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Transport for NSW Core Business Policy

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Public Passenger Operators and Drivers Fit and Proper Policy

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1. Policy statement

This policy is intended to assist delegated decision makers in carrying out their functions in ensuring that all persons holding or applying for an authority as a bus driver or an accreditation as a bus or community transport service operator are 'fit and proper' and of 'good repute'. In this context, a person may be considered 'fit and proper' or of 'good repute' if they possess the necessary inherent characteristics, moral fibre, good character, honesty, values and reputation to enable Transport for NSW to give effect to the objects of the *Passenger Transport Act 1990 and 2014* ('the Act') and of any Regulations to those Acts, and to perform its functions as a government agency enabling safe and efficient journeys. This policy notes that 'fitness and propriety' and 'good repute' are only two of several characteristics that a decision maker is required to take into account under 'the Act' when considering whether a regulatory program participant should be refused entry, or an authority or accreditation suspended or cancelled. This policy does not deal with characteristics such as competence and medical fitness which are also required to be considered.

2. Scope and coverage

This policy is for use by Transport for NSW (Transport) staff administering any regulatory program in which a participant:

- operates a bus or community transport service, or
- drives a public bus.

Under clauses 7 and 8 of the Passenger Transport (General) Regulation 2017 ('the Regulation'), Transport may refuse to grant a public passenger operator accreditation where it is not satisfied that a person or nominated directors/managers of a body corporate are 'fit and proper' or of 'good repute'. Under Clause 29 of 'the Regulation', Transport may refuse to grant a bus driver authority where it is not satisfied that an applicant is 'fit and proper' or of 'good repute'.

Similarly, Section 10 of 'the Act' requires Transport to cancel an operator accreditation where Transport is satisfied that the holder is no longer 'fit and proper' or of 'good repute'. Section 14 of 'the Act' requires Transport to cancel a bus driver authority where it is satisfied that the holder is no longer 'fit and proper' or of 'good repute'.

This policy is intended to provide guidance for assessing 'fitness and propriety' and 'good repute' with respect to:

- Applicants - when applying for a public passenger driver authority or public passenger operator accreditation, and;
- Participants - both when considering their 'fitness and propriety' to remain within a regulatory program and/or to hold a public passenger authority or public passenger operator accreditation generally.

This policy does not apply to interstate bus drivers in NSW working under the Automatic Mutual Recognition (AMR) scheme. AMR enables holders of occupational licences, including a bus driver, to work in a second state or territory without the need to obtain a licence or pay fees in that second state or territory.

However, under Commonwealth legislation, AMR workers are not subject to NSW laws requiring attainment or possession of some qualifications or experience relating to fitness to carry on the activity. This extends to requirements for a person to be 'fit and proper', of 'good repute' or of 'good character'.

Conduct by an AMR worker which would lead to action taken under this policy if they were a NSW licence holder, should be referred by notification back to the AMR workers home state, and Legal consulted.

3. Purpose and intended outcomes

Under the Passenger Transport Acts, Transport accredits and authorises public passenger regulatory program participants. This policy is designed to reduce some of the risks associated with the programs, in particular ensuring that unsuitable persons are not involved in the bus and community transport industry. These risks may include harm or potential harm to members of the public, damage to property or reputation, and corrupt business practices.

Following an investigation conducted by the Independent Commission Against Corruption (ICAC) in January 2014 (Operation Nickel) and a subsequent organisational review of third-party regulatory programs in NSW, Transport considers all third party regulatory program providers to be 'public officials'. This is based on their requirement to enter into an agreement with or obtain a statutory licence from Transport that defines both the services they provide and conditions under which they may provide these services. As a result, the importance of their fitness and propriety cannot be overstated.

This Policy, along with all supporting procedures, is not designed to be a discriminatory tool for the exclusion of specific regulatory program participants, but rather a guide to assist Transport decision makers to apply a consistent standard in ensuring that regulatory program participants do not pose a risk to the public, or to Transport in terms of its reputation or to carrying out its obligations.

4. Policy

Transport has an obligation to members of the public using a public passenger service to ensure that both public passenger operators and drivers are both 'fit and proper' and of 'good repute' to participate in the regulatory program. 'Fit and proper' and 'good repute' are not terms that can be defined as they must be viewed subjectively in the context of the occupation being sought. The High Court of Australia, in the matter of the Australian Broadcasting Tribunal vs Bond (1990), found that in order to determine whether a person is 'fit and proper' to hold a particular licence, reference should be made to their "conduct, character and reputation".

In the case of public passenger operators and drivers, conduct, character and reputation are scrutinised to provide assurance that operators and drivers can participate in the regulatory program in accordance with the regulatory program objectives.

With this in mind, Section 5 'Considerations' provides a list of examples which may preclude a person from being considered 'fit and proper' or of 'good repute'.

5. Considerations for refusal, suspension or cancellation or other sanction

Any person seeking to be accredited by Transport to operate a public passenger service or to be authorised by Transport to drive a public passenger service must demonstrate that they can satisfy the considerations set out in this section before they can be considered 'fit and proper' or of 'good repute'. Failure to meet these considerations should ordinarily result in a refusal or a suspension or cancellation from the program in cases where the decision maker determines that the objects of 'the Act' cannot be met by the participant.

Under the Automatic Mutual Recognition (AMR) scheme, an interstate licence cannot be refused or suspended but it can end or be cancelled. Therefore, the policy only applies to the AMR scheme with respect to ending/cancelling their Automatic Deemed Registration. However, Legal advice should be sought in any such circumstances, as the grounds for cancelling AMR are more limited, and for bus drivers, are likely to be

limited to making a false or misleading application or committing (or being alleged to have committed) a criminal offence within the context of the activity of bus driving itself.

These considerations are:

5.1 Conflict of interest

5.1.1 A person must not be considered 'fit and proper', of 'good repute' or of 'good character' if it can be demonstrated that a conflict of interest exists.

5.2 Criminal Record

5.2.1 This part must be read in conjunction with Section 7 – 'Irrelevant considerations' and Section 10 – 'Definitions' (specifically the definition relating to spent convictions). If there is any confusion as to whether an offence is spent or not, the matter should be referred to Transport's Legal section for advice.

5.2.2 The fact of the existence of a criminal record is not of itself a reason to refuse or sanction. A previous offence must be looked at only in the context of whether it reasonably demonstrates that a regulatory program participant is, or is not, fit and proper to participate within a regulatory program.

5.2.3 A regulatory program participant is not considered 'fit and proper' or of 'suitable character' under this policy if they have been convicted or found guilty of:

- breaches of the rules of the regulatory program where those breaches are significant enough to threaten the integrity of the regulatory program;
- Where penalty notices have been issued for breaches of the rules of the regulatory program;
- any offence relating to making false or misleading statements or declarations, including, but not limited to, perjury, benefits by deception, forgery, and failure to declare previous convictions;
- any offence relating to tax fraud or evasion, or social security fraud;
- any offence involving vehicle rebirthing, vessel rebirthing, or the tampering with identification plates or numbers, or any offence involving fraud or attempted fraud on a regulatory program involving road transport law (such as obtaining vehicle registration by false statement etc.)
- a serious driving offence including negligent, reckless or dangerous driving, driving with a prescribed concentration of alcohol, driving under the influence of alcohol or drugs, driving whilst using a mobile phone, menacing driving, a loss of traction offence, unlawful racing or a police pursuit;
- an indictable criminal offence including:
 - i. Murder and/or manslaughter;
 - ii. Attempted murder;
 - iii. A sexual assault or indecent assault of any kind;
 - iv. An assault or affray of any kind;
 - v. Any offence related to voyeurism or child abuse material;
 - vi. Any offence which has caused reckless or negligent danger to life or has cause bodily harm (including public safety matters such as arson);
 - vii. Theft and similar offences (including larceny, motor vehicle theft or embezzlement);
 - viii. Fraud, forgery, money laundering or dealing in the proceeds of crime;

ix. Identity offences;

- Any interstate or overseas offence that is the equivalent of any of the above offences.

5.3 Current investigations and matters pending

5.3.1 A regulatory program participant is not considered 'fit and proper', or of 'good repute' or of 'good character' under this policy if they are:

- Currently under investigation by Transport or another public authority (including interstate and international) in relation to fraud or corrupt activity. This is particularly relevant where Transport is of the opinion that the applicant poses a significant risk to probity/governance.
- Charged with an indictable offence that is a matter of assault of any kind, stalking or intimidating, or a matter involving any allegation of dishonesty, theft, fraud or other deception.
- Charged with any offence committed in the context of driving a motor vehicle which has as a potential maximum penalty a period of imprisonment, or any offence committed while in the act of performing duties as a public passenger driver (for driver only).
- A Transport safety employee who has returned a positive drug or alcohol test after in-depot testing has been conducted under the *Passenger Transport (Drug & Alcohol Testing) Regulation 2010*.
- Bankrupt (unless bankruptcy is discharged or annulled - for operator only).

Note: Where a regulatory program participant is under investigation or has been charged (but not yet convicted), their 'fitness and propriety' or 'good repute' may be assessed as temporarily under question and the authority or accreditation suspended pending the outcome of the investigation. Prior to suspending an operator accreditation, enquiries should be made as to whether this might have any consequences which would require the involvement of Transport for NSW in the decision – e.g. a 'step-in contract' for school transport.

5.4 Justified complaints

5.4.1 A regulatory program participant is not considered 'fit and proper' or of 'good repute' under this policy if they have been the subject of repeated complaints by customers in relation to conduct under this, or any third-party regulatory program, administered by Transport, and Transport has conducted an investigation and found those complaints to be justified on the balance of probabilities.

5.5 Behaviour

5.5.1 A person who fails to behave with civility and proper community standards when dealing with Transport (or with a member of the public engaged under their authority) will not be considered 'fit and proper' or of 'suitable character' to hold an authority, as it may demonstrate behaviour which shows an unwillingness to meet those standards, shows a refusal to be appropriately regulated under the statutory licence, and a failure to represent Transport appropriately as its agent or licensee. This includes making personal, threatening, harassing, predatory or intimidating remarks, correspondence, or action against public servants administering the regulated scheme.

6. Exercising discretion

It is particularly important when exercising discretion that action taken by Transport is seen as both consistent and fair. In considering circumstances where the regulatory program participant has not met the considerations set out in section 5, the decision maker responsible for determining whether the person is 'fit and proper' and of 'good repute' may take into account;

- The nature, seriousness and frequency of the offence(s).
- The nature, seriousness and frequency of previous offences where the applicant or participant has been convicted or found guilty.
- The nature, seriousness and frequency of previous complaints made against the applicant/participant.
- The time lapsed since the finding of guilt.
- The severity of any sentence imposed by the Court (e.g. a dismissal or non-conviction will be an indication the offence was considered trivial or technical in nature)
- The likelihood that the person will re-offend (including time since last offence, expressions of remorse, efforts made towards rehabilitation and any other relevant changes in the applicant/participant's circumstances).
- The risk that the offence or condition poses to Transport ethical, probity and governance obligations, and to its reputation.
- Other similar cases - where another applicant/participant has been assessed as 'fit and proper' or not (as the case may be) in similar circumstances. Note that these must be considered, especially as an applicant might obtain details of similar decisions under the *Government Information (Public Access) Act 2009*.

In addition to the above, every consideration must be assessed in the context of the services to be performed by the regulatory program participant. The relevance of the consideration to the act of operating or driving a public passenger service must be established (*for instance a minor assault matter committed in the context of a domestic dispute or a pub argument may not be as 'relevant' or 'concerning' to a decision maker in this context as the same assault committed in the carriage of public passenger services*).

The steps taken by a decision maker in exercising their discretion to sanction (whether to refuse, exclude, suspend or cancel) a regulatory program participant (including criteria that the regulatory program participant has not met, reasoning behind the decision and any internal communications) must be documented and stored for future reference.

If necessary, the decision maker may decide that more information is required to make a decision. If so, the decision maker may request more information from the regulatory program participant. Failure by the regulatory program participant to provide requested additional information may be a factor which can be considered in determining if a person is of 'fit and proper' and/or 'good repute'.

7. Irrelevant considerations

The following factors should not be considered when determining if a person is 'fit and proper' and of 'good repute':

- The person's race, ethnicity, religious beliefs or any attributes that are protected under the *AntiDiscrimination Act 1977* and/or the *Commonwealth Disability Discrimination Act 1992*.
- Spent convictions, as defined under the *Criminal Records Act 1991* (or equivalent interstate

legislation), unless they are part of a pattern evidencing a disregard for the law or they may suggest the presence of a road or public safety risk.

- Minor regulatory breaches or summary offences, unless they are part of a pattern evidencing a disregard for the law or they may suggest the presence of a road or public safety risk.

8. Responsibilities

Transport is responsible for:

- Ensuring that this policy is considered in the scope of their respective staff's duties.
- Reviewing the policy at the nominated review date. It is the responsibility of the reviewing officer to seek input, from all business units using the policy and from Legal, to ensure that the policy is sound.
- Identifying any operational process improvements in the application of this policy.
- Applying this policy in decision making, to ensure that all persons accredited as a public passenger operator or authorised as a public passenger driver are considered 'fit and proper' and of 'good repute'.

9. Evaluation

The policy will be reviewed every two years or in the event of legislation or regulation amendments to determine whether it still meets Transport obligations. The review should focus on including additional criteria which may identify regulatory program participants that do not meet the 'fit and proper' criteria and in evaluating the current criteria to ensure that they are still relevant.

Evaluation should also include a review of regulatory program participants who have been refused or removed from the regulatory programs relevant to this policy. These should be assessed for common themes leading to the administrative sanction taken and any such themes considered for inclusion into the policy.

10. Definitions

Delegated Person – Any Transport staff member with delegated authority, involved in the management of the above regulatory programs and tasked with specific roles in relation to that regulatory program.

Indictable Criminal Offence - An offence where the defendant has the right to trial by jury and are more serious offences.

Public Official – A regulatory program participant who enters into a service agreement with, and is appointed to exercise authority on behalf of, the NSW State Government.

Spent Convictions – A conviction is considered 'spent' where it meets criteria as defined under the *Criminal Records Act 1991*, or relevant interstate legislation.

Public Passenger Service – Means the carriage of passengers for a fare or other consideration by motor vehicle (other than a light rail vehicle) along a road or road related area, or along the whole or part of a transitway route.

Regulatory Program participant – a person who is an applicant for, or the holder of, a Public Passenger Accreditation or driver authority under the *Passenger Transport Act 1990* or *2014*.

11. Related Information

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