

Inspector-General Practice Statement 19

Fit and proper requirements for personal insolvency practitioners

1. Overview

1.1 The purpose of this document is to provide the industry with guidance on what it means to be a 'fit and proper' person in the context of gaining, and maintaining, registration as a personal insolvency practitioner in Australia.

1.2 Being a fit and proper person is integral in maintaining public confidence in the personal insolvency profession. Ideally only persons who act with honesty, integrity, diligence, judgement and good character will operate within the industry – so that vulnerable users can feel confident when engaging their services.

1.3 This statement is relevant to registered trustees and registered debt agreement administrators.

1.4 This Inspector-General Practice Statement will not limit, in any way, the ability of the Inspector-General to inquire and determine whether a person is a fit and proper person.

2. Who the fit and proper test applies to

2.1 For registration as a *registered trustee*, an applicant must satisfy a committee considering their registration that they are a fit and proper person under section 20-20 of Schedule 2 of the *Bankruptcy Act 1966* ('the Act'). Once registered, a trustee must remain a fit and proper person to maintain their registration, otherwise it may form a ground for the Inspector-General to issue a show-cause notice under section 40-40 of Schedule 2 of the Act.

2.2 For *debt agreement administrators*, the fit and proper requirement is applicable to those who are registered, or have had their registration renewed, on or after 27 June 2019. To be registered as a debt agreement administrator, an applicant must satisfy the Inspector-General that they are a fit and proper person under section 186C of the Act. For registered company administrator applicants, the company itself and each director of the company must be a fit and proper person. Once registered, they must remain a fit and proper person to maintain registration. Otherwise, it may form a ground for the Inspector-General to request a written explanation from an administrator under section 186K and 186L of the Act, asking why the administrator should continue to be registered.

3. Fit and Proper – General Overview

3.1 There is no set standard test to determine what constitutes 'fit and proper' and it is not defined by the Act. This is in acknowledgment of the fact that the concept is constantly evolving to reflect the expectations of the community.

3.2 Establishing whether a person is fit and proper requires the Inspector-General to take into account a range of factors that shows a person has sufficient honesty, integrity, diligence, judgement and good character to carry out the duties and activities required of them as a personal insolvency practitioner.

3.3 A very wide discretion is necessary to take into account the context which is relevant to the duties of a personal insolvency practitioner. In the High Court case of *Hughes and Vale Pty Ltd v State of NSW (No 2)*¹ Dixon CJ, McTiernan and Webb JJ stated that the purpose of the fit and proper test was “to give the widest scope of judgment and indeed for rejection”.

3.4 The mere fact that a person’s conduct falls into one of the listed considerations in this statement does not automatically mean that a person is not fit and proper. The Inspector-General will assess the relevance and significance of the conduct in determining whether the person is fit and proper. An assessment may also take into account whether there has been a significant single breach or multiple breaches of lesser severity.

4. Considerations for being assessed as a ‘fit and proper’ person

4.1 The following are relevant considerations the Inspector-General may have regard to when determining a person is not fit and proper. It is not intended to be an exhaustive list, and regard may be had to other factors that, in the view of the Inspector-General, are also related to whether or not a person is or remains fit and proper.

Honesty	<ul style="list-style-type: none"> • Providing false or misleading information to stakeholders, other practitioners, professional industry bodies, other regulatory bodies, the Inspector-General, the court or the public • Misappropriation of funds that a person was entrusted with • For registered debt agreement administrators, taking part in false, misleading or deceptive conduct in advertisements and promotions
Integrity	<ul style="list-style-type: none"> • Displays of unprofessional behaviour to stakeholders, other practitioners, professional industry bodies, other regulatory bodies, the Inspector-General, the court or the public • Failing to maintain independence, or the perception of independence in the course of their insolvency work • Direct or indirect involvement in negligent, deceitful or discreditable business or professional practices • Breaching fiduciary obligations • Convictions that may affect the confidence the public has in a person’s role as an insolvency practitioner • For registered debt agreement administrators, failing to provide balanced views of options available to debtors in financial distress
Diligence	<ul style="list-style-type: none"> • Failing to provide information reasonably requested by stakeholders, other practitioners, professional industry bodies, other regulatory bodies, the Inspector-General the court or the public • Failing to maintain confidentiality of stakeholders as required under privacy rules and legislation • Failing to conscientiously discharge their role as a personal insolvency practitioner • For registered debt agreement administrators, failing to conscientiously discharge their certification duties to ensure debtors provided full and true disclosures about their assets, liabilities and budget to their creditors

¹ (1955) 93 CLR 127

Judgement	<ul style="list-style-type: none"> • Requiring stakeholders to respond to correspondence in an unreasonable timeframe • Contacting stakeholders outside of reasonable hours (unless agreed upon) • Repeated and serious complaints received by the Inspector-General about a practitioner or their staff
Competence	<ul style="list-style-type: none"> • Failure to possess or maintain the skills and knowledge required of a personal insolvency practitioner, or failure to ensure staff are reasonably trained to discharge their role • Failure to possess or maintain adequate resources or appropriate processes to meet the demands of current and future workloads • For registered debt agreement administrators, failing to maintain proper accounts, books and records that accurately reflect transactions that have taken place in accounts that hold debt agreement funds
Professional character and reputation	<ul style="list-style-type: none"> • Repeated failure to comply with the <i>Bankruptcy Act 1966</i> or other laws that are relevant to the duties of an insolvency practitioner • Demonstrating a lack of willingness to comply with regulatory requirements or industry professional standards and codes • Being subject to civil, criminal or enforcement proceedings which are related to honesty, integrity, diligence, judgement or competence • Disciplinary action, including adverse findings, reprimands and disqualifications, by other regulatory bodies, professional industry bodies or the court • Failure to co-operate with the Inspector-General

4.2 In assessing the conduct of a personal insolvency practitioner, the Inspector-General may consider compliance with:

- Bankruptcy Legislation – such as the *Bankruptcy Act 1966*, *Bankruptcy Regulations 1996* and *Insolvency Practice Rules (Bankruptcy) 2016*
- Professional industry standards – such as APES 330 Insolvency Services
- Codes of Professional Conduct – such as the ARITA Code of Professional Practice
- Inspector-General Practice Statements and Directions
- [Integrity Principles for Trustees and Debt Agreement Administrators](#) - While the Integrity Principles are broader than the ‘fit and proper’ test, they offer a vision of good culture that may inform how a ‘fit and proper’ person should conduct themselves

5. Mitigating or aggravating circumstances

5.1 Additional considerations will be taken into account which may mitigate or aggravate the significance of an incident identified by the Inspector-General. These factors are not intended to be an exhaustive list, and regard may be had to other factors that, in the view of the Inspector-General, are also related to whether or not a person is or remains fit and proper.

Repeat conduct	<ul style="list-style-type: none"> • Whether a person has reoffended or whether an identified incident is part of a sustained pattern of behaviour • Evidence of attempts to address known issues, such as steps taken to improve conduct or professional standing e.g. remedial training or action taken.
Severity	<ul style="list-style-type: none"> • Level of seriousness of past unacceptable behaviour

	<ul style="list-style-type: none">• Whether an incident involved a breach of trust, which could affect the public's confidence and trust in that person's role in the profession.
Consequences of actions	<ul style="list-style-type: none">• Whether the consequences to those affected by an incident were significant in the assessment of the Inspector-General. Factors in assessing the significance can include, for example, whether a person was in a position of vulnerability.
Time elapsed	<ul style="list-style-type: none">• Time that has elapsed since the occurrence of an identified incident. It is more likely that the time elapsed will be relevant where the incident is less serious, or does not relate to dishonesty or other significant conduct.

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