FEDERAL COURT OF AUSTRALIA

Frugtniet v Tax Practitioners Board [2019] FCAFC 193

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| Appeal from: | *Frugtniet v Tax Practitioners Board* [2018] FCA 387 |
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| File number: | VID 413 of 2018 |
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| Judges: | **PERRY, MOSHINSKY AND LEE JJ** |
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| Date of judgment: | 8 November 2019 |
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| Catchwords: | **ADMINISTRATIVE LAW** – Appeal from Federal Court decision dismissing appeal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) against Administrative Appeals Tribunal (**AAT**) decision – where no further hearing held after reconstituting the AAT – where AAT affirmed Tax Practitioners Board decision terminating the appellant’s registration as a tax agent under ss 40-5(1)(b), *Tax Agent Services Act 2009* (Cth), on the ground it was not satisfied he was a fit and proper person – whether AAT breached procedural fairness including by reason of delay or the failure by the reconstituted Tribunal to hold a further hearing – whether AAT erred in having regard to certain evidence of conduct in court and other tribunal proceedings – whether AAT erred in having regard to a witness statement where the witness was not called – whether AAT had jurisdiction to determine the validity of the Board’s decision – where only a court may authoritatively determine whether an administrative body has acted within jurisdiction – where AAT’s decision effectively overtook any jurisdictional error in the Board’s decision – appeal dismissed |
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| Legislation: | *Tax Agent Services Act 2009* (Cth) ss 20-5, 20-15, 40-25, 60-95, 60-125  *Administrative Appeals Tribunal Act 1975* (Cth) ss 33, 44 |
|  |  |
| Cases cited: | *Ahmed v Minister for Immigration and Multicultural Affairs* [2001] FCA 506;(2001) 184 ALR 343  *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16; (2019) 93 ALJR 629  *Frugtniet v Board of Examiners* [2002] VSC 140  *Frugtniet v Board of Examiners* [2005] VSC 332  *Frugtniet v Tax Practitioners Board* [2018] FCA 387; (2018) 74 AAR 279  *Frugtniet v Tax Practitioners Board* [2015] FCA 1066; (2015) 67 AAR 336  *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; (2015) 233 FCR 315  *Kennedy v Administrative Appeals Tribunal* [2008] FCAFC 124; (2008) 168 FCR 566  *MZXRE v Minister for Immigration and Citizenship* [2009] FCAFC 82; (2009) 176 FCR 552  *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 77; (2005) 228 CLR 470  *Re Adams and the Tax Agents’ Board* (1976) 7 ATR 87  *Shi v Migration Agents Registration Authority* [2008] HCA 31; (2008) 235 CLR 286  *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93; (2014) 226 FCR 555 |
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| Date of hearing: | 29 November 2018 |
|  |  |
| Date of last submissions: | 13 December 2018 |
|  |  |
| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 93 |
|  |  |
| Counsel for the Appellant: | The Appellant appeared in person |
|  |  |
| Counsel for the First Respondent: | Mr P Gray QC |
|  |  |
| Solicitor for the First Respondent: | Australian Government Solicitor |
|  |  |
| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice |

ORDERS

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|  | | VID 413 of 2018 |
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| BETWEEN: | RUDY FRUGTNIET  Appellant | |
| AND: | TAX PRACTITIONERS BOARD  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | PERRY, moshinsky and lee jJ |
| DATE OF ORDER: | 8 November 2019 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant is to pay the first respondent’s costs as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

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##### INTRODUCTION

1. The first respondent, the Tax Practitioners Board (the **Board**), was established by the *Tax Agent Services Act 2009* (Cth) (the **TAS Act**) and has responsibility for the registration of tax agents in Australia.
2. The appellant, Mr Rudy Frugtniet, appeals from a decision of a single judge of this Court dismissing his appeal from the Administrative Appeals Tribunal (**AAT**) on a question of law under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the **AAT Act**) against a decision of the Board: *Frugtniet v Tax Practitioners Board* [2018] FCA 387; (2018) 74 AAR 279. By its decision, the AAT (constituted by the member, Dr Hughes) affirmed the Board’s decision to terminate Mr Frugtniet’s registration as a tax agent and to preclude him from reapplying for registration for a period of five years: *Frugtniet and Tax Practitioners Board* [2017] AATA 1393; (2017) 106 ATR 434 (**AAT reasons**).
3. Mr Frugtniet appeared unrepresented on the appeal and in the Court below. However, as the primary judge observed at [2], he has a law degree:

… and is no stranger to litigation: see, for example, *Frugtniet v Board of Examiners* [2002] VSC 140; *Frugtniet v Board of Examiners* [2005] VSC 332; *Law Institute of Victoria Ltd v Frugtniet* [2011] VCAT 596; *Frugtniet v Australian Securities and Investments Commission* (2016) 152 ALD 31; *Frugtniet v Migration Agents Registration Authority* [2016] AATA 299; *Frugtniet v Secretary, Department of Social Services* [2017] FCA 1227; *Frugtniet v Migration Agents Registration Authority* (2017) 156 ALD 79; *Migration Agents Registration Authority v Frugtniet* [2018] FCAFC 5.

1. Mr Frugtniet challenges the decision of the primary judge on various grounds which reflect those grounds pressed below. In essence he contends that the Tribunal acted in breach of procedural fairness, made findings which lacked any or any probative evidence, took into account irrelevant considerations, and erred in holding that the Tribunal lacked jurisdiction to determine the validity of the Board’s decision (see further the summary at [35]-[37] below).
2. For the reasons set out below, none of these grounds has merit and the appeal must be dismissed with costs.

##### LEGISLATIVE CONTEXT

1. In order to provide tax agent services for a fee or to engage in other conduct connected with the provision of such services, a person must be registered under the TAS Act. Division 20 of Part 2 of that Act prescribes the eligibility criteria for registration. In particular, s 20-5 provides that a person is eligible for registration as a registered tax agent if the Tax Practitioners Board is “*satisfied*” that:

(a) the individual is a fit and proper person; and

(b) the individual meets the requirements prescribed by the regulations (including, but not limited to, requirements relating to qualifications and experience) in respect of registration as a registered tax agent …

1. Section 20-15 in turn provides that, in deciding whether it is satisfied that an individual is a fit and proper person, the Board must have regard to “*whether the individual is of good fame, integrity and character*”.
2. Once registered, a tax agent is subject to the Code of Professional Conduct (the **Code**) prescribed by s 30-10 including the obligations to act honestly and with integrity and to act lawfully in the best interests of the client (s 30-5, TAS Act). Subdiv 30-B of Division 30 of Part 3 provides for various sanctions to be imposed where the Board is satisfied after conducting an investigation under subdiv 60-E that the registered tax agent has failed to comply with the Code, including suspension and termination of registration.
3. Part 4 of the TAS Act also deals with the termination of registration by the Board. Relevantly, s 40-5(1) of subdiv 40-A provides that the Board may terminate a person’s registration if:

(a) an event affecting your continued registration, as described in section 20‑45, occurs; or

(b) you cease to meet one of the \*tax practitioner registration requirements; or

(c) you breach a condition of your registration.

Note: The Board may also terminate your registration for breach of the Code of Professional Conduct: see Subdivision 30‑B.

1. The “*tax practitioner registration requirements*” are relevantly those set out in s 20-5 of the TAS Act and therefore include the requirement that the person be “*fit and proper*”.
2. Section 40-25 provides that if the Board terminates a tax agent’s registration, the Board may also determine a period, of not more than 5 years, during which that person may not apply for registration.
3. Finally, subdiv 60-E of the TAS Act makes provision for the conduct of investigations by the Board into an application for registration, any conduct that may breach the Act, or other matters prescribed by the regulations. An investigation is commenced by a notice in writing given under s 60-95 and must be completed within six months or as determined by the Board (s 60-125). Subdiv 60-E confers various compulsive powers upon the Board in the conduct of an investigation (see in particular ss 60-100, 60-105, and 60-110). The Board has various powers under s 60-125(2) where it finds on an investigation that the person has engaged in conduct in breach of the Act, including to impose sanctions under subdiv 30-B, to terminate the person’s registration, and to apply to the Federal Court for an injunction and/or a pecuniary penalty. The legislative note to s 60-125(2) clarifies that “*[t]he Board may terminate an entity’s registration under Subdivision 40-A* ***without*** *investigating conduct under section 60-95*” (emphasis added).

##### PROCEDURAL HISTORY

1. Mr Frugtniet’s application for registration as a tax agent was approved by the Tax Agents’ Board of Victoria (**TABV**) on 30 May 2008 for a period of three years effective from 1 January 2010 (AAT reasons at [1]). He sought renewal of his registration on 28 November 2012. His registration continued pursuant to s 20-50(2) of the TAS Act pending the Board’s decision on 16 January 2013 (AAT reasons at [3]).
2. On 16 January 2013, the Board decided to terminate Mr Frugtniet’s registration as a tax agent effective from 22 March 2013, and to preclude him from re-applying for registration for a period of five years, because in the Board’s opinion he had ceased to meet the requirement that he was a fit and proper person. Mr Frugtniet was notified of this decision on 15 February 2013.
3. Mr Frugtniet applied for merits review of the Board’s decision by the AAT by an application lodged on 18 February 2013. The Tribunal (the **first Tribunal**) constituted by Senior Member Fice held a hearing on the application for review on 26-27 June 2014 and on 23 October 2014 decided that the applicant had not shown himself to be a fit and proper person: *Frugtniet and Tax Practitioners Board* [2014] AATA 766; (2014) 148 ALD 401 (the **first Tribunal decision**).
4. Mr Frugtniet appealed against the first Tribunal decision under s 44 of the AAT Act. On 1 October 2015, the Federal Court set aside that decision and ordered that the application for review be remitted for hearing and determination by the Tribunal differently constituted (the **second Tribunal**): *Frugtniet v Tax Practitioners Board* [2015] FCA 1066; (2015) 67 AAR 336 (***Frugtniet [2015]***).
5. A differently constituted Tribunal (Deputy President Alpins) heard the application for review on remittal on 15 June 2016 and 15-16 November 2016. At the start of the hearing on 15 June 2016, Mr Frugtniet confirmed that the Tribunal had provided him with a copy of the transcript of the hearing before the first Tribunal. From the outset, Deputy President Alpins emphasised that the proceeding was a re-hearing and therefore, aside from particular transcript that may be relied upon in a certain context, she did not intend to read the transcript of the first Tribunal hearing (transcript 15 June 2016, AB, Part C, tab 10, at pp. 8.28-9.10). The Board’s position was that it did not intend to rely upon the transcript save where a need may arise in cross-examination (see e.g. transcript 15 November 2016, AB, Part C, tab 12, at p. 127.38), as Mr Frugtniet accepted (transcript 15 November 2016, Part C, tab 12, at pp. 124.46-125.5; see also at pp. 125.31-127.1 and 127.36-43).
6. The hearing on 16 November 2016 was followed by further written submissions, the last of which were received on 23 January 2017. However, the presiding member’s tenure with the Tribunal ceased on 30 June 2017, by which time no decision had been given.
7. Pursuant to an instrument of delegation signed on 1 July 2015, Deputy President Forgie made a direction on 3 July 2017 pursuant to s 19D(2)(a)(i) of the AAT Act that a different member of the Tribunal (Dr Hughes) take over the proceeding (the **reconstitution decision**). Section 19D(2)(a)(i) confers a discretion on the President to revoke a direction given under s 19A(1) to a member to constitute the Tribunal for the purposes of a proceeding, and to give another such direction where, relevantly, the member constituting the proceeding stops being a member. In such a case, s 19D(4) provides that the reconstituted Tribunal “*must continue the proceeding*” and “*may have regard to any record of the proceeding before the Tribunal as previously constituted (including a record of any evidence taken in the proceeding)*.”
8. The second Tribunal wrote to Mr Frugtniet and the Board on 3 July 2017 advising them of the reconstituted Tribunal and that:

As required by s 19D(4), Dr Hughes will continue the proceeding and, for that purpose, may have regard to any record of the proceeding before Deputy President Alpins. That record includes a transcript of the evidence taken over the course of the hearing concluding on 16 November 2016.

(Appeal Book (**AB**), Part C, at tab 18)

1. On 30 August 2017, the second Tribunal made a decision on the papers, that is, without holding a further hearing: *Frugtniet and Tax Practitioners Board* [2017] AATA 1393; (2017) 106 ATR 434 (the **second Tribunal decision**). In reaching its decision to affirm the Board’s decision, the Tribunal stated that it had regard to all of the documents admitted into evidence during the course of the remittal hearing, as well as the transcript of the 2016 hearing (AAT reasons at [11]).

##### THE SECOND TRIBUNAL DECISION

###### The issues before the Tribunal

1. The Tribunal identified three questions for determination at [19] of its reasons:

* Did Mr Frugtniet cease to meet the requirement for registration as a tax agent that he is a fit and proper person?; If so:
* Should the discretion to terminate his registration be exercised?; If so:
* Should a period, during which Mr Frugtniet cannot apply for registration, be imposed?

1. Mr Frugtniet also submitted that the Board’s decision to terminate his registration was invalid, which the Tribunal rejected as we later explain: see further at [80]-[87] below.

###### The finding that Mr Frugtniet was not a fit and proper person and termination of his registration

1. The Tribunal found at [67] that it was not satisfied that Mr Frugtniet was a fit and proper person on the basis of detailed and careful findings which may be summarised as follows.
2. ***First***, the Tribunal found that the applicant “*knowingly gave false answers to two of the questions asked of him in his application*” for registration as a tax agent in May 2008 (at [28]). Specifically, the applicant answered “*No*” to questions requiring him to disclose matters relevant to the Board’s assessment of his character, thereby neglecting to disclose that the Board of Examiners had not been satisfied that he was a fit and proper person for admission to legal practice in Victoria on two occasions, and that appeals to the Supreme Court of Victoria against those decisions had been dismissed in *Frugtniet v Board of Examiners* [2002] VSC 140 (***Frugtniet [2002]***) and *Frugtniet v Board of Examiners* [2005] VSC 332 (***Frugtniet [2005]***). The Tribunal found that Mr Frugtniet had knowingly given false answers to these questions as he “*must have understood that these matters would be relevant to any consideration of his fame, integrity and character*” (at [28]).
3. ***Secondly***, the Tribunal noted that the Victorian Civil and Administrative Tribunal (**VCAT**) found that the Law Institute of Victoria was justified in disqualifying Mr Frugtniet for a period of three years under the *Legal Profession Act 2004* (Vic): *Law Institute of Victoria Ltd v Frugtniet* [2011] VCAT 596. The basis for the VCAT decision was that in 2010 Mr Frugtniet deliberately and falsely represented to a Magistrate and barrister that he was a sole practitioner and solicitor. VCAT observed that Judge Jenkins, Vice President, held that Mr Frugtniet had “*failed to demonstrate any insight into his behaviour and failed to express any responsibility or remorse. Indeed he has denied any transgressions whatsoever, notwithstanding clear and objective evidence*.” An appeal against that decision to the Victorian Court of Appeal was dismissed other than the findings by VCAT of contempt and as to costs: *Frugtniet v Law Institute of Victoria Limited* [2012] VSCA 178.
4. ***Thirdly***, the Tribunal took into account adverse comments made about Mr Frugtniet by the Victorian Supreme Court in *Frugtniet [2002]* and *Frugtniet [2005]*. In particular in a passage quoted by the Tribunal at [27] from *Frugtniet [2005]*, Gillard J found that:

67. The appellant carries with him a massive bag of dishonest conduct. It is a pattern of conduct committed over an extensive period …

68. His pattern of conduct raises a substantial question mark concerning his honesty and his character and reputation. He is a person who does not appear to have learned from his experiences during 1989 to 2000. He carries a very heavy burden of persuading this Court that he is a person of good character and reputation and a fit and proper person to practise law. He has not discharged that burden. The way he has presented himself to this Court shows a man who is loose with the truth and is prepared to distort the truth if he thinks it will help him. Often he was asked questions which he failed to answer and went off on some tangent seeking to minimise his criminality in the past. The evidence does not persuade me that the appellant has learned from his past experience, or that he is a person motivated to tell the truth.

…

70. The appellant has to frankly and candidly state the level of his dishonesty in the past, and not seek to hide it. He must show that it will not reoccur. Unfortunately he has not demonstrated any of these matters to the Court. Indeed, he is one of those witnesses who, when asked a question, thinks how he should answer the question rather than answering it truthfully and accurately. It will take, in my view, many years of blameless conduct before one could have any confidence that the appellant has shed his past, turned over a new leaf and intends to pursue a blameless and honest career.

1. ***Fourthly***, in line with findings also made by Gillard J in *Frugtniet [2005]* at [47], the Tribunal found that the applicant “*knowingly made a false declaration to [the Migration Agents Registration Authority] in his 1999 application for repeat registration*” as a migration agent (Tribunal at [38]; see also the finding by Gillard J quoted in the AAT reasons at [32]). The false declaration was in answering “*No*” to a question asking whether he was the subject of criminal charges still pending before a court at a time when, in fact, he was the subject of nine pending criminal charges concerning his employment with the ANZ Bank (of which he was later acquitted). Mr Frugtniet submitted that he was not required to disclose the pending charges because he had disclosed them previously to the Migration Agents Registration Authority (**MARA**). He further submitted that the Tribunal could not find that he had made a false declaration because MARA had not made any such finding itself. The Tribunal however held that it was not precluded from making a different finding from MARA and there was no qualifying statement in the application form to the effect that previously disclosed charges did not need to be disclosed again, contrary to Mr Frugtniet’s submissions (AAT reasons at [37]-[38]). Nor, the Tribunal found, was there any evidence which substantiated Mr Frugtniet’s claim that he had disclosed his pending charges to MARA before he completed the 1999 form (AAT reasons at [36] and [38]).
2. In the ***fifth*** place, the Tribunal considered a complaint concerning Mr Frugtniet’s conduct in providing services to a former client, Ms Galvez-Londono, as a tax agent for 2010/11, finding that Ms Galvez-Londono’s version of events was borne out by emails between her and Mr Frugtniet (at [43]). Specifically, the Tribunal found at [44] of its reasons that Mr Frugtniet:
3. administered Ms Galvez-Londono’s tax affairs without obtaining her consent on a number of occasions;
4. refused to provide a full list of deductions claimed on her behalf;
5. provided a false impression that he was operating a trust account and that funds would be held in that account;
6. lodged an amended return without proper authority and against his client’s wishes;
7. deducted fees from Ms Galvez-Londono owed by her brother in an unrelated matter;
8. refused to provide Ms Galvez-Londono with a copy of her tax return or amended return; and
9. made comments in correspondence, including about risks to Ms Galvez-Londono’s citizenship, which suggested that he sought to mislead and threaten her.
10. The Tribunal found that the conduct complained of “*reflects poorly on [Mr Frugtniet’s] insight, ability and honesty*”and“*demonstrates that the public would not have confidence that he would carry out the functions of a tax agent with integrity and competence*” (AAT reasons at [44] and [45] respectively).
11. ***Sixthly***, Mr Frugtniet had been cross-examined before the first Tribunal on a passage from *Frugtniet [2002]* at [12]. In the relevant passage, Pagone J held that he had “*no present confidence*” that Mr Frugtniet would have disclosed the ANZ charges and his convictions in the United Kingdom if they had not otherwise come to the Board’s attention and the Board had not tendered evidence of them in the Supreme Court proceeding. During cross-examination on this finding before the first Tribunal, Mr Frugtniet said that he had brought the relevant charges and convictions to the Supreme Court’s attention in the first affidavit which he filed in that proceeding (the **first affidavit**), stating that his “*first affidavit had full disclosure*” (AAT reasons at [47]). Mr Frugtniet was granted leave by the first Tribunal to lodge a copy of the first affidavit allegedly filed by him in the 2002 Supreme Court proceeding.
12. However, the second Tribunal on remittal accepted that evidence led by the Board in response established that the affidavit lodged by the applicant pursuant to that leave was in fact the ***second*** affidavit which he had filed in the 2002 proceeding, and that Mr Frugtniet’s ***first*** affidavit in that proceeding had not disclosed the relevant charges and convictions. Mr Frugtniet submitted in response that he had merely made a mistake. The Tribunal rejected that explanation, finding instead that Mr Frugtniet’s conduct during the First Tribunal hearing displayed a preparedness to mislead the First Tribunal:

52. … Mr Frugtniet informed the First Tribunal that it was he, and not the Board of Examiners, who brought the relevant convictions and charges to the Supreme Court’s attention. Justice Pagone took a different view, stating that the relevant convictions and charges were first brought to his attention by the Board of Examiners. Having read the affidavits that led Justice Pagone to that view and having seen the dates on which those affidavits were filed, the Tribunal reaches a similar conclusion. It is plain to see that the Board of Examiners was the source of that information in the 2002 proceedings and not Mr Frugtniet. The Tribunal is not convinced that Mr Frugtniet was merely *mistaken* before the First Tribunal in claiming that he was the source of the information. Whilst it would be unreasonable to expect Mr Frugtniet to remember every part of the 2002 proceeding, it defies belief that Mr Frugtniet would forget such an important series of events in the context of that proceeding. Indeed, Pagone J noted that Mr Frugtniet’s failure to disclose the relevant convictions and charges to the Board of Examiners and to the Court were matters preventing him from finding that Mr Frugtniet was a fit and proper person for admission. The Tribunal finds that Mr Frugtniet knew that he was not the source of the relevant information to the Supreme Court in the 2002 proceedings, yet sought to portray to the First Tribunal that he was. As such, the Tribunal finds that Mr Frugtniet was prepared to mislead the First Tribunal.

53. Mr Frugtniet’s preparedness to mislead the First Tribunal during the hearing of the application is further compounded by his preparedness to mislead the First Tribunal following the hearing. In lodging his second affidavit from the 2002 proceedings with the Tribunal post-hearing, Mr Frugtniet provided an explanation that it was a *further* affidavit in response to orders of Master Wheeler of the Victorian Supreme Court. Mr Frugtniet described the contents of this affidavit as *self explanatory*. Although he opted for the term *further* instead of *first* in his explanation of the affidavit, the Tribunal finds that Mr Frugtniet sought to cloud the First Tribunal’s judgement by failing to explicitly note that this was not his first affidavit. Indeed, as he had received leave from the First Tribunal to lodge the first affidavit, it was important for Mr Frugtniet to note that this was not his first affidavit and provide an explanation beyond it being *self explanatory*. Of more concern is the fact that, in lodging his second affidavit and merely stating that its contents were *self explanatory*, he further perpetuated the misleading assertion that it was he, and not the Board of Examiners, who disclosed the relevant convictions and charges to the Supreme Court. This is further indicative of Mr Frugtniet’s preparedness to mislead the First Tribunal.

(emphasis in the original)

1. The Tribunal concluded on this issue that:

67. Mr Frugtniet has established a clear and consistent pattern of conduct over a considerable period that shows him to be a person of dishonest behaviour and lacking in integrity, and the public will have no confidence that future dishonesty would not occur if he remains registered as a tax agent. There have been a number of adverse comments made about Mr Frugtniet and his character, and the totality of his conduct indicates that he clearly has not learnt from his past mistakes. Mr Frugtniet’s character has long been in question, dating back at least to his false declaration to MARA in his 1999 application for repeat registration in which he failed to disclose the charges that were still pending. In answering questions 17 and 18 in the negative on his 2008 application for registration as a tax agent Mr Frugtniet has not demonstrated that he has changed his behaviour, despite any claims to the contrary. His actions in misleading the Werribee Magistrates’ Court in 2010 by deliberately and falsely representing that he was a sole practitioner and solicitor evidenced a continuing willingness to mislead and deceive. His conduct as a tax agent in dealing with Ms Galvez-Londono’s tax affairs in 2011 raises grave concerns about his character, honesty, transparency and accountability, for example by misrepresenting to Ms Galvez-Londono that he was operating a trust account and attempting to impose a $500 fee on her relating to her brother’s migration matters. Finally and most recently, Mr Frugtniet displayed a preparedness to mislead the First Tribunal at and after the hearing. The Tribunal finds that Mr Frugtniet has not shown that he is a person of good fame, integrity and character, and he does not satisfy the Tribunal that he is a *fit and proper person* for the purposes of the mandatory requirements for registration as a tax agent.

(emphasis in the original)

1. ***Finally***, given its finding that Mr Frugtniet did not satisfy a mandatory requirement for registration as a tax agent, the Tribunal decided that his registration as a tax agent should be terminated under s 40-5(1)(b) of the TAS Act (AAT reasons at [68]). The Tribunal also exercised its discretion under s 40-25 of the TAS Act to find that Mr Frugtniet may not apply for registration as a tax agent for a period of five years after the effective date of termination of his registration (AAT reasons at [71]). In this regard, the Tribunal did not consider that Mr Frugtniet’s expressions of remorse were matched by action on his part. In the Tribunal’s view, the Australian Taxation Office, the public, and Mr Frugtniet’s clients would have no confidence that he would perform the functions of a registered tax agent with integrity and “*he represents an unacceptable risk to the public in that role*” (ibid).

##### THE DECISION OF THE PRIMARY JUDGE AND NOTICE OF APPEAL

1. Mr Frugtniet pressed six questions of law/grounds before the primary judge with grounds 1 and 3 being considered together by his Honour. In essence, Mr Frugtniet alleged that:
2. the Tribunal acted in breach of procedural fairness by reason of extreme delay in the hearing and determination of his application for review, in failing to hold a fresh oral hearing when the Tribunal was reconstituted, and in having regard to the transcript from the first Tribunal’s hearing in making the findings explained at [32]-[33] above when the presiding member had said that it would not be considered (**grounds 1** and **3**);
3. the Tribunal erred in finding (as explained at [28] above) that the appellant had made a false declaration to MARA when he lodged his 1999 application for repeat registration where no such finding had been made by MARA and there was no evidence on the basis of which to make such a finding (**ground 4**);
4. the Tribunal erred in relying on emails between Ms Galvez-Londono and Mr Frugtniet because this was not a complete set of communications between the parties and Ms Galvez-Londono was not called as a witness at the remittal hearing (**ground 5**) (see above at [29]-[30]);
5. the Tribunal erred or took into account irrelevant considerations or acted in breach of natural justice by referring to the transcript before the first Tribunal in connection with its conclusion that Mr Frugtniet had attempted to mislead the first Tribunal (**ground 6**) (see above at [31]-[33]); and
6. the Tribunal erred in failing to conclude that the Board’s decision was invalid by reason of its failure to make a decision within six months of allegedly commencing an “*investigation*” pursuant to s 60-95(1) of the TAS Act (**ground 7**) (see below at [80] ff).
7. The primary judge noted (at [22]) that some of these grounds overlapped and that, while some effectively invited the Court to reconsider the merits of certain factual findings by the Tribunal, no submission was made by the Board that any of the grounds did not constitute questions of law for the purposes of s 44 of the AAT Act.
8. The primary judge held that none of these grounds were made out. On the appeal, Mr Frugtniet contends that the primary judge fell into error in failing to uphold each of these grounds. As such, it is convenient to consider the primary judge’s reasons for rejecting each ground in the course of considering the equivalent grounds of appeal before the Full Court.

##### CONSIDERATION

###### Alleged breaches of procedural fairness (grounds 1 and 3)

1. Mr Frugtniet submitted, first, that the delay between the date on which the first Tribunal completed its hearing (27 June 2014) and the date on which a decision was given by the reconstituted Tribunal (30 August 2017) meant that the second Tribunal decision was procedurally unfair or was one factor with others which established a breach of procedural fairness. (We note that while the primary judge referred at [26] of his reasons to 7 June 2014, it is agreed on the appeal that the hearing was completed on 27 June 2014: see the agreed chronology.)
2. The circumstances where delay of itself will vitiate an administrative decision are rare: *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 77; (2005) 228 CLR 470 (***NAIS***)at [5] (Gleeson CJ), [174] (Callinan and Heydon JJ); see also e.g. *MZXRE v Minister for Immigration and Citizenship* [2009] FCAFC 82; (2009) 176 FCR 552 at [80] (Graham J). The question is ultimately whether in all of the circumstances the procedure adopted by the decision-maker was fair. Thus, in *NAIS* the High Court held by majority that the delay (5 years) was so extreme that there was a real and substantial risk that the Refugee Review Tribunal’s capacity to assess the credibility of the appellants’ evidence was impaired and for this reason the procedure was not fair: *NAIS* at [10] (Gleeson CJ), [60], [102]-[103] and [106] (Kirby J) and [168] (Callinan and Heydon JJ). As the majority in *NAIS* said, the delay in that case was extraordinary: *NAIS* at [2] (Gleeson CJ), [115] (Kirby J), [174] (Callinan and Heydon JJ). Furthermore, while some of the findings of the Refugee Review Tribunal in *NAIS* adverse to the appellants were based upon their own admissions, importantly, other adverse credibility findings necessarily involved an assessment of their demeanour: *NAIS* at [8]-[10] (Gleeson CJ); see also at [85]-[86] (Kirby J) and [161], [169]-[170], and [174] (Callinan and Heydon JJ).
3. In this case, the primary judge at [26] rejected the submission that any relevant delay should be measured from the last day of the hearing before the first Tribunal. Rather in his Honour’s view, delay could relevantly be measured only by reference to the dates on which the hearing before the second Tribunal took place, namely 15 June 2016 and 15-16 November 2016, and 30 August 2017 when Dr Hughes handed down his decision shortly after the reconstitution decision. As such, his Honour held that there was no significant delay as alleged. It is not clear on what basis the primary judge reached this view. However, as the first Tribunal decision was set aside on judicial review, logically it cannot be said that the period ***before*** orders were made remitting the matter back to the Tribunal established that the Tribunal ***following*** the remittal had acted in a procedurally unfair way. In other words, the delay to this extent was not attributable to any (relevant) default on the part of the Tribunal.
4. It follows that the relevant “delay” for present purposes is the period of approximately nine and a half months between the conclusion of the hearing before the second Tribunal, on the one hand, and delivery of the Tribunal’s decision, on the other hand. While that delay is unfortunate as the Board accepts (first respondent’s outline of submissions at [39]), the primary judge rightly held that this does not constitute an extraordinary delay akin to that in *NAIS*.
5. Secondly, as to the question of whether this was a case in which adverse credibility findings could be said to have been influenced by demeanour, Mr Frugtniet submitted (by analogy with *NAIS*) that the reconstituted Tribunal should not have made findings about his credit and that of Ms Galvez-Londono without first affording him a further oral hearing. This was particularly so, in his submission, given the seriousness of the finding that he had misled the first Tribunal.
6. There was no statutory requirement under the TAS Act that the Tribunal in a case where it has been reconstituted after holding a hearing must afford the person affected a further hearing. The primary judge’s statement to this effect at [28] was not challenged on the appeal and was plainly correct: see by analogy *Ahmed v Minister for Immigration and Multicultural Affairs* [2001] FCA 506;(2001) 184 ALR 343 at [24] (Hely J) upon which the primary judge relied.
7. The question therefore turns upon whether in all of the circumstances a further hearing was required as a matter of procedural fairness. We agree with the primary judge that no such obligation arose in this case. As the primary judge held at [27], Mr Frugtniet was advised by letter dated 3 July 2017 that the Tribunal would be reconstituted and that it may have regard to any record of the proceeding before the Tribunal before Deputy President Alpins (see above at [19]). Yet Mr Frugtniet made no application for an oral hearing despite having in excess of 8 weeks within which to do so and bearing in mind his legal qualifications and experience in prior litigation.
8. Furthermore, the Tribunal’s decision did not rely upon Mr Frugtniet’s demeanour in giving his evidence. Rather, as the primary judge also held at [27], the Tribunal “*reached its findings based upon an assessment of objective events, findings made by other courts, contemporaneous evidence, and the inherent probability that explanations given by [Mr Frugtniet] at the 2016 hearing were true or correct*”.
9. This is true also of the findings by the Tribunal at [52] that Mr Frugtniet misled the first Tribunal. These findings were based upon objective evidence, in particular as to the order in which affidavits by the parties had been filed in the 2002 proceedings in the Victorian Supreme Court and their contents (which Mr Frugtniet did not ultimately dispute), together with the inherent implausibility of his explanation that he had merely been mistaken in claiming that he had been the source of the information in question: see above at [32]-[33]. As the primary judge held:

29. This is a case where, to use the language of Ryan J in *Abujoudeh v Minister for Immigration and Multicultural Affairs* (2001) 115 FCR 179, “the approach which led the Tribunal to characterise certain parts of the applicant’s claims as implausible, was based on a dispassionate analysis of the content of the applicant’s evidence, not the manner in which it was given” (at par [32]). It was thus proper for the Tribunal to reject explanations and answers given by the applicant, and even make findings that he had misled the first Tribunal, without the need for any further hearing. Whilst I accept that the finding that the applicant has misled the Tribunal was serious, it was open to the Tribunal so to conclude on the material before it without the need for a further oral hearing. …

1. Finally, Mr Frugtniet argued that the primary judge should have held that the Tribunal was in breach of procedural fairness in referring at [47] of its reasons to the transcript of the first Tribunal hearing, given that Deputy President Alpins had said at the 2016 second Tribunal hearing that the earlier transcript would not be considered. In this regard, the primary judge accepted:

30. … An examination of the 2016 transcript [before Deputy President Alpins] bears that out [that is, the proposition that the earlier transcript would not be considered]. Moreover, the transcript from the first Tribunal hearing was not put to the applicant in cross examination, and was not tendered, either in whole or in part, by the Board, although its counsel had given notice that it might be relied upon, depending upon the answers given by the applicant in cross-examination. Nonetheless, the transcript is expressly quoted in the reasons of the reconstituted Tribunal … at [47].

1. The passage of transcript from the first Tribunal hearing quoted at [47] of the AAT reasons contains cross-examination of Mr Frugtniet in which he contended, contrary to the finding in *Frugtniet [2002]* at [12], that he had brought the Supreme Court’s attention to his charges and UK convictions in the first affidavit which he filed with the Court. It will be recalled that the Tribunal found that in making that claim in his evidence, Mr Frugtniet had displayed a preparedness to mislead the first Tribunal which it took into account in finding that he was not a fit and proper person.
2. At first blush, it might appear that the circumstances relied upon by Mr Frugtniet in this regard are suggestive of a breach of procedural fairness. However, as the primary judge held:

32. … The transcript was reproduced only to describe the context of the applicant’s conduct before the first Tribunal. That conduct had been the subject of renewed cross-examination of the applicant in 2016, without any need to rely upon the transcript from the first Tribunal. The specific paragraph from Pagone J’s judgment, as set out above, was expressly put to the applicant by the representative for the Board in 2016 and he was asked whether he agreed with it. He was then directly asked questions about the filing of the second affidavit, and the circumstances surrounding it, and was given, a full and proper opportunity to explain his conduct, both in the witness box and subsequently in submissions. I find that the applicant was well aware of this issue in 2016. Indeed, the very same conduct had formed part of the first Tribunal’s decision, which also found that it had been misled by the applicant. The applicant then appealed that finding, without success, before Jessup J: *Frugtniet v Tax Practitioners Board* [2015] FCA 1066 at [42]-[48].

1. There being no challenge on the appeal to any of the factual findings made by the primary judge at [32], it follows that the primary judge was plainly correct to hold that no breach of procedural fairness had been established in this respect. In particular, Mr Frugtniet was extensively cross-examined at the hearing on 16 November 2016 before the Tribunal on remittal about his earlier evidence before Senior Member Fice (transcript 16 November 2016, AB, Part C, tab 13 at pp. 309.36-332.5) and admitted that he had wrongly claimed that he was the source of the information in question. Furthermore, as also noted earlier, he had a copy of the transcript of the hearing before the first Tribunal and it was open to him to tender any parts of that transcript to correct any propositions put to him in cross-examination if he so wished.

###### The challenge to the Tribunal’s finding that the appellant had made a false declaration to MARA (ground 4)

1. Mr Frugtniet submits that the primary judge also erred in failing to hold that it was not open to the Tribunal to find (at [38] of its reasons) that he had knowingly made a false declaration to MARA in his 1999 application for repeat registration as a migration agent (appellant’s outline of submissions at [9]-[10]; appellant’s reply submissions at [15]). Specifically, Mr Frugtniet contends that:
2. it was not open to the Tribunal to make such a serious finding where that finding had not been made by MARA or by the first Tribunal “*as* *the Tribunal can only address the same issues or questions as those addressed by the original decision maker*”;
3. a finding of such seriousness could not be based on anything that Gillard J said in *Frugtniet [2005]*; and
4. such a serious finding was not otherwise open on the evidence where the appellant denied making a false statement in the 1999 application for repeat registration and the 1999 application itself was not in evidence.

(Appellant’s outline of submissions at [9]-[10].)

1. For these reasons, Mr Frugtniet submits that the Tribunal’s reasons in this respect lack an evident and intelligible justification and the primary judge should have found that the Tribunal did not comply with its statutory obligations or failed to afford Mr Frugtniet procedural fairness.
2. The primary judge rejected Mr Frugtniet’s challenge to this aspect of the Tribunal’s decision for the following reasons:

35. First, regardless of what MARA did or did not decide, the issue before the Tribunal was whether the applicant was a “fit and proper person” for the purposes of ss 20-5 and 20-15 of the TAS Act. That required, amongst other things, a consideration of whether “the individual is of good fame, integrity and character”. The Tribunal’s finding about the completion of the 1999 MARA form was relevant to that issue, as it constituted conduct going to his character and the Tribunal was correct to consider it.

36. Secondly, whatever may or may not have been decided by the first Tribunal, it could not bind the Tribunal in 2017 on remittal from this Court.

37. Thirdly, it is plain that the applicant was cross-examined about his disclosure to MARA before the Tribunal in 2016, and it was proper for the reconstituted Tribunal to have regard to the transcript of that examination. The issue was also the subject of closing submissions. The Tribunal did not err by considering it.

1. In so deciding the primary judge was correct.
2. As to Mr Frugtniet’s first submission, the question of what MARA did or did not decide is irrelevant. It could not on any view bind the Tribunal in determining whether it is satisfied that Mr Frugtniet is a fit and proper person under the TAS Act. The question of what the first Tribunal decided is equally irrelevant for the same reason. On 1 October 2015 the Federal Court in *Frugtniet [2015]* set aside the decision by the first Tribunal on the ground of apprehended bias and remitted Mr Frugtniet’s application for review to the Tribunal differently constituted for hearing and determination (AB, Part C, tab 7). As such, upon remittal the Tribunal was seized afresh with Mr Frugtniet’s application for merits review and by virtue of s 43 of the AAT Act, “stood in the shoes” of the Board, being vested with all of the powers and discretions conferred on the Board: *Shi v Migration Agents Registration Authority* [2008] HCA 31; (2008) 235 CLR 286 (***Shi***)at [100] (Hayne and Heydon JJ). In other words, the Tribunal’s function was to reach the correct or preferable decision on the material before it: *Shi* at [35]-[38] (Kirby J), [97]-[100] (Hayne and Heydon JJ), and [140]-[142] (Kiefel J, as her Honour then was). It follows that the Tribunal on remittal as reconstituted was required to determine for itself whether it was satisfied that Mr Frugtniet was a fit and proper person, independently of the view reached by the first Tribunal. That being so, the question of whether Mr Frugtniet made a false declaration to MARA was plainly relevant to an assessment of his character, as the primary judge held at [35].
3. As to Mr Frugtniet’s second and third submissions, s 33(1) of the AAT Act relevantly provides that Tribunal proceedings must be conducted with as little formality and technicality as the Act and due consideration of the matter permit, and that the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate. As Flick and Perry JJ observed in *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93; (2014) 226 FCR 555 at [88]:

The charter given by [s 33(1) of the AAT Act] to the Tribunal to be the master of its own procedure, together with the emphasis upon informality and the freedom not to be bound by the common law rules of evidence, were hallmarks of the Tribunal being espoused even before the *Administrative Appeals Tribunal Act* was enacted in 1975.

1. That notwithstanding, it is not in issue that the Tribunal must still act on material which is logically probative in which the rules of evidence provide a guide: *Sullivan* at [97] (Flick and Perry JJ).
2. In this regard, while the Tribunal acknowledged at [34] that it did not have a copy of the 1999 application before it or a blank copy of the form at that time, it had the reasons of Gillard J in *Frugtniet [2005]* which quoted the question contained in the 1999 form and the answer which Mr Frugtniet gave. Furthermore, the reasons of Gillard J quoted by the Tribunal at [32] record Mr Frugtniet’s admission in that proceeding that his answer to the question in the 1999 form was wrong, as well as his failure to produce a document in support of his claim that he had told MARA about the charges in a separate document. Similarly, in cross-examination at the remittal hearing, Mr Frugtniet again admitted that he did not disclose the charges and convictions in the 1999 form, but said that he had previously advised MARA of the pending charges and that the repeat registration form in 1999 and in its current form stated that it was unnecessary to disclose criminal charges which had previously been disclosed (transcript 16 November 2016, AB, Part C, tab 13 at pages 332.16-336.2). He also said that “*I’m happy to forward a copy of the form that states that*” (ibid at 334.13). However, he did not provide the 1999 form and the Tribunal found that the 2004 application for repeat registration which he subsequently provided to the Tribunal (reproduced at AB, Part C, tab 9) lacked any such explanatory note or question (AAT reasons at [35]). Those findings are unchallenged.
3. In these circumstances, there was a rational, probative basis in the evidence for the Tribunal’s finding that Mr Frugtniet had not disclosed the charges and UK convictions to MARA before submitting the 1999 application for repeat registration, and that he had knowingly made a false declaration in that application. Ultimately, Mr Frugtniet’s complaint in this respect is therefore with the merits of the Tribunal’s decision. However, the Court below had jurisdiction under s 44 of the AAT Act to grant relief only in the event that the appellant established that the Tribunal had erred in law. As the Full Court has held, “*the right of appeal does not extend to mere questions of fact*”: *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; (2015) 233 FCR 315 at [192] (the Court). As such, this ground of appeal must fail.

###### The challenge to the Tribunal’s findings with respect to the complaint by a former client of Mr Frugtniet (ground 5)

1. In support of ground 5 of the notice of appeal, Mr Frugtniet contends that the primary judge erred in failing to find that the Tribunal wrongly took into account a statement made by Ms Galvez‑Londono dated 1 February 2012 and emails between Ms Galvez‑Londono and him in circumstances where:
2. Ms Galvez‑Londono was not called to give evidence orally and be cross-examined;
3. the email record “*was not the complete picture*” but “*formed part of the exhibits attached to [her statement] … by Investigators*”; and
4. “*selected emails are no more reliable than the persons responsible for their composition. Errors may be as easily recorded in writing as expressed orally. Lies may be as readily told in writing as spoken.* *For those reasons no record is credible of itself.*”

(Appellant’s outline of submissions at [11]-[14]; see also the appellant’s reply submissions at [16]-[20] to similar effect.)

1. Mr Frugtniet also submitted that the primary judge “*should have found that it is of no consequence that a hearing certificate produced by the [Board] did not confirm that Ms Galvez would be presented as a witness, given that the [Board] was on notice that the matter was a hearing of the matter not some limited hearing: at FC [39] and [40]*” (appellant’s outline of submissions at [15]). By the last submission, we understand Mr Frugtniet to be referring to repeated statements by the Tribunal during the remittal hearing to the fact that the hearing was a complete rehearing of his application for review, and not merely a hearing intended to supplement evidence led, and submissions made, at the hearing before the first Tribunal (see e.g. transcript 15 June 2016, AB, Part C, tab 10 at p. 2.25-33; transcript 15 November 2016, AB, Part C, tab 12, at p. 126.18-22).
2. The finding challenged by ground 5 is found in the Tribunal’s reasons at [40], namely:

The evidence of Ms Galvez‑Londono remains relevant to this proceeding. The Applicant asserted, however, that the evidence should be disregarded because Ms Galvez‑Londono was not called as a witness and he did not have an opportunity to cross-examine her. The Tribunal rejects this submission, given that the Applicant did not, in the course of the hearing, raise that he wanted to cross-examine this witness. Whilst the Tribunal is willing to take account of Ms Galvez‑Londono’s witness statement, it makes the observation that its ultimate conclusions can be reached independently of this evidence by reference to a series of emails between the Applicant and Ms Galvez‑Londono.

1. As to the last point, the Tribunal then explained in detail at [40] how the statement of Ms Galvez-Londono was made out in any event by the email correspondence.
2. The primary judge rejected Mr Frugtniet’s contention that the Tribunal thereby fell into error for the following reasons:

39. … It was entirely open to the Tribunal to have regard to the statement and to the emails without the need for Ms Galvez‑Londono to be called as a witness. As is well known, the Tribunal is not bound by the rules of evidence and may inform itself on any matter as it thinks appropriate: see s 33 of the Act. It was open to the applicant to call Ms Galvez-Londono and challenge the contents of her statement or the contents of the emails she had sent him. He declined to do so, although he did object to the statement and emails being before the Tribunal. The Tribunal did not err by relying on this material and the weight to be placed on it was a matter for it.

40. At the hearing before me, the applicant argued that the Tribunal itself or the Board should have called Ms Galvez-Londono to give evidence. I reject that submission. Whilst s 33(1AA) of the Act imposed an obligation on the Board to “use his or her best endeavours to assist the Tribunal to make its decision”, this did not oblige it to call Ms Galvez‑Londono, or any other witness. It was open for the Board to present its case limited to production of contemporaneous documents. The applicant was made aware upon the opening of the hearing that the emails and statements would be relied upon by the Board. They were in the Tribunal documents, and they had also been relied upon in the first Tribunal hearing. The applicant was not taken by surprise. Nor was the Tribunal itself under any duty to call Ms Galvez‑Londono. Whilst proceedings in the Tribunal are inquisitorial, it is not obliged to run the case of a party before it. It is under no duty to seek to remedy deficiencies in an applicant’s case: *Rahman v Minister for Immigration and Multicultural Affairs* [2000] FCA 1277 at [29]; *Abebe v Commonwealth* (1999) 197 CLR 510 at 576.

1. No error is apparent in his Honour’s reasons. First, Ms Galvez-Londono’s statement and the email correspondence were also relied upon by the Board before the first Tribunal where she was called as a witness and cross-examined by counsel for Mr Frugtniet (first Tribunal at [95]-[97]). As the Board submits in its outline of submissions at [44], there is no suggestion by Mr Frugtniet that he did not have a copy of that transcript and could not have sought to rely upon it before the Tribunal on remittal, if he had so wished. To the contrary, at the commencement of the hearing on 15 June 2016, Mr Frugtniet confirmed that he had a copy of the transcript which had been provided by the Tribunal (AB, Part C, tab 10 at p. 4.7-9).
2. Secondly, at the remittal hearing Mr Frugtniet did not object to the statement of Ms Galvez-Londono being relied upon, but only to the transcript of her evidence. Upon Deputy President Alpins reassuring Mr Frugtniet that her understanding was that the Board was not suggesting that it would rely upon the transcript of Ms Galvez-Londono’s evidence but that it was possible that she would go to the transcript of what Mr Frugtniet said in his evidence, Mr Frugtniet said “*then that’s fine. … Then there is no issue*” (transcript 15 November 2016, AB, Part C, tab 12 at p. 129.1-16).
3. Thirdly, the Board lodged and served a hearing certificate in the second Tribunal proceeding informing Mr Frugtniet that it did not intend to call any witnesses. There is no challenge to the finding by the (second) Tribunal at [40] that Mr Frugtniet failed to request that Ms Galvez-Londono be made available for cross-examination. Nor did Mr Frugtniet point to any impediment to him making any such request. That being so, there was no obligation upon the Board to call Ms Galvez-Londono. Rather, Mr Frugtniet raised the issue about Ms Galvez-Londono not being called for the first time only on 15 November 2016 when, in the course of giving evidence in chief, Mr Frugtniet said that he was disadvantaged as a result (transcript 15 November 2016, AB, Part C, tab 12 at p. 228.20-25). Given that concern and the late stage at which Mr Frugtniet raised the issue, Deputy President Alpins made it clear (in line with the Board’s submissions) that she put the emphasis upon the documentary record, saying that “*I would be concerned to have anything turn on what is in the statement when there isn’t a document about it*”, and upon ensuring that Mr Frugtniet had a chance to say anything that he wished about the documents (transcript 15 November 2016, AB, Part C, tab 12 at pp. 231.40-42 and 232.7-232.23). Consistently with this approach and the findings ultimately made by the Tribunal at [40], the Tribunal indicated that it would consider the emails separately from the statement of Ms Galvez-Londono (transcript 15 November 2016, AB, Part C, tab 12 at p. 235.20). It is also apparent from the transcript that Mr Frugtniet in fact had ample opportunity to give evidence about the documentary record, giving extensive evidence in chief on the issue and in cross-examination.
4. Fourthly, if, as Mr Frugtniet contends, the email record was incomplete or inaccurate, no reason was given by Mr Frugtniet as to why he could not have sought to supplement or correct the email record by providing further oral or documentary evidence. The same may be said with respect to the suggestion that “*there is a conspicuous omission of text messages and telephone calls made*” (appellant’s reply submissions at [19]).
5. Fifthly and in any event, the suggestion that the email record was incomplete or unreliable is made at a high level of generality without any attempt to identify the respects in which it was deficient despite the fact that the email correspondence either emanated from, or was sent to, Mr Frugtniet.
6. Finally, at the remittal hearing Mr Frugtniet confirmed that he did not provide a copy of the deductions claimed in Ms Galvez-Londono’s 2011 tax return and the amended tax return lodged with the ATO without her authorisation which Ms Galvez-Londono had requested in her emails of 12 and 16 September 2011 (AAT reasons at [40]). As such, to this extent, the Tribunal was entitled to rely upon Mr Frugtniet’s own evidence.
7. It follows that there is no merit in ground 5 of the notice of appeal. Rather, Mr Frugtniet’s complaint is ultimately about the weight given by the Tribunal to the email correspondence, and the correlation between Ms Galvez-Londono’s statement and that correspondence, which is simply a question of fact: see above at [59].

###### The challenge to the Tribunal’s reliance upon the transcript of the hearing by the first Tribunal (ground 6)

1. Mr Frugtniet also contends that the primary judge should have found that the Tribunal erred by referring to the transcript of the first Tribunal hearing in finding that Mr Frugtniet had attempted to mislead the first Tribunal by suggesting that he had brought the charges and convictions to the attention of the Supreme Court in the 2002 proceedings by his first affidavit. This error is variously described by him as the Tribunal having taken into account irrelevant considerations or having acted in breach of procedural fairness.
2. Mr Frugtniet’s submissions in support of this ground were, with respect, very confused. Insofar as it is said that that the Tribunal acted in breach of procedural fairness in citing the transcript before the first Tribunal in its consideration of this issue, the submission must be rejected for the reasons given earlier at [50].
3. Otherwise, Mr Frugtniet submitted first that the Tribunal’s finding that the first Tribunal was misled was misconceived because the first Tribunal did not find that it was misled and, in any event, the decision of the first Tribunal could not be relevant as its decision had been set aside (appellant’s outline of submissions at [16]). However, the question of whether the first Tribunal found that Mr Frugtniet had sought to mislead it is irrelevant to the task of the (second) Tribunal. As earlier explained, the Tribunal on remittal was required to determine independently for itself whether Mr Frugtniet was a fit and proper person so as to enliven the power to terminate his registration under s 40-5 of the TAS Act.
4. Further, as to the alleged relevance of the transcript in view of the orders setting aside the decision of the first Tribunal, the primary judge correctly held that:

41. … It was contended that because the decision of the first Tribunal had been set aside by Jessup J, it followed that the transcript [of the first Tribunal hearing] should not have been considered. This ground is rejected. For the reasons expressed above, it was a matter for the Tribunal as reconstituted to consider for the purposes of both ss 19D(4) and 33 what material it should consider in continuing the Tribunal. This was the conclusion the Tribunal itself reached. At par [51] of the reasons below the Tribunal said:

In setting aside the First Tribunal’s decision, Jessup J ordered that this matter *be remitted for hearing and determination by the… Tribunal differently constituted*. No further directions were made for how the matter should be conducted on remittal. With that in mind, the Tribunal concludes that having regard to the transcript of the First Tribunal hearing and in particular Mr Frugtniet’s assertions regarding the disclosure of his convictions and charges in the 2002 proceeding, is not inconsistent with any direction made by Justice Jessup.

I agree with this reasoning.

1. Secondly, Mr Frugtniet submitted that “*the question of who informed whom first in relation to an affidavit that referenced spent convictions, or no convictions was of* ***no*** *consequence in that one is not obliged to inform under the TASA Act 2009 the primary decision maker, or the Tribunal in these proceedings any matter in relation to spent convictions*” (appellant’s outline of submissions at [16]; emphasis added). The submission with respect misses the point. The first question for the Tribunal was whether Mr Frugtniet was a fit and proper person having regard, among other things, to whether he is an individual of integrity and good character. The issue of whether he had sought to mislead the first Tribunal on a material issue relevant to that question was plainly highly relevant to the question of his integrity and character.
2. We note in this regard that Mr Frugtniet sent emails to the Court and the respondents’ solicitors dated 17 May 2019 and 7 August 2019 seeking, in effect, to make further submissions. In those emails, Mr Frugtniet referred to *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16; (2019) 93 ALJR 629 (***Frugtniet (HCA)***) relating to whether the AAT can take spent convictions into account on review of a decision of the Australian Securities and Investments Commission to impose a banning order. As no leave was granted to Mr Frugtniet to make the further submissions contained in these emails, their substance has not been considered. It suffices to say that the issue raised in *Frugtniet (HCA)* was quite distinct from the issues in the present appeal and that decision would not in any event have taken the issues here any further.
3. Thirdly, Mr Frugtniet submits that the finding that the first Tribunal was misled lacked any evident or intelligible foundation given that:
4. Mr Frugtniet’s recollection of what might have occurred more than 15 years earlier was “*not logically probative*”; and
5. Mr Frugtniet having “*accepted without reservation*” that his failure to disclose matters which he was required to disclose, including before the second Tribunal, meant that his explanation that he made a mistake in identifying the source of the information was the more likely explanation.

(Appellant’s outline of submissions at [18]; see also at [17], the appellant’s reply submissions at [21], and the appellant’s post-hearing list of transcript references dated 6 December 2018 at [19] and [35].)

1. These submissions seek again impermissibly to take issue with the factual merits of the Tribunal’s decision. It follows that there is no substance to ground 6 and it was correctly dismissed by the primary judge.

###### The appellant’s objection to the validity of the Board’s decision (ground 7)

1. To place ground 7 of the notice of appeal into context, Mr Frugtniet submitted to the Tribunal that the Board’s decision to terminate his registration was invalid because the Board had not made a decision within six months of commencing its investigation in breach of s 60-125(3) and must therefore be taken as having decided to take no further action at the conclusion of that period by operation of s 60-125(7) (AAT reasons at [60]). The Tribunal, however, found that there was no obligation on the Board to conduct an investigation under subdiv 60-E of the TAS Act where the complaint was that the tax agent has ceased to meet one of the eligibility requirements for registration, and therefore that there was no statutory time limit on the Board’s consideration of whether the applicant had ceased to meet one of the eligibility requirements. As such, the Tribunal found that the Board’s decision of 15 February 2013 was validly made under ss 40-5(1) and 40-25(1) of the TAS Act and, therefore, it had jurisdiction to review that decision (AAT reasons at [62]).
2. Mr Frugtniet repeated his submission as to the alleged failure by the Board to make a decision within six months of commencing an investigation and as to the consequences before the primary judge. He argued that the letter received by him from the Board on 26 June 2012 constituted notification of a decision to investigate him for the purposes of s 60-95(2) and therefore the Board had given its decision to terminate his registration as a tax agent more than six months later on 15 February 2013 (primary judgment at [43]).
3. The primary judge held that this was not a ground which Mr Frugtniet could effectively raise in the Tribunal “*because if he is right, the Board was deemed to have made a decision in 2012 to take no further action in relation to its investigation into the applicant’s character with the result that there was no reviewable decision for the Tribunal to consider pursuant to s 70-10 of the TAS Act*” (primary judgment at [44]). Section 70-10(e) and (h) relevantly provide that an application may be made to the Tribunal for review relevantly of a decision under subdiv 40‑A to terminate registration and under s 40‑25 to determine a period during which an application for registration may not be made. His Honour continued:

44. … Absent an application of s 60‑125(7) of the TAS Act, a decision was made on 15 February 2013 to terminate the applicant’s registration pursuant to s 40‑5(1)(b) of that Act which is reviewable in the Tribunal pursuant to s 70‑10(e). However, if s 60‑125(7) is engaged a statutory fiction is thereby created which denies the very existence of the reviewable decision. A similar issue had arisen in *Kennedy v The Administrative Appeals Tribunal* (2008) 168 FCR 566. In that case, the applicant sought to challenge the validity of a notice of assessment in a tax appeal made pursuant to Pt IVC of the *Taxation Administration Act 1953* (Cth), which had been commenced in the Tribunal. The Court decided that such a challenge could not effectively be made in the Tribunal as its authority to consider the excessiveness of assessments was premised on the presence of a valid assessment. The Court referred to the decision of Rath J in *F.J. Bloemen Pty Ltd v Federal Commissioner of Taxation* [1978] 2 NSWLR 468 at 480, where his Honour said “[a] properly constituted appeal assumes that there is a valid assessment”: *Kennedy* at [12].

45. So too here, the applicant’s challenge to the decision to terminate his registration assumes the existence of a decision made under s 40-5 which can be reviewed by the Tribunal. Invoking s 60‑125(7) of the TAS Act denies the existence of any such decision and, in my view, for that reason, cannot be effectively raised as a ground in the Tribunal.

46. This is not to deny that there was before the Tribunal a decision which was incapable of review. As counsel for the Board submitted, a “decision” for the purposes of s 25 of the Act refers to a decision in fact made regardless of whether or not it is legally effective. The decision in fact made here was made on 15 February 2013. The Tribunal had power to consider the merits of that decision, even though it may not be one that had been lawfully made. However, what the Tribunal could not itself decide was the legal validity of the decision being reviewed. That can only be done by this Court [quoting *Kennedy* at [22]-[23]].

1. Further, while the primary judge did not consider it necessary to decide, in his Honour’s view the letter dated 26 June 2012 was simply an attempt by the Board to gather preliminary information (primary judgment at [48]).
2. There is a potential tension between the conclusions by the primary judge at [44]-[45] and that at [46]. However, it is unnecessary to resolve that issue. The primary judge was plainly correct at [46] in holding that the Tribunal had no authority to determine the validity of the Board’s decision. Only a court may authoritatively and in a binding manner determine whether an administrative body has acted within its statutory authority: see e.g. *Re Adams and the Tax Agents’ Board* (1976) 7 ATR 87 at 89 (Brennan J (in his capacity as President of the Administrative Appeals Tribunal)). Furthermore and related to this, while an administrative body such as the Tribunal is bound to observe the limits of its jurisdiction and therefore must form an ***opinion*** as to the limits of its own authority, it was unnecessary for the Tribunal here to form an opinion as to the validity of the Board’s decision in order to reach the view that it had jurisdiction. This is because, as the primary judge held, the mere existence of a decision by the Board purportedly made under ss 40-5(1) and 40-25 of the TAS Act sufficed to establish the Tribunal’s jurisdiction to entertain the application for merits review. As the Full Court held by analogy in *Kennedy v Administrative Appeals Tribunal* [2008] FCAFC 124; (2008) 168 FCR 566 with respect to the taxpayer’s challenge in the Tribunal to the validity of the Commissioner’s assessments of income tax:

22. … The Tribunal has jurisdiction to hear and determine the present review under Pt IVC of the [*Taxation Administration Act 1953* (Cth)] because each assessment purports to have been made in exercise of powers conferred by that enactment. Whether or not the assessments were, as a matter of law, validly made does not attenuate this finding. There is a long line of authorities which supports this proposition, starting with *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307. More recently, in *Minister for Immigration and Multicultural and Indigenous Affairs v Ahmed* (2005) 143 FCR 314 at 323, the Full Federal Court observed that the judgment as to the validity of a Minister’s actions is for the courts, not for an administrative body such as a Tribunal: see also *Zubair v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 344.

23. Accordingly, if the Tribunal in this case were to make an administrative ruling that the Commissioner’s assessments were valid, this would not take effect as a binding determination of law, and the Commissioner would remain entitled to collect tax pursuant to the assessments subject to any determination by a court that those assessments were not valid. In this case, Mr Kennedy has elected to have the objection decisions referred to the Tribunal, yet he complains that the Tribunal cannot decide whether the assessments were correctly and validly made and does not have the jurisdiction which he has invoked. In these circumstances, the Court would lean against finding that the jurisdiction can be challenged: see *Kim v Minister for Immigration and Citizenship* (2008) 167 FCR 578 at [21]-[29] (per Tamberlin J) and [37]-[39] (per Gyles J).

1. It also follows that the decision of the Tribunal has effectively overtaken any jurisdictional defect in the Board’s decision.
2. Further and in any event, the primary judge was plainly correct in finding in the alternative that the letter from the Board to Mr Frugtniet dated 26 June 2012 cannot be characterised as the provision of a notice in writing under s 60-95(2) to commence an “*investigation*” under subdiv 60-E of the TAS Act. The letter makes no reference to any such investigation being commenced and cannot be put any higher than “*a ‘natural justice’ letter that invited the appellant to make submissions and provide materials to the respondent about whether he was a fit and proper person to continue to be registered as a tax agent, and in response to the complaints made*”, as the Board submits (respondent’s outline of submissions at [54]). In this regard, we note that while certain text in the copy of the letter reproduced at AB, Part C, tab 5.1, p. 225 has been redacted, no party suggested that any part of the redacted text could bear upon the proper characterisation of the letter.
3. Given these matters, it is unnecessary to determine whether the letter of 20 November 2012 constituted formal notification of an investigation for the purposes of s 60-95(2). We note that this letter, to which the primary judge referred at [48], was apparently mistakenly dated 20 November 2005 but the parties agreed that it should read 2012 (see AAT reasons at [61]). A copy of this letter was somewhat surprisingly not included in the Appeal Book. The short point in any event is that, even if that letter is properly so characterised, it was not in issue that the decision was given within a six month period of the letter.
4. Finally, by ground 7 Mr Frugtniet also alleged that the primary judge erred in “*refusing to accept an application for judicial review under the Judiciary Act filed predicated on the same set of facts involving the same parties before any decision had been made in the matter*”. The draft originating application under s 39B of the *Judiciary Act 1903* (Cth) dated 2 March 2018 (the **draft s 39B application**) sought to directly challenge the validity of the Board’s decision and therefore went beyond the relief sought in the s 44 proceeding.
5. The draft s 39B application was marked for identification at the hearing of the appeal, with the Court indicating that it would rule on its admissibility in the final judgment (T5.36-40). In our view, the originating application should be received in evidence solely on the basis that it relates to and informs ground 7 of the amended notice of appeal.
6. Mr Frugtniet sent the draft s 39B application under cover of an email dated 6 March 2018 to the associate to the primary judge after judgment had been reserved on 1 March 2018 (AB, Part B, tab 19). The associate to the primary judge replied advising that:

We confirm that, as explained by the registry, this application cannot form part of your appeal from the Administrative Appeals Tribunal to this Court.

You should seek legal advice as to whether the matter you seek to pursue can be raised otherwise.

(AB, Part C, tab 19)

1. The response is unexceptional and plainly correct. If filed, the s 39B application would have constituted a new proceeding to be heard and determined in the normal course.
2. We also note in any event that any such application, if filed, would have encountered the same difficulty as ground 7 of the notice of appeal in that the letter of 26 June 2012 was not a notice commencing an investigation under s 60-95(2) of the TAS Act.

##### CONCLUSION

1. For these reasons, the appeal must be dismissed with costs.

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| I certify that the preceding ninety-three (93) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Perry, Moshinsky and Lee. |

Associate:

Dated: 8 November 2019