reputation, and by the nature of their past misconduct, - (1990) 170 CLR 321 at 383.

251. In *Re Su and Tax Agents' Board, South Australia* [1982] AATA 127; (1982) 61 FLR 1, the tax agent was a 35 year old chartered accountant. There was no evidence of any deficiency in the agent's conduct in handling any of his client's affairs. But he had incurred six convictions, between May 1979 and June 1981, for various offences of failing to lodge his own personal tax returns and failing to remit amounts deducted from employees' wages. Those convictions resulted in fines ranging from $40 to $600. Davies J expressed the view that, whilst a tax agent's default in relation to his personal affairs could potentially adversely reflect on their fitness, Mr Su's six convictions would not, of themselves have warranted a conclusion terminating his registration as a tax agent.[37] They did not involve conduct that

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[37] The decision preceded the 1988 amendments to the ITAA 36 eligibility criteria. Those amendments would have characterised the convictions as relating to a "serious taxation offence" and, save for

necessarily demonstrated his lack of fitness. However, the underlying irregularities in his personal tax affairs were relevant because they had the potential to detract from his good standing and impede his ability to represent his clients' interests effectively to taxation authorities. In (1982) 61 FLR 1 at 4 to 5, Davies J said this:-

> *"A person is a fit and proper person to handle the affairs of a client if he is a person of good reputation, has a proper knowledge of taxation laws, is able to prepare income tax returns competently and is able to deal competently with any queries which may be raised by officers of the Taxation Department. He should be a person of such competence and integrity that others may entrust their taxation affairs to his care. He should be a person of such reputation and ability that officers of the Taxation Department may proceed upon the footing that the taxation returns lodged by the agent have been prepared by him honestly and competently."*

252. Against that background, Davies J considered that the irregularities in Mr Su's personal taxation compliance, combined with three other matters, warranted the conclusion that he was not a fit and proper person. Those three other matters were:

(a) Mr Su's chronic failure, in the financial year ended June 1982, to remit group tax deductions;

(b) his 1982 removal from the register of company liquidators (for irregularities not detailed in the judgment); and

(c) false answers to questions about recent convictions in each of his last three annual declarations as a tax agent.

253. In relation to the failure to remit group tax deductions, Davies J appears to have accepted Mr Su's claims that it was mistaken rather than deliberate, and characterised it as suggestive of incompetence. But when Mr Su had sought to negotiate with the Commissioner to offset those non-paid amounts against other amounts he claimed to have "overpaid", Davies J characterised Mr Su's behaviour as "both legally and morally indefensible":- see (1982) 61 FLR 1 at 6 & 9.

254. The circumstances in *Su* involved a substantial degree of contemporaneity between the tax agent's false declarations, his more significant personal tax obligation defaults, and the

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"special circumstances" warranting their being disregarded, would have precluded his assessment as a "fit and proper person".

assessment of his current fitness. In *Stasos v Tax Agents' Board of New South Wales* [1990] AATA 346; (1990) 21 ALD 437, the agent's contentious registration cancellation decision was made (despite any intervening irregularity) several years after a period when he had consistently understated his professional income (and disguised the understatement by failing to claim corresponding deductions in his clients' tax returns). In upholding the lawfulness of the termination decision, Hill J made the following pertinent observation about the assessment of fitness after past instances of serious impropriety.

> *Where the issue is whether a person, who has been guilty of misconduct is at a time somewhat after that misconduct a fit and proper person to exercise a particular occupation carrying with it privileges and responsibilities, it will be relevant whether that person has understood the error of his ways. Failure to do so would, in itself, demonstrate his unfitness. (at (1990) 21 ALD 442) …*
>
> *Where a person has, in dereliction of his responsibilities as a tax agent, not only engaged in a deliberate and extensive course of conduct of tax evasion, (conduct, which, as Davies J explained in Re Su, is inconsistent with the role which tax agents are called upon to perform) but did so in such a way as to be not only dishonest, but also so as to prefer his own interests to that of his clients, and indeed to the detriment of his clients, it is clear that in so doing and at the time of the wrongdoing, that person is not a fit and proper person to remain registered as a tax agent. This does not mean that that person will for all time be unfit to be registered, or as here that, where action to deregister is delayed for some years he will have combined to be a person who is not fit and proper to remain registered at the time his cancellation of registration is considered.*
>
> *However, a person who has been shown to be other than a fit and proper person to be registered must satisfy the Tribunal considering his reregistration or cancellation of his registration as the case may be, that he appreciates the significance of his wrongdoing, that he regrets it and that he has rehabilitated himself such that it is truly unlikely that there will be any lapse in the future of the standards which are required of him. The more serious his dereliction from duty the longer may be the time necessary to show this. It will not be sufficient for him to merely express his contrition. The Tribunal must be satisfied on the balance of probabilities that not only is that contrition actually felt, but that he will not again deviate from the high standards required of him as a registered tax agent. (at (1990) 21 ALD 444, 445).*

255. The last sentence in the immediately preceding passage, with its apparent emphasis on the likelihood of future compliance, has been particularly influential in subsequent decisions that have focussed on the protective nature of the registration function – and in the Explanatory Paper itself (see [62]). But, as the full context of Hill J reasoning, and the earlier cited passages from the reasons in *Bond* and *Su* show, the considerations relevant to the protective function are not limited to subjective confidence in the unlikelihood of future misconduct. Reputation and perceptions are also permissibly relevant considerations. In *Stasos*, Hill J emphasised that the person's subjective contrition was not conclusively determinative. His Honour also said that fitness depended on satisfaction that others (clients

and tax officers) could confidently be satisfied of an agent's honesty, competence and the lawfulness of their relevant conduct.

256. The relevance of both actuality and repute in relation to those characteristics was apparent in *Hughes and Vale Pty Ltd*, as in *Bond*, *Su* and *Stasos*, and has continued to be apparent in subsequent decisions. That appearance can be seen in the decision in *Toohey v Tax Agents Board of Victoria (No 2)* [2008] FCA 1796; (2008) 106 ALD 506, where a tax agent of many years standing had failed to lodge his personal tax returns on a number of occasions between 1989 and 2002 – apparently despite being put on notice in 1995 that the registration board was "extremely concerned" about his default. After 2002, apart from tardiness in lodging tax returns for the 2006 financial year, the tax agent had generally complied with his personal tax obligations. A July 2004 decision to reject the agent's registration renewal application sparked almost six years of controversy, before it was ultimately upheld. (The stages in that controversy are briefly described in *Toohey v Tax Agents' Board of Victoria (No 3)* [2010] FCA 356; (2010) 78 ATR 905.) Several aspects of the matters addressed in the course of that controversy are material to bear in mind:-

(a) the agent's personal honesty, and his genuine endeavour and competence in dealing with client's affairs were substantially accepted:- see *Toohey and Tax Agents' Board of Victoria* [2009] AATA 603 at [36];

(b) the agent had suffered from a number of significant personal and financial stressors, including physical and mental ill health which had led him to neglect his personal affairs, but which had substantially resolved by mid-2009:- see *Toohey and Tax Agents' Board of Victoria* [2009] AATA 603 at [6] & [34];

(c) the person's current fitness (rather than at the time of the impugned conduct) was the matter to be assessed:- *Toohey v Tax Agents' Board of Victoria (No 3)* [2010] FCA 356; (2010) 78 ATR 905 at [3];

(d) the assessment required a determination of both the likelihood of future default and the community confidence about its improbability:- *Toohey v Tax Agents' Board of Victoria (No 3)* [2010] FCA 356; (2010) 78 ATR 905 at [16]; and

(e) the Tribunal's ultimate lack of satisfaction (about future default and community confidence) was contributed to by (i) the Applicant's extensive past non-compliance, (ii) the Applicant's lack of diligent promptness in the conduct of the review

proceedings, (iii) the basic nature of the compliance obligation involved, (iv) the pedestrian nature of the various stressors that had contributed to his default (i.e. the inherent likelihood of similar stressors occurring again) and, (v) the importance of public confidence that a tax agent would "lead by example" in relation to timely compliance with taxation obligations:- see *Toohey and Tax Agents' Board of Victoria* [2009] AATA 603 at [36].

257. The required assessment of contemporary fitness must pay adequate regard to the whole of the relevant circumstances in which any past misconduct occurred:- see *A Solicitor v Council of the Law Society of NSW* [2004] HCA 1 at [18]; (2004) 216 CLR 253. Personal ill health, domestic stress, and aberrant errors of judgment, where substantiated and relevantly causal, may all favourably influence an assessment of fitness, despite the otherwise apparent objective gravity of the impugned conduct involved:- see *SRBP and Tax Practitioners Board* [2016] AATA 456 at [40]-[43]; (2016) 103 ATR 708. Similarly, there are situations where the limited extent of a tax agent's taxation non-compliance, and their current relevant compliance, warrant no adverse finding about their contemporary fitness. That was the situation in *Wyborn v Tax Agents' Board of NSW* [2007] AATA 1492. In that case DP Hack accepted (at [29]) the previously cited reasoning in *Su* (*see paragraph 251 above).* However, in circumstances where there had not been any relevant taxation offence conviction, nor any adverse finding about the agent's honesty, the Deputy President concluded that the comparatively small number of personal ITR (three) and BAS (three) (lodgement defaults and the modest amount of the taxation debts involved (each of them was substantially less than $10,000) did not justify an adverse conclusion about the agent's fitness.

258. But there are also situations where the nature and extent of the agent's non-compliance can result in absence of satisfaction about their fitness, even in the absence of positive findings of misconduct or incompetence in handling client affairs. Persistent significant lodgement failures, and significant failures to remit GST and PAYG amounts, undoubtedly tend to be probative of an agent's lack of fitness. Those propositions may be illustrated by regard to four decisions.

259. In *Comino v Tax Agents' Board of NSW* [2009] AATA 766, the Tribunal affirmed the Board's rejection of the registration renewal of a tax agent who had over 40 years experience. In four of the five preceding years the agent had late lodged his ITR. More significantly, he

had incurred convictions (in 2000 and 2003) for two ITR non-lodgement offences, and (in 2007, a month before his renewal application) for five BAS non-lodgement offences. Finally, whilst his renewal application was under consideration, he had entered into, but failed to comply with, a payment plan relating to a $23,000 tax debt, and he had also again (but temporarily) fallen behind with his BAS lodgements. Under the then applicable ITAA 36 registration provisions, Mr Comino's BAS lodgement offence convictions were for "serious taxation offences", and potentially precluded his registration eligibility. However, the Tribunal was satisfied that various personal and professional exigencies had contributed to those particular offences and warranted characterisation as "special circumstances" that permitted disregard of those offences. The Tribunal also described itself as having "no concerns" about the agent's "honesty or integrity, or his goal of serving his clients". However, the Tribunal commented that the agent appeared to be disorganised, and that his significant $1.6 million tax debt (briefly, and imprecisely, attributed in the decision reasons to "difficulties" following the introduction of GST) was "unsatisfactory". The Tribunal then declared (at [36] & [37]) its dissatisfaction about the agent's fitness for registration, on the basis that (i) his lodgement compliance difficulties (in relation to both ITRs and BAS) had been recurring problems, involved obligations in relation to which a tax agent's conduct should be "above reproach", and would not / did not inspire confidence in the unlikelihood of their recurrence.

260. In *Proh and Tax Agents' Board of Victoria* [2010] AATA 149; (2010) 78 ATR 663 (a case that concerned convictions for more than one (non-lodgement) "serious taxation offence") in a passage reminiscent of the observations of Davies J in *Su*, DP McDonald said this:-

> *[15] The purpose of cancellation or suspension of a tax agent's registration is not to punish the person concerned, although it may have that effect but to protect taxpayers from agents who are not conforming to the legislative requirements attaching to their registration as agents. It is generally accepted, and the Tribunal accepts, that a failure of an agent to attend to his/her own taxation affairs demonstrates a lack of suitability, rendering the agent unfit to handle the affairs of those who may seek to utilise his/her services. The time at which such concerns are relevant is the time the Tribunal hears the application. That does not mean that at the time of hearing there must be outstanding breaches for there to be an adverse finding but that the facts as determined by the Tribunal must bear upon a person's current fitness to carry out his/her functions as a tax agent.*
>
> *[16] The Tribunal is firmly of the view that the applicant's convictions in October 2008, for events occurring over the preceding three year period, combined with his failure to lodge the quarterly return for the period ending 30 September 2009 until about three months later, do reflect on his fitness to transact business on behalf of taxpayers in income tax matters.*

261. A similar view about the likely significance of personal taxation default was expressed in *Phillip Same Accountants Pty Ltd and Tax Practitioners Board* [2010] AATA 439. That matter involved an individual who was the "nominee" of the corporate tax agent and its predecessor (under the ITAA 36 registration provisions). The corporate tax agent and its predecessor ("JMN") had a significant (many year) history of BAS lodgement default. Those defaults had led to the winding up of JMN (when it was unable to pay its approximately $100,000 BAS debt), and to the corporate tax agent's accumulated BAS debt of about $36,000. In addition, the individual nominee had been tardy in filing two of his own income tax returns. The lodgement and payment defaults had all been regularised at the time of the review proceedings, and there was significant evidence of the individual nominee's general competence and good repute, including his work in mentoring another tax agent who had got into difficulty managing his practice. The Tribunal expressly accepted that the individual nominee was both dedicated and competent and had always satisfactorily attended to his client's affairs. Indeed, the Tribunal appeared to accept that his neglect of his own affairs had been contributed to by his dedication to his clients. The Tribunal also accepted that (at least in the absence of any conviction) compliance with taxation lodgement and payment obligations was not an inflexible registration eligibility requirement. Nevertheless, the Tribunal concluded that the individual nominee (and hence the corporate tax agent) was not a fit and proper person whose registration should be renewed. The basis for the Tribunal's conclusion was expressed in the following passages (from which I have omitted the footnote citations):-

> *22. In this case there has been a consistent failure of personal compliance over nearly a 10 year period. The Tribunal accepts that, in the 2006-2009 period, the failure of Mr Same to submit BAS returns along with a failure to submit his personal tax returns on time is indicative of him having a disregard of his obligations. The failure to file BAS has permitted him the use of moneys, which ought to have remitted to the ATO. This further demonstrates his lack of good faith, integrity and character in the context of his obligations, not only as a citizen but as a citizen with particular responsibilities, in his capacity as the nominee of the applicant tax agent.*
>
> *23. The Tribunal is satisfied that Mr Same fulfils his family and community responsibilities; the latter in particular through his work connected with his local synagogue. The Tribunal is also satisfied that Mr Same has, in the week before this hearing, installed updated computers and software to assist him in reducing the time it would otherwise take to keep his BAS and personal tax affairs up to date. It is also accepted that the failure to reregister must have had a salutary effect in bringing to his attention the need to take care of his personal tax affairs. Mr Same's statements before the Tribunal, that his inaction with respect to his personal tax affairs was 'a gross exercise in stupidity' and that he would ensure this would not happen again, constitute his recognition of the unsatisfactory nature of his omissions and a strong desire that they not be repeated. However, given Mr Same's past failures over a*

*lengthy period of time, the Tribunal is hesitant to conclude that the public can repose confidence in these statements being reflected in timely action in the future.*

*24. In such cases as the present, a balance must be reached between the failures of the past with the actions taken to correct them plus proposals that conduct will be modified in the future. The only way in which this can be done is for the decision maker to have regard to the past performance or lack of it. In this case the failures are extensive and Mr Same has had the use of money which ought to have been paid to the ATO. The public can expect those such as Mr Same, who as the result of registration as tax agents, to lead by example by meeting their obligations to file required returns and to pay tax owing on time. It is clearly a breach of trust for money, which should be set aside for the ATO, to be diverted for other purposes. That breach of trust occurs in circumstances when the clients are unaware that money, they have paid for remission to the ATO as GST, has been diverted for use by Mr Same until such time as he chooses to pay it or indeed, as in the case of JMN, if it is ever paid.*

262. The fourth case is the Tribunal's decision in *Delis and Tax Practitioners Board* [2015] AATA 820 (which was affirmed in *Delis v Tax Practitioners' Board* [2016] FCA 570). In that case the individual tax agent had delays of six months or more in lodging his income tax returns and had a current personal income tax debt approximating $10,000. By early 2015 the corporate tax agent he controlled had an accumulated tax debt approximating $372,000. This debt had been steadily increasing over a 12 year period and included a shortfall in superannuation guarantee remittances. That remittance shortfall totalled about $99,000 over a three year period, of which the outstanding liability approximated $30,000. In addition, the corporate tax agent had numerous BAS lodgement delays (of various lengths) that had occurred over a five year period (from January 2010 to January 2015). Another trustee company controlled by the individual tax agent had an accumulated tax debt of about $50,000. In concluding that neither agent was a fit and proper person whose registration should be renewed (despite any evidence of misconduct in handling client affairs) the Tribunal made the following observations:-

(a) (at [53], [91] & [94]) there had been a long (up to 14 year) history of failure to comply with taxation laws;

(b) (at [36]) those failures were not accounted for by either personal or financial difficulty;

(c) (at [93] & [99]) in particular, the failures relating to non-remission of superannuation guarantee charge amounts were "inexplicable"; and

(d) (at [98] & [99]) the fact that all the taxation debts had been discharged was not persuasively probative of the respective agent's contemporary fitness, because the payment had been belatedly made, under the pressure of the Board's renewal refusal, and the controversy involved in the review proceedings.

263. The adverse findings I have made in relation to Mr Birdseye and Claim It have a limited compass, in comparison not only to the Board's February 2020 findings but also to the transgressions that have influenced termination decisions in some other matters (e.g. *Comino* and *Delis*). In relation to the latter observation, the outcomes of fitness assessments in other cases provide useful illustrations of the permissibly relevant considerations and their appropriate evaluation of their ultimate significance. However, every assessment must be based on the circumstances of the particular case, and factors that have been treated as significantly influencing or ameliorating an assessment in other cases, may readily and reasonably be accorded a different significance. In the present case, I have come to the same view as the Board (e.g. in paragraphs [103] to [105] of its contention document) that Mr Birdseye's lodgement and payment defaults have not been shown to be either isolated or a consequence of aberrant exigency. In its contention statement, the Board went further, and submitted that the only inference available in relation to the BAS / PAYG lodgement delays was that Mr Birdseye had intentionally sought to delay the notification that would permit assessment / crystallisation of the taxation related liability. I accept that such an inference is available, but I do not accept that it is the only one. On the other hand, I recognise that Mr Birdseye and Claim It derived a financial benefit from the payment defaults, and I am unpersuaded that those defaults, and the related lodgement delays, are properly to be characterised as merely aberrant and non-culpably exigent. On the contrary, those defaults are apparently consistent with past similar and persistent defaults, at least some of which have previously been the subject of a formal caution by the Board. Consequently, I am unable to arrive at positive satisfaction that Mr Birdseye is currently a fit and proper person to retain his tax agent registration.

## CONCLUSION ON THE TERMINATION DECISIONS

264. As I have already indicated, characterisation of Mr Birdseye and Claim It's lodgement and payment defaults as failures to comply with the TASA s 30-10(7) Code obligation does not dictate a conclusion that registration termination is the most appropriate of the sanctions authorised by TASA s 30-15(2). Neither does an absence of positive satisfaction that Mr

Birdseye is a fit and proper person for registration, necessarily dictate the exercise of the termination discretion conferred by TASA s 40-5(1). A termination decision has potential adverse consequences for the agent, the agent's employees and taxpayer clients. In the case of the agent, the financial consequences may be significantly adverse. There is a similar, but probably lesser, potential for financial hardship for a terminated agent's employees. The potential disadvantage to an agent's existing clients is less predictable and, in any event, needs to be balanced against the inherent desirability of clients engaging the services of appropriately registered "fit and proper" persons.

265. In the present case, Mr Birdseye has asserted a significant decline in his practice income, and produced financial statements indicating its marginal profitability in the year ended June 2020. However, it is also apparent (from the circumstances relating to Ms Johnstone) that he has continued to operate his accountancy practice, and make arrangements with other registered tax agents to be remunerated for preparatory ITR work. That evidence does not contradict the likelihood of significant financial disadvantage to Mr Birdseye, but such financial disadvantage is not a sufficient consideration to detract from the appropriateness of affirming the Board's termination decisions, because of an absence of contemporary satisfaction of Mr Birdseye's personal fitness for registration.

**THE REGISTRATION PRECLUSION PERIOD**

266. The Board's determinations of a five year period prohibiting registration applications by each of Mr Birdseye and Claim It were patently influenced, and likely primarily influenced, by the Board's (now abandoned) findings of dishonesty, and by the Board's adverse findings (which I have found unsubstantiated) about the competence of Mr Birdseye and Claim It in the provision of tax agent services. That changed position necessarily calls into question the appropriateness of maintaining the determination decisions.

267. In these proceedings, the Board contended that Claim It's breaches of the TASA s 30-10(2) Code obligations alone justified the five year preclusion period. That contention had necessary implications for the position of Mr Birdseye although, in relation to him, the Board also relied on the lodgement defaults of all of the Group (ii), (iii) and (iv) entities (i.e. the familial, non-practice and other entities) in Schedule 1.

268. The most likely immediate purpose of the statutory discretion to impose a registration preclusion period is to emphasise the overriding TASA purpose. A subsidiary, but arguably

related purpose, is to provide a salutary sanction, perhaps for the purposes of general deterrence, for inappropriate tax agent conduct. A third purpose may be to provide a mechanism for avoiding the Board being subjected to the administrative burden of assessing registration applications by agents whose registration has recently been terminated on misconduct and fitness grounds.

269. In some previous Tribunal decisions, it has been suggested that useful guidance in the exercise of the preclusion period discretion can be provided by the cases dealing with other statutory provisions dealing with the disqualification of company directors, and the banning of securities industry operatives. Those particular statutory discretions are not precisely congruent with the preclusion period discretion in TASA s 40-25(1). The presently relevant difference is that in both of those statutory regimes there is a further statutory power to truncate the disqualification or ban period. There is no such truncation discretion in relation to a preclusion period determined in accordance with TASA. That consideration invites caution against imposing a preclusion period that would prevent consideration of a renewal application based substantially on significant additional information or materially changed circumstances.

270. In the present matter I have found that Mr Birdseye's failures in relation to the lodgement and payment defaults are inconsistent with contemporary satisfaction of his fitness for registration. I made that finding because of the intrinsic importance of taxation law compliance by a tax agent, because of his history of apparently similar defaults, because of the recency of the defaults (at the time of the Board's decision) and because of my inability to accept Mr Birdseye's explanatory exegesis attributing those defaults to his employees and to financial exigency.

271. The conduct deficiency I have found is significant. Neither Mr Birdseye, nor any other registered tax agent should be under any misapprehension about the content and significance of the TASA Code obligation to comply with taxation laws in the conduct of their personal affairs. Nevertheless, the reality is that Mr Birdseye and Claim It have already suffered a substantial period of loss of registration (and that period has no certain end point). In my view that loss adequately addresses two of what I regard as the three primary purposes of the TASA preclusion period discretion.

272. In relation to the third suggested purpose of the preclusion period discretion, I am not at all sure that Mr Birdseye, and those advising him, fully appreciated the potential significance of his lodgement and payment deficiencies. (The submission made on his behalf was that they were minor and immaterial:- *see paragraph 66 above*.) That lack of appreciation may have been contributed to by the gravity, diversity and imprecision of some of the findings that the Board made in its 20 February 2020 decision. It may also have been contributed to by the bulk of the material with which he was confronted, and by the burden of attempting to address the serious, but ultimately abandoned, finding that he had "knowingly obstructed" the administration of taxation laws. Whether or not any of those factors came into play, I am concerned that the quality of the evidence proffered by Mr Birdseye and Claim It in the review proceedings may have been affected adversely by a failure to appreciate the potential significance of the "personal affairs" compliance issues, and the nature and extent of the evidence necessary to demonstrate the accuracy and persuasive force of Mr Birdseye's belatedly asserted explanations for Claim It's lodgement and payment defaults. In those circumstances, and without expressing any concluded view about either (i) the reality or the significance of any such apprehended misapprehension or, (ii) the quality or cogency of any further evidence that Mr Birdseye might be able to adduce to support his previously asserted explanations, I do not think it is appropriate to impose any preclusion period.

**CONCLUSION**

273. Each of the Board's registration termination decisions is affirmed. Each of the Board's five year determination decisions is set aside and in substitution for those determinations, no preclusion periods are imposed.

*I certify that the preceding 273 (two hundred and seventy-three) paragraphs are a true copy of the reasons for the decision herein of Mr P W Taylor SC, Senior Member*

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

Associate

Dated: 20 April 2021

| | |
|---|---|
| Dates of hearing: | **18, 19, 20, 23 November 2020** |
| Counsel for the Applicant: | **Mr N Shaw** |
| Solicitors for the Applicant: | **Case Legal Pty Ltd** |
| Counsel for the Respondent: | **Ms G Walker** |
| Solicitors for the Respondent: | **Tax Practitioners Board** |

| | G | H | I | J | K | L | M | N | O | P | Q | R | S | T | U |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 3 | **Schedule 1 - Birdseye entities - ITR defaults - lodgments** | | | | | | | | | | | | | | |
| 4 | ***- Reasons paragraphs [52] to 58]*** | | | | | | | | | | | | | | |
| 5 | | **Taxpayer** | | **Birdseye - personal status** | | | **ITR lodgement default status at 30 June // with subsequent [Lodgment date & number lodged]** | | | | | | | | |
| 6 | Notes | | | | | | **2012** | **2013** | **2014** | **2015** | **2016** | **2017** | **2018** | **2019** | **2020** |
| 7 | | | ***Incorp'ratn / form'ntn*** | ***Start*** | ***Director / Trustee status*** | ***End*** | ***Type*** | ***Type*** | | | | | | | |
| 8 | | **(i) Birdseye - practice related entities** | | | | | | | | | | | | | |
| 9 | | Claim It SA Pty Ltd | 28-Jun-94 | 20-Mar-02 | 1 | (continued) | | | | | | | | | |
| 10 | [1] | Nicholas Birdseye Family Trust (Trustee:- Claim it SA Pty Ltd) | | | | (continued) | | | | | | | | | |
| 11 | [4] | "ITR" tax liablity / debt | | | | | | | disputed | disputed - [4] | ?? | ?? | ?? | ?? | ?? |
| 12 | | | | | | | | | | | | | | | |
| 13 | | **(ii) Birdseye - familial entities** | | | | | | | | | | | | | |
| 14 | [2] | Birdseye Children Family Trust (Trustee:- Birdseye) | | 20-Sep-13 | sole | (continued) | | | | overdue (1) | overdue (2) | overdue (3) | overdue (4) | overdue (5) | [2-Mar-20_"5"] |
| 15 | [2] | N&T Birdseye Superfund (Trustee N & T Birdseye) | | 9-May-11 | 1 of 2 | (continued) | | | | | overdue (1) | overdue (2) | overdue (3) | overdue (4) | [23-Apr-20_"3"] |
| 16 | | Trust's "ITR" tax liablity / debt | | | | | | | | | ?? | ?? | ?? | ?? | ?? |
| 17 | | Torrens Finance Brokers Pty Ltd | 21-Nov-85 | 24-Jan-02 | 1 | (continued) | [ITR not nec/y] | [20-Jun-19] | [ITR not nec/y] | [20-Jun-19] | overdue (2) | overdue (3) | overdue (4) | overdue (3) | ?? |
| 18 | | "ITR" tax liablity / debt | | | | | | | | | ?? | ?? | ?? | ?? | |
| 19 | | | | | | | | | | | | | | | |
| 20 | | **(iii) Birdseye - non practice entities** | | | | | | | | | | | | | |
| 21 | | Medlow Chocolates Pty Ltd | 29-Jan-14 | 29-Jan-14 | 1 | 18-Feb-16 | | | | | | | | | |
| 22 | [3] | Medlow Chocolates Pty Ltd | " | 19-Feb-16 | 1 of 3 | 9-Oct-18 | | | | | overdue (1) | overdue (1) | overdue (3) | [April 2019 - 4] | |
| 23 | | "ITR" tax liablity / debt | | | | | | | | | ?? | 2,670 | 400 (//) | ?? | |
| 24 | | | | | | | | | | | | | | | |
| 25 | | **(iv) Birdseye entities - ITR lodgements "not necessary" - per ATO records as at 15 November 2019** | | | | | | | | | | | | | |
| 26 | [2] | Accounting CRM Pty Ltd | 29-Jun-16 | 29-Jun-16 | 1 | (continued) | pre-incorp'n | pre-incorp'n | pre-incorp'n | pre-incorp'n | | overdue (1) | overdue (2) | overdue (3) | [ITR's not nec/y] |
| 27 | [2] | Claim It Financial Planning Pty Ltd | 21-Mar-16 | 21-Mar-16 | 1 | (continued) | pre-incorp'n | pre-incorp'n | pre-incorp'n | pre-incorp'n | | overdue (1) | overdue (2) | overdue (3) | [ITR's not nec/y] |
| 28 | [2] | Pfeiffer Services Modelling Pty Ltd | 29-Jul-14 | 20-Sep-16 | 1 | (continued) | pre-incorp'n | pre-incorp'n | pre-incorp'n | not director | not director | overdue (1) | overdue (2) | overdue (3) | [ITR's not nec/y] |
| 29 | [2] | Sinbird Nominees Pty Ltd | 18-May-10 | 18-May-10 | 1 of 2 | (continued) | overdue (1) | overdue (2) | overdue (3) | overdue (4) | overdue (5) | overdue (6) | overdue (7) | overdue (8) | [ITR's not nec/y] |
| 30 | [2] | Nick Sunshine Family Trust | 20-May-10 | | sole | | overdue (1) | overdue (2) | overdue (3) | overdue (4) | overdue (5) | overdue (6) | overdue (7) | overdue (8) | [ITR's not nec/y] |
| 31 | [2] | Peter and Nick Sunshine Unit Trust | 1-Jul-10 | | 1 of 3 | | overdue (1) | overdue (2) | overdue (3) | overdue (4) | overdue (5) | overdue (6) | overdue (7) | overdue (8) | [ITR's not nec/y] |
| 32 | [2] | Sylvia Family Trust | 1-Jul-10 | | sole | | overdue (1) | overdue (2) | overdue (3) | overdue (4) | overdue (5) | overdue (6) | overdue (7) | overdue (8) | [ITR's not nec/y] |
| 33 | | | | | | | | | | | | | | | |
| 34 | Notes | | | | | | | | | | | | | | |
| 35 | [1] | Claim It and Claim It Financial Planning Pty Ltd may both have been trustees after March 2016. For the sake of convenience, and in view of the "return not necessary" classification of ITR lodgement by Claim It Financial Planning Pty Ltd (see Group (iv), I have assumed that the trustee obligations were those of Claim It. | | | | | | | | | | | | | |
| 36 | [2] | In Mr Birdseye's communications with the ATO in September 2019, the fact of the ITR lodgement default by these entities was identified. Mr Birdseye is recorded as having agreed to lodge all of the outstanding ITRs by 11 October 2019. The lodgment dates noted in the table indicate that he did not fulfill that agreement. There was a substantial lodgement delay (apart from the ITR's whose lodgment was recorded as "not necessary"), even after a further reminder from the ATO in November 2019. In his April 2020 statement Mr Birdseye said that the N&T Birdseye Super Fund had not traded in any of the tax years from 2016 to 2018. The Super Fund's only outstanding ITR was for the 2019 tax year. Mr Birdseye anticipated that ITR would be lodged by 20 April 2020, and would not result in any tax being payable. In his Septemebt 2020 statement Mr Birdseye acknowledged that the N&T Birdseye Super Fund's 2019 ITR was still outstanding. (It was still outstanding in November 2020.) In the same statement he acknowledged the ITR lodgment default fot the Birdseye Children Family Trust, said that the Fund had not earned any income in the relevant years, and said that the Fund's corresponding ITR's had all been lodged. | | | | | | | | | | | | | |
| 37 | [3] | An ATO 19 June 2017 phone call record indicates that Medlow's ITR lodgements for 2014, 2015 & 2016 were then all outstanding. The phone call record attributes to Mr Birdseye an assurance that all outstanding ITR (and BAS) lodgments would be attended to by 30 June 2017. Medlow also had outstanding SGC payment obligations, under an existing payment plan. The phone call record attributes to Mr Birdseye (i) ignorance about the SGC non-payment and, (ii) an assurance that it would be paid by 20 June 2017. | | | | | | | | | | | | | |
| 38 | [4] | The 13 March 2018 Deed of Settlement involved a relase of all the disputed "tax related liabilities" of both the Family Trust and Mr Birdseye, up to 30 June 2015. | | | | | | | | | | | | | |

| | F | G | H | I | J | K | L | M | N | O | P | Q | R | S |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 3 | **Schedule 2 - Birdseye entities - BAS lodgement defaults (chronological order)** | | | | | | | | | | | | | |
| 4 | ***- Reasons paragraphs [52] to 58]*** | | | | | | | | | | | | | |
| 5 | Notes | **Taxpayer** | **Entity & relationship details** | | | | **BAS lodgment status - or "[Lodgement Date & "n"]"** | | | | | | | **2020** |
| 6 | | | | | | | **2002 to 2014** | | | | | | | **[Lodgements]** |
| 7 | | | **Start** | **Birdseye - personal status** | | | **2002** | **2003** | **2004-2010** | **2011** | **2012** | **2013** | **2014** | **2019** |
| 8 | | | ***Incorp'ratn / form'ntn*** | ***Start*** | ***Director / Trustee status*** | ***End*** | | | | | | | | |
| 9 | | | | | | | | | | | | | | |
| 10 | | Torrens Finance Brokers Pty Ltd | 21-Nov-85 | 24-Jan-02 | 1 | (continued) | overdue (4) | overdue (5) | overdue (5) | overdue (5) | overdue (9) | overdue (12) | overdue (14) | [Jun 2019 - "4"] |
| 11 | | BAS liablity / debt | | | | | ?? | ?? | ?? | ?? | ?? | ?? | ?? | |
| 12 | | | | | | | | | | | | | | |
| 13 | | | | | | | | | | | | | | |
| 14 | | | | | | | **2015 to 2016** | | | | | | | |
| 15 | | | **Start** | **Birdseye - personal status** | | | **December** | **March** | **June** | **September** | **December** | | | |
| 16 | | | ***Incorp'ratn / form'ntn*** | ***Start*** | ***Number*** | ***End*** | | | | | | | | |
| 17 | | Medlow Chocolates Pty Ltd | 29-Jan-14 | 29-Jan-14 | 1 | 18-Feb-16 | | | | | | | | |
| 18 | [1] | Medlow Chocolates Pty Ltd | " | 19-Feb-16 | 1 of 3 | 9-Oct-18 | overdue (1) | overdue (1) | overdue (2) | overdue (3) | overdue (4) | | | |
| 19 | [2] | BAS liablity / debt | | | | | 6,438 ? | ?? | ?? | ?? | ?? | | | |
| 20 | | | | | | | | | | | | | | |
| 21 | | | | | | | | | | | | | | |
| 22 | | | | | | | **2017 to 2018** | | | | | | | **2019** |
| 23 | | | | | | | **March** | **June** | **September** | **December** | **March** | **June** | **September** | **[Lodgements]** |
| 24 | | | ***Incorp'ratn / form'ntn*** | ***Start*** | ***Number*** | ***End*** | | | | | | | | |
| 25 | | Medlow Chocolates Pty Ltd | " | 19-Feb-16 | 1 of 3 | 9-Oct-18 | overdue (5) | overdue (6) | overdue (7) | overdue (8) | overdue (9) | overdue (10) | overdue (11) | [April 2019 - "10"] |
| 26 | [1] | BAS liablity / debt | | | | | ?? | ? | ?? | ?? | ?? | ?? | ?? | 1,897 |
| 27 | | SGC liabuility / debt | | | | | | 1,262 ? | | | | | | 6,730 |
| 28 | | | | | | | | | | | | | | |
| 29 | | | | | | | **2019** | | | | | | | **2020** |
| 30 | | | | | | | **June** | **July** | **August** | **September** | **October** | **November** | **December** | **[Lodgements]** |
| 31 | | | ***Incorp'ratn / form'ntn*** | ***Start*** | ***Number*** | ***End*** | | | | | | | | |
| 32 | | | | | | | | | | | | | | |
| 33 | [3] & [4] | Nicholas Birdseye Family Trust - (Trustee:- Claim it SA Pty Ltd) | 28-Jun-94 | 20-Mar-02 | 1 | (continued) | overdue (1) | overdue (2) | overdue (3) | overdue (4) | overdue (5) | overdue (6) | overdue (7) | [26-Mar-20 - "7"] |
| 34 | [5] [6] & [7] | BGST & PAYG liablity / debt | | | | | 65,716 | 66,377 | 66,922 | 67,362 | 67,779 | 68,299 | 68,509 | 188,434 |
| 35 | | | | | | | | | | | | | | |
| 36 | **Notes** | | | | | | | | | | | | | |
| 37 | [1] | An ATO 19 June 2017 phone call record attributes to Mr Birdseye an assurance that all outstanding BAS lodgments would be attended to by 30 June 2017. Medlow also had outstanding SGC payment obligations (likely arising from the ATO's 10 January 2017 audit decision) that were subject to an existing payment plan, with which the company had not complied. The phone call record attributes to Mr Birdseye (i) ignorance about the non-payment and, (ii) an assurance that it would be paid by 20 June 2017. | | | | | | | | | | | | |
| 38 | [2] | The liability shown as at December 2015 is the GST shortfall penalty liability ammount for the 2015 tax year, as stated in the ATO's 8 November 2018 referral letter to the Board. | | | | | | | | | | | | |
| 39 | [3] | Claim it was the sole trustee until the company's (temporary) liquidation in March 2016. Claim It Financial Planning Pty Ltd was appointed as a trustee on 22 March 2016. After that date both companies were recorded by the ATO as trustees of the Nicholas Birdseye Family Trust. For the sake of convenience, I have assumed that the lodgement obligation was primarily that of Claim It - notwithstanding the March 2016 to March 2018 "temporary" period of Claim Its liquidation. | | | | | | | | | | | | |
| 40 | [4] | The 13 March 2018 Deed of Settlement between the ATO and Claim It Financial Planning indicated that the Trust had outstanding BAS lodgement obligations, and required them to be brought up to date by 31 March 2018.. The ATO account records for the Family Trust suggest that the last of the BAS covered by the Deed was not in fact lodged until early August 2018. Thereafter, the Family Trust continued to be in default of its BAS lodgement obligations until May / June 2019:- see Note [5]. After June 2019, the BAS lodgement defaults re-occurred, and were not remedied until March 2020. | | | | | | | | | | | | |
| 41 | [5] | Claim Its "BAS liability" as at June 2019 appears to have resulted from the (late) lodgment (and non-payment) of BAS for the period from September 2018 to April 2019. Those BAS were lodged and "processed" between May and June 2019. On 22 June 2019, the trustee entered into a payment plan arrangement with the ATO, for a total debt of $67,604. The payment plan required monthly payments, from late June 2019 to January 2020. None was made. | | | | | | | | | | | | |
| 42 | [6] | The "BAS (PAYG) liability" amounts are derived from the "processed date" entries in the ATO / ICP Statement of Account extracts. Reliance on the "processed date" understates the debt amount. The debt amount in March 2020, indicates the overall liability at that time. But those late lodgements were not "processed" in the order of the accounting periods to which they related. The processing sequence confounds the accuracy of any attempt to (retrospectively) determine the liability amount attributable to any particular activity statement period. | | | | | | | | | | | | |
| 43 | [7] | The BAS lodgements in March 2020 covered the period up to the end of February 2020. When all the late BAS lodgements had been processed, Claim Its ATO account debt had increased to $188,434. That debt was the subject of a 31 March 2020 payment plan arrangement with the ATO. Under that arrangement, an initial payment of about $94,000 was to be made by 29 May 2020, followed by monthly payments approximating $9.500. None of those payments was made. By October 2020 the tax debt had grown to $210,606. Between October 2018 and October 2020, the only significant credit payment to the account had been the Cash Flow Boost" credits (associated with the Government's "Covid" relief measures) in March, April & May 2020. | | | | | | | | | | | | |

| | F | G | H | I | J | K | L | M | N | O | P | Q | R | S | T | U | V | W |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 3 | **Schedule 3 - Birdseye entity - taxation liabilities** | | | | | | | | | | | | | | | | | |
| 4 | ***- Reasons paragraphs [59] to [62]*** | | | | | | | | | | | | | | | | | |
| 5 | | **Taxpayer** | | **Birdseye - personal status** | | | | | | | | | | | | | | |
| 6 | Notes | | | | | | **2016** | **2017** | **2018** | | | | **2019** | | | | **2020** | |
| 7 | | | | | | | | **June** | **March** | **June** | **September** | **December** | **March** | **June** | **September** | **December** | **March** | **October** |
| 8 | | | ***Incorp'ratn / form'ntn*** | ***Start*** | ***Number*** | ***End - or Idereg'tn]*** | | | | | | | | | | | | |
| 9 | | **(i) Nicholas Birdseye - personal liabilities** | | | | | | | | | | | | | | | | |
| 10 | | Nicholas Birdseye - personal - income tax | | | | | | | | | | | | | | | | |
| 11 | | Director Penalty Notice | | | | | | | | | | | | | | | | |
| 12 | | SGC - AFG Group Pty Ltd - 7 May 2019 | | | | | | | | 60,787 | 56,335 | 56,335 | 56,335 | 56,335 | 56,335 | 56,335 | 56,335 | 56,335 |
| 13 | | PAYG - AFG Group Pty Ltd - 25 Jun 2019 | | | | | | | | 12,432 | ***?*** | ***?*** | ***?*** | ***?*** | ***?*** | ***?*** | ***?*** | ***?*** |
| 14 | | PAYG - Claim IT SA Pty Ltd - 24 Feb 2016 | 28-Jun-94 | 20-Mar-02 | 1 | (continued) | 152,130 | 152,130 | (released) | | | | | | | | | |
| 15 | | | | | | | | | | | | | | | | | | |
| 16 | | **(ii) Birdseye - practice related entities** | | | | | | | | | | | | | | | | |
| 17 | [1] [2] [3] | Claim IT SA Pty Ltd (GST & PAYG withholding) | 28-Jun-94 | 20-Mar-02 | 1 | (continued) | 152,130 | 152,130 | (released) ? | | 6,539 | 25,429 | 45,854 | 65,716 | 67,362 | 68,509 | 188,434 | 210,606 |
| 18 | | | | | | | | | | | | | | | | | | |
| 19 | | **(iii) Birdseye - non practice entities** | | | | | | | | | | | | | | | | |
| 20 | | AFG Group Pty Ltd - (per ASIC register) - [de-registered] | 18-Jan-12 | 5-Jul-12 | 1 of 4 | [17-Jun-18] | | | | 112,311 | 114,534 | | | | 121,517 | | | |
| 21 | | AFG Group Pty Ltd (per Birdseye 24 Sep 20) | " | 5-Jul-12 | 1 of 4+ | 11-Dec-12 | | | | | | | | | | | | |
| 22 | | Medlow Chocolates Pty Ltd | 29-Jan-14 | 29-Jan-14 | 1 | 18-Feb-16 | | | | | | | | | | | | |
| 23 | | Medlow Chocolates Pty Ltd - income tax | 29-Jan-14 | 19-Feb-16 | 1 of 3 | 9-Oct-18 | | 2,670 | ? | 381 | ? | ? | ? | ? | ? | ? | ? | ? |
| 24 | | Medlow Chocolates Pty Ltd - SGC | 29-Jan-14 | 19-Feb-16 | 1 of 3 | 9-Oct-18 | | | | 5,075 | ? | ? | ? | ? | ? | ? | ? | ? |
| 25 | | Sazzii Pty Ltd (per ASIC register) | 4-Dec-08 | 4-Dec-08 | 1 | 30-Jun-12 | | | | 114,534 | ? | 124,189 | ? | 140,191 | ? | ? | ? | ? |
| 26 | | | | | | | | | | | | | | | | | | |
| 27 | **Notes** | | | | | | | | | | | | | | | | | |
| 28 | [1] | Claim It and Claim It Financial Planning Pty Ltd may both have been trustees of the Nicholas Birdseye Family Trust after March 2016. For the sake of convenience, and in view of the "return not necessary" classification of ITR lodgement by Claim It Financial Planning Pty Ltd (see Schedule 1 Group (iv)) I have assumed that the trustee obligations were those of Claim It. | | | | | | | | | | | | | | | | |
| 29 | [2] | Claim Its "BAS liability" as at June 2019 appears to have resulted from the (late) lodgment of BAS for the period from September 2018 to April 2019. Those BAS were lodged and "processed" between May and June 2019. On 22 June 2019, the trustee entered into a payment plan arrangement with the ATO, for a total debt of $67,604. The payment plan required monthly payments, from late June 2019 to January 2020. None was made. | | | | | | | | | | | | | | | | |
| 30 | [3] | The "BAS (PAYG) liability" amounts after June 2019 are derived from the "processed date" entries in the ATO / ICP Statement of Account extracts. Reliance on the "processed date" tends to understate the debt amount at the end of any particular reporting period, because late lodgements were not "processed" in the order of the accounting periods to which they related. The BAS lodgements in March 2020 covered the period up to the end of February 2020. When those lodgements had been processed, Claim Its ATO account debt had increased to $188,434. By October 2020 the tax debt had grown to $210,606. Between October 2018 and October 2020, the only significant credit payment to the account had been the Cash Flow Boost" credits (associated with the Government's "Covid" relief measures) in March, April & May 2020. | | | | | | | | | | | | | | | | |

**Schedule 4 - NB&A - profit and loss summary (re-presented)**

***- Reasons paragraphs [82] to [84]***

| | 30-Jun-20 | | 30-Sep-20 | Evidence comments |
|---|---|---|---|---|
| | | | | |
| **Income** | | | | |
| Sales | 770,510 | | 152,856 | These are GST exclusive amounts - see Tcpt 74.23 |
| Other income | 58,395 | | 84,000 | |
| **Total income** | **828,904** | | **236,856** | |
| | | | | |
| **Operating Expenses** | | | | GST inclusive ?? |
| | | | | |
| Computer expenses | 42,649 | | 8,062 | |
| Interest expenses | 45,000 | | 46,767 | borrowing from Mrs Birdseye for past debts:- Tcpt 76.35, 77.10 |
| Legal expenses | 16,903 | | 40,800 | |
| Office expenses | 8,271 | | 883 | |
| Rates and taxes | 42,396 | | 8,243 | "tax" amount unexplained |
| Rent | 108,000 | | 7,136 | paid to a trust controlled by Mr Birdseye and of which he was a beneficiary - amount estimated by Mr Birdseye:- Tcpt 78 |
| Rent penalty | 32,908 | | | an estimate by Mr Birdseye:- Tcpt 78 |
| Salaries & wages | 311,441 | | 92,806 | inconsistent evidence as to whether or not it includes the PAYG withheld - Tcp 75.7, 75.27 & Tcpt 75.35, 79.40 |
| Subscriptions | 36,934 | | 14,154 | |
| Superannuation | 57,096 | | 29,308 | timeously paid - Tcpt 79.18 - Note: - superannuation % of Salaries & wages is 18.3% for YE June 2020 and 31% to September 2020 |
| Telephone & Internet | 28,894 | | 4,842 | |
| ***Expense Subtotal*** | ***730,492*** | | ***253,000*** | |
| | | | | |
| Other Operating Expenses | 98,218 | | 26,752 | |
| | | | | |
| **Total expenses** | **828,710** | | **279,752** | |
| | | | | |
| **Net Profit** | **194** | | **-42,896** | |

**Schedule 5 - NB&A client audit results addressed in Birdseye cross examination**

***- Reasons paragraphs [209] & [221]***

| Client | ITR | Label | Claimed | Audited | | Objection | | Later | Birdseye statement table |
|---|---|---|---|---|---|---|---|---|---|
| | | | $ | *Result* | *Reason* | *Result* | *Reason* | | |
| | | | | | | $ | | $ | |
| **Part 5.1:-** - Clients included in ATO audit result referrals 17 September 2014 & 8 December 2015 | | | | | | | | | |
| *Note:- no ATO audit / objection decision, reasons documents in Tribunal documents)* | | | | | | | | | |
| Brown | 2012 | D1 - Car | 16,871 | 3,750 | substantiation | 3,750 | ? Invalid logbook - ? Reason | 3,750 | receipt // log book discrepancy |
| Brown | 2013 | D1 - Car | 17,005 | 4,506 | substantiation | 4,506 | ? Invalid logbook - ? Reason | 4,506 | receipt // log book discrepancy |
| Gava | 2012 | D1 - Car | 17,504 | 0 | no response | 0 | not stated | 17,555 | AAT s 42C agreement |
| Gava | 2013 | D1 - Car | 20,610 | 0 | no response | 0 | not stated | 23,305 | AAT s 42C agreement |
| Kuchel | 2012 | D2 - Travel | 27,991 | 0 | no response | ?? | ?? | 26,844 | AAT s 42C agreement |
| Kuchel | 2013 | D2 - Travel | 23,599 | 0 | no response | ?? | ?? | 23,709 | AAT s 42C agreement |
| Opie | 2013 | D1 - Car | 15,893 | 3,750 | substantiation | 3,750 | Invalid logbook - ? Reason | 6,750 | AAT s 42C - ? log book reason |
| | | | | | | | | | |
| **Part 5.2:-** - Clients included in ATO audit result referral 29 August 2018 | | | | | | | | | |
| *Note:- ATO audit reasons, but no objection decision reasons, included in Tribunal documents* | | | | | | | | | |
| Borgas | 2016 | D1 - Car | 4,141 | 3,300 | log book - ? descriptive | na | insufficiently descriptive | | na - "overloaded" in responding to Board |
| Gava | 2016 | D1 - Car | 12,032 | 0 | subs'tn - x log book | ?? | ?? | | na - "overloaded" - (client handled obj'n) |
| Stewart | 2016 | D1 - Car | 10,207 | 0 | subs'tn - x log book | ?? | ?? | | na - don't remember |
| Kaspersky | 2016 | D1 - Car | 5,372 | 3,300 | log book - ? descriptive | ?? | ?? | | na - "overloaded" in responding to Board |