In the matter of an application by Gadd [2013] NTSC 13

PARTIES:	IN THE MATTER OF: THE LEGAL PRACTITIONERS ACT And IN THE MATTER OF AN APPLICATION BY: GADD, Andrew Phillip FOR ADMISSION AS A LEGAL PRACTITIONER OF THE SUPREME COURT OF THE NORTHERN TERRITORY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	LP 8 of 2012 (21226092)
DELIVERED:	20 March 2013
HEARING DATES:	13 February 2013
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

Legal Practitioners (Northern Territory) – Application for admission – Referral from Legal Practitioners Admission Board – no positive submissions by Law Society challenging admission – Law Society raise issues to be considered by the Court in the decision as to fitness to be admitted.

Legal Practitioners (Northern Territory) – Application for admission – fit and proper person – duty of disclosure – initial disclosure of prior criminal history inadequate – not a deliberate omission by the applicant – timing of disclosure not adverse to application – disclosure of applicant not reckless – whether prior discreditable conduct relevant to suitability.

Legal Practitioners (Northern Territory) – Application for admission – prior finding of guilt – conviction for purposes of Act – prior acquittals – misconduct not the subject of criminal charges – whether discreditable conduct relevant to suitability – evidence of current character.

Legal Practitioners (Northern Territory) – Application for admission – whether applicant rehabilitated – applicant found to now be of good fame and character – applicant found to be fit and proper for admission – *Legal Profession Act* 2006 s 32(1), s 11.

Legal Profession Act 2006 (NT) s 11, s 15, s 23, s 24, s 25, s 30, s 32, s 33, s 34, Part 2.2
Summary Offences Act s 61,
Criminal Code (WA) s 83,

Application by Deo, Re (2005) 16 NTLR 102; *Application by Saunders, Re* (2011) 29 NTLR 204; *Hampton, Re* [2002] QCA 129; distinguished

Cohen v Legal Practitioners Admissions Board (No 2) [2012] QCA 106: *Tkacz, Re* (2006) 206 FLR 171: discussed

Del Castillo, Re (1998) 136 ACTR 1; *Gadd v Middleton* [2008] NTCA 4; *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655; *Thomas v Legal Practitioners Admission Board* (2005) 1 Qd R 331; *OG, a lawyer, Re* (2007) 18 VR 164; *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239; referred to

REPRESENTATION:

Counsel:

Applicant:	Mr Aughterson
Respondent:	Ms Truman

Solicitors:

Applicant:	De Silva Hebron
Respondent:	The Law Society of the Northern Territory

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

In the matter of Application by Gadd [2013] NTSC 13
No. LP 8 of 2012 (21226092)

BETWEEN:

IN THE MATTER OF:
THE LEGAL PRACTITIONERS ACT
Applicant

AND:

IN THE MATTER OF AN
APPLICATION BY:
ANDREW PHILLIP GADD
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 20 March 2013)

Introduction

[1] The applicant has applied for admission as a legal practitioner.[1] Pursuant to s 32(1) of the *Legal Profession Act 2006*, the Legal Practitioners Admission Board (the Board) referred the application to the court to determine whether the applicant is a fit and proper person to be admitted to the legal profession.[2]

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1 Originating Motion filed 12 July 2012.

2 Referral to the Supreme Court, 29 October 2012. See s 25(2)(b) *Legal Profession Act*. The court must be satisfied the person is a fit and proper person to be admitted to the legal profession.

[2] Associated with the question of fitness, the Board refers the question of whether the applicant fails to satisfy the suitability matters specified in s 11(1)(a) and (c) of the Act; namely, whether the applicant is "currently of good fame and character" and whether he has been convicted of an offence.

[3] Pursuant to s 34(3) *Legal Profession Act 2006* the Law Society is entitled to make written submissions and make representations to the court on the hearing of the reference. Through counsel, the Law Society told the court that it did *not* seek to make a positive submission that the court should find the applicant is *not* a fit and proper person. The Law Society's approach was to highlight a number of matters relevant to the question of what is meant by a "fit and proper person", and to ensure the court considered a number of matters relevant to this particular applicant in coming to the ultimate determination.

[4] The burden remains on the applicant to satisfy the court that he is a fit and proper person to be admitted.[3]

Relevant legislative provisions and principles

[5] As between the applicant and the Law Society there is no significant issue about the principles to be applied, nor the interpretation of the relevant parts of the *Legal Profession Act* (NT).

[6] Section 32(3) of the *Legal Profession Act* (NT) confers the same powers on the court as the Admission Board to deal with the application. A decision

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3 *Application by Deo, Re* (2005) 16 NTLR 102 at [4].

made by the court is taken to be a decision of the Board. The court may make an order or declaration that it considers is appropriate in the circumstances.[4] Any declaration or order made under s 32(4) is binding on the Board unless the applicant failed to make full and fair disclosure of all matters relevant to the declaration sought.[5]

[7] Apart from formal and academic requirements to admit a person as a legal practitioner, the court must be satisfied the person is a "fit and proper person".[6]

[8] The expression "fit and proper person" is not defined by the Act, however in determining if a person is a fit and proper person, the court must consider[7] each of the "suitability matters" in relation to an applicant, to the extent that they are appropriate, *and* any other matter it considers relevant.[8] Relevantly, s 11 of the *Legal Profession Act* provides the following are "suitability matters":

> (a) whether the person is currently of good fame and character; and
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> (c) whether the person has been convicted of an offence in Australia or a foreign country, and if so,
>
> (i) The nature of the offence; and
>
> (ii) How long ago the offence was committed; and

4 S 32(4) *Legal Profession Act* (NT).
5 S 33 *Legal Profession Act* (NT).
6 S 25(2)(b) *Legal Profession Act* (NT).
7 S 30(1) *Legal Profession Act* (NT).
8 S 30(1)(b) *Legal Profession Act* (NT).

(iii) The person's age when the offence was committed.

[9] Importantly, in the context of the *Legal Profession Act*, a reference to "conviction", includes a finding of guilt, whether or not a conviction is recorded.[9]

[10] Although the court must take into account the "suitability matters" under s 11 when determining whether a person is a fit and proper person, the court is clearly not confined to considering only those matters and must consider any other matter it considers relevant to the assessment of fitness.

[11] In cases of admission to practise, of utmost importance is the duty of the court to ensure, "so far as possible, that the public is protected from those who are not properly qualified and ... from those who are not "suitable ... for admission"."[10]

[12] The significance of this principle is evident throughout Part 2.2 of the *Legal Profession Act*, especially "The Purposes of this Part ..." as detailed in s 24(a) of the Act. Together with other expressions setting out the purpose of Part 2.2, reference is made to the interests of the administration of justice, the protection of consumers of legal services and to qualified applicants who are "fit and proper persons".

[13] That the terminology in some respects may have changed or that the terms "fit and proper person" and "suitable ... for admission" may at times be used

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9 S 15 *Legal Profession Act* (NT).
10 *Wentworth v NSW Bar Association* (1992) 176 CLR 239 at 251.

interchangeably does not affect the nature of the court's duty to have regard to the protection of the public. The nature of the issues to be determined remain the same,[11] whatever terminology is used, namely to protect the public, the profession and the administration of justice.

[14] The importance of candour, the assessment of fitness and its relationship with the responsibility of the court to maintain public confidence is discussed in *Incorporated Law Institute of New South Wales v Meagher*[12] by Isaac J:

> "The errors which human tribunals are inevitably exposed, even when aided by all the ability, all the candour, and all the loyalty of those who assist them, whether as advocates, solicitors or witnesses, are proverbially great. But, it added to the imperfections inherent in our nature, there be deliberate misleading, or reckless laxity of attention to necessary principles of honesty on the part of those the Courts trust to prepare the essential materials for doing justice, these tribunals are likely to become mere instruments of oppression, and the creator of greater evils than those they are appointed to cure. There is therefore a serious responsibility on the Court – a duty to itself, to the rest of the profession, to its suitors, and to the whole of the community to be careful not to accredit any person as worthy of public confidence who cannot satisfactorily establish his right to that credential. It is not a question of what he has suffered in the past, it is a question of his worthiness and reliability for the future."

[15] Additionally, an applicant for admission is obliged to deal with the admitting authorities, (in this case initially the Board and ultimately the court), "with the utmost good faith and candour, comprehensively disclosing any matter which may reasonably be taken to bear on an assessment of

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11 *Wentworth v NSW Bar Association* (1992) 176 CLR 239 at 254. Although *Wentworth* concerned the question of qualifications, the underlying principle of protection of the public remain.

12 (1909) 9 CLR 655 at 681.

fitness for practice (sic)".[13] The obligation requires frankness and honesty about any matters that may reflect adversely on fitness to practise. It is recognised in the authorities that there may be questions about how much is entailed in such a disclosure; but that an applicant must at least disclose anything which they believe should not be left out.[14] Importantly, it has been recognised that candour does not permit "deliberate or reckless misrepresentation pretending to be disclosure".[15]

[16] In relation to past conduct, past discreditable conduct is definitely relevant to fitness, however it is also well recognised that the decision on whether an applicant is a fit and proper person should be governed by an assessment of the applicant's *current* attitude/behaviour, and not *solely* by his past conduct. The tension between past conduct and current good fame and character was dealt with by Martin (BR) CJ in *Re Deo*.[16] With respect I found the following observation helpful:

> The only questions in issue are whether the court should be satisfied that the applicant is of good fame and character, and a fit and proper person to be admitted to practise. While the applicant's past conduct is relevant to the determination of these critical issues, and for that reason evidence as to past conduct is admissible, the question is not whether the applicant was in the past a fit and proper person to be admitted, but whether he is, today, of good fame and character.

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13 *Re Hampton* [2002] QCA 129 at [26]; see also *Thomas v Legal Practitioners Admission Board* (2005) 1 Qd R 331.
14 *Re OG* (2007) 18 VR 164 at 203, para 123.
15 *Re OG* (ibid).
16 (2005) 16 NTLR 102 at [4].

The Referral from the Board

[17] The concerns raised by the Board were broadly in relation to three areas drawn from the material filed and disclosures made by the appellant.

[18] The first concern was in relation to the applicant's first affidavit sworn 6 July 2012 and subsequent disclosures made after further information was requested. In his first affidavit the applicant disclosed that a finding of guilt had been made against him after he pleaded guilty to an offence of being in possession of property reasonably suspected of being stolen in 2004.[17] A related part of this disclosure also revealed other charges dealt with in 2004 of which the Court of Summary Jurisdiction found there was no case to answer. Two other disclosures were made by him in relation to charges for criminal offences which were either dismissed at first instance or in the case of one charge, a conviction was set aside on appeal.[18]

[19] In relation to each disclosure the applicant stated that he could not remember the exact details of the offences so he contacted the Magistrates Court to obtain the certificate relevant to each of the proceedings. Those certificates were annexed to his first affidavit, as was a copy of the Court of Appeal decision setting aside the conviction and fine for stealing.[19]

[20] The Board queried the credibility of the applicant's statement that he could not recall the details, particularly in the light of the supplementary affidavit sworn on 9 October 2012 in which the applicant described the factual

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17 S 61 *Summary Offences Act*.
18 First Affidavit, Annexure 'F', Disclosure Statement.
19 *Gadd v Middleton* [2008] NTCA 4.

circumstances of each of the offences. The facts relevant to both the charges which were dismissed and the charge against s 61 *Summary Offences Act* that he pleaded guilty to were set out in that affidavit.

[21] The Board considered that this subsequent disclosure would suggest a lack of credibility in the applicant's initial explanation. The Board considered this was a relevant matter for the purposes of s 30(1)(b) of the Act; it was also relevant to a "suitability matter" under s 11(1)(a) of the Act, "good fame and character". On behalf of the Law Society, it was submitted the applicant's level of disclosure in the first of the three affidavits was "scant and insufficient". This issue was explored in some depth in evidence and submissions before the court and is discussed later in these reasons.

[22] The second area the Board had concerns about was why the applicant had provided a Northern Territory address when he was in fact residing in New South Wales. The Board acknowledged there may be a simple explanation. The Board considered this to be a "suitability matter" under s 11(1)(a) of the Act. This question was similarly explored in evidence before the court.

[23] The referral also draws attention to the status of the disclosure of the criminal offending as a 'suitability matter' under ss 11(1)(a) and (c) of the Act and makes the point that the offending is a relevant matter under s 30(1)(b) *Legal Profession Act* regardless of whether or not a conviction was recorded.

[24] The process of assessing whether the applicant is a fit and proper person involves not only the specified suitability criteria, (including whether he is "currently" of good fame and character), but involves assessing all of the relevant matters that bear on his fitness to hold the office of a legal practitioner. Relevant here is the past conduct of the applicant including one finding of guilt and matters of conduct which might, as a matter of ordinary experience put the court or an interested party on notice that further inquiry as to the applicant's fitness to practise may be prudent.[20]

[25] Although the applicant was acquitted of all remaining charges, it is appropriate in my view to consider whether any associated conduct remains of concern to the assessment of the applicant's fitness. Full respect must however be given to the acquittals. This is not an occasion to revisit those verdicts. Both the applicant's level of frankness and honesty towards the Board and the court must be considered as well as the applicant's current character. The history of disclosure and the applicant's explanations for the manner in which he disclosed the matters are the subject of evidence before the court.

Evidence before the court

[26] The evidence relied on by the parties includes the three 3 affidavits[21] filed by the applicant in these proceedings, and the oral testimony given by the applicant, primarily, by way of cross examination and re-examination. On

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[20] *Re Del Castillo* (1998) 136 ACTR 1. I accept this case is decided under different legislation but it remains a useful statement in terms of conduct that needs to be disclosed.

[21] 6 July 2012; 9 October 2012; 5 February 2013.

behalf of the Law Society, transcripts of past proceedings that had been taken against the applicant in relation to the matters he disclosed were filed.[22]

[27] The Law Society was also permitted to subpoena police investigation files relevant to the applicant. None of that material was tendered but counsel for the Law Society put what were described as notes of a record of interview to the applicant in cross examination.

[28] As already referred to, the applicant's first affidavit, sworn on 6 July 2012, contains disclosures in Annexure 'F'. The applicant stated he had "no recorded convictions, except for traffic offences". He said he "could not remember the exact details of the offences" he was charged with, however, included in the Annexure 'F' are 3 separate disclosure documents. The disclosure documents also state that because he could not remember the details, he contacted the Magistrates Court to obtain a Certificate of Proceedings in relation to each disclosure. Those certificates are also produced in Annexure 'F'.

[29] Disclosure 1(a) includes a Certificate of Proceedings for a charge of possess stolen property under section 61 of the *Summary Offences Act.* The applicant disclosed he pleaded guilty to that charge. The Certificate of Proceedings shows the offence was committed in 2003 and he was dealt with in the Court of Summary Jurisdiction on 4 June 2004. The property

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[22] Affidavit's of Kellie Anne Grainger, 27 November 2012; Transcript of proceedings 14 July 2004; 12 October 2007; and 21 November 2008, Court of Summary Jurisdiction, Darwin.

concerned was a mobile phone. Without proceeding to conviction he was fined $400 with a victim's levy of $40 and ordered to pay compensation of $250. The further Certificate of Proceedings relating to Disclosure 1(b) shows that for three other offences charged and alleged to have been committed in April 2003 the court found no case to answer and the prosecution was ordered to pay costs.

[30] Disclosure 2 includes a further Certificate of Proceedings for a charge of stealing alleged to have been committed by the applicant in September 2006. As noted, a conviction for this charge was set aside on appeal and the information dismissed. A copy of the decision of the Court of Appeal was also included as part of this disclosure.[23] The third and final disclosure document included a Certificate of Proceedings from the Court of Summary Jurisdiction for three offences that were alleged to have been committed on 16 December 2007. The Certificate of Proceedings shows the applicant was found not guilty for the first two offences, (assault and impersonating a member of the police force), and for the third offence it was found there was no case to answer (drive unlicensed).

[31] The applicant was informed by the Registrar by letter of 26 July 2012,[24] that further details needed to be provided by him. The Registrar's letter also informed the applicant that his first affidavit was not signed on every page

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23 *Gadd v Middleton* [2008] NTCA 4.
24 Exhibit 4 in these proceedings.

and his date of birth was obviously incorrect.[25] The applicant was asked to provide detailed information about the matters he had disclosed to enable him to be assessed. It was also requested he attach a police report. As noted later in these reasons, the Police Certificate contained no notation of the charges the applicant disclosed himself in his first affidavit.

[32] The applicant's second affidavit, sworn on 9 October 2012 provides a significant amount of detail about the facts and the circumstances surrounding the criminal charges disclosed in the first affidavit.[26] In this affidavit he apologised to the Board, stating it was not his intention to be vague or provide inadequate information. He also explained that during the period (2000 – 2004), due to domestic violence from his step father he was homeless; he could not stay with grandparents for various reasons but he would store things at their home. He acknowledged he was at fault with both the offending he pleaded guilty to and to being at fault in relation to other conduct not strictly the subject of charges. He stated he should not have purchased anything from the person who had the suspect property. The applicant also provides a lengthy description of the events, from his perspective, of all matters he was acquitted of.

[33] In this affidavit he provided information about his changed attitude, changed life and commitment to legal practice. He confirmed he worked as a para-legal continually for four years, and for the last 10 months of it at the

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25 The first affidavit had the year "2012". It should have been "1980" and was corrected in the second affidavit.

26 Annexure 'A'.

Australian Government Solicitor. Also annexed to the second affidavit is a copy of the applicant's 'National Police Certificate'[27] that details traffic offences for which he was convicted and he received fines. As mentioned above, none of the disclosures he made for the offences he was acquitted of nor the offence he pleaded guilty to were listed on the National Police Certificate.

[34] On 21 January 2013, the Law Society contacted the applicant's legal counsel by letter.[28] The Law Society set out the issues which would be raised in court as to the fitness and propriety of the applicant for admission.

[35] The third and final affidavit sworn by the applicant on 5 February 2013 is effectively a response to that letter. It included an explanation as to what the applicant meant when he originally said he could not remember the exact details. He explained he could not remember what all of the charges were and could not remember the technical details of these charges. He said that was the reason why he contacted the Magistrates Court to obtain correct details for the Board and the court.

[36] It was submitted on the applicant's behalf that there had been a misunderstanding about what the applicant meant in his first affidavit when he said he could not remember all the details. The applicant also gave evidence about a conversation he had with the Registrar where it was explained to him he needed to give some information about "what

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27 Annexure 'B'.
28 Exhibit 1 in these proceedings.

happened".[29] The applicant explained in relation to the disclosure of his criminal history in the first affidavit, that he felt that the Certificates of Proceedings were sufficient to disclose this history. He said he did not realise he had to provide detail as to the surrounding circumstances of the offending.[30] His evidence was:

> "I thought it was okay, you know, to tell them what the charges were. I didn't understand that I had to go through and explain everything that had happened in the lead up or afterwards, your Honour. I didn't know."

[37] In the third affidavit the applicant refers to "being in a rush" and "in a hurry" to file the affidavits and that he had prepared the earlier affidavits without help; he had not prepared this type of affidavit previously and he acknowledged he had made mistakes in them. He was cross-examined at length.

[38] In examination in chief, the applicant confirmed his current address was in North Sydney, NSW. He explained that he had lived in Sydney for 2-3 years. He said that he provided the NT address instead of his NSW address, to ensure service of any court documents because the NT address was where all of his mail went. He stated his address in Sydney changed regularly and by providing his father's address in the NT, the court would be able to reach him easily.

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29 Affidavit of the applicant 5 February 2013, paras 11-13.
30 T page 58.

[39] During cross-examination, the applicant was open to being thoroughly scrutinised about the circumstances surrounding his offending. Although he appeared to be nervous, which may be understandable in the circumstances, he provided clear and considered answers. He struck me as being sincere and more than willing to give comprehensive answers.

[40] Counsel for the Law Society questioned the applicant extensively about his prior criminal history. His attention was drawn to hand written notes taken during an interview with police. As already mentioned, neither party sought to tender those notes. The applicant was forthcoming with information about the charge relating to the possession of stolen property, admitting that "there was no excuse" for his behaviour.

[41] He was questioned extensively about the level of detail included in the affidavits concerning the prior offending, and the details he gave to the police officers at the time of the offending. It was clear that the applicant was struggling to recall the particular detail of the offences as counsel for the Law Society took him to the relevant passages in the subpoenaed material. After being taken to that material, the applicant admitted to having lied to the police officers at a time soon after the offending, and admitted that he did not disclose this in his any of the 3 sworn affidavits. He acknowledged in cross-examination he had given police an address but that he was not living at the address given. He acknowledged he was being questioned about more items of property than the possession of one phone. He had referred to further items in his second affidavit. He also

acknowledged in both his second affidavit and in evidence he had sold some of the items to a friend. He stated "I put in the affidavit as much as I could remember".

[42] In re-examination the applicant confirmed that he could not recall the conversations which comprised the police interview about the property suspected of being stolen property. He said that the first time he had seen the notes in subpoenaed material of the interview was the day of the hearing before this court.[31] It seemed obvious his memory was jogged by being referred to his material. The interview was approximately 10 years ago. I note he disclosed in the second affidavit that he had misled police about not knowing the names of persons that he bought the property from.[32] I do not regard this as an example of a deliberate failure to disclose a material matter.

[43] In relation to the urgency of the submission of the affidavits, the applicant explained during cross-examination that he was hoping to be admitted so that he could provide his family in Indonesia with a more definitive idea of his future plans. He said that at the relevant time he felt he did not want to bring his wife and children to Australia if he had not secured employment after admission. Further, he said it was his preference to have the affidavits submitted by the particular deadline that he had understood was specified by the registry on the Supreme Court website.

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31 T page 56.
32 Affidavit, 9 October 2012, para 9.

[44] The applicant stated that at the time he was preparing documents for admission he thought that the continuation of his employment was contingent on his admission. Since then, however, he has been employed by his employer (Australian Government Solicitor) on a full-time basis as a paralegal.

[45] The applicant was also questioned about his homelessness that he had outlined in the affidavits. He said this extended from the end of 1999 to 2004. He stated that "he did not have a place to call home" and was living in a park and intermittently sleeping on the couches of friends or girlfriends.

[46] Counsel for the Law Society tendered the Legal Profession Admission Guidelines[33] and the sample originating motion and affidavit[34]. The applicant agreed that he used these guidelines to assist him in the preparation of his affidavits

[47] The applicant admitted that he forgot to attach the criminal history check to his first affidavit saying "I think it was I'd forgotten, the whole process of having to apply and attach it. I'd completely forgotten about it."[35]

[48] Counsel for the Law Society questioned the applicant about time limits he may experience by way of deadlines imposed in his current employment. The applicant explained that it would not be uncommon to have a 3-4 week deadline for the matters he works on for the Australian Government

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33 Exhibit 2.
34 Exhibit 3.
35 T pages 39-40.

Solicitor. He said that he may be working on many matters during a particular period of time and admitted to feeling in a rush on those occasions when he is dealing with many matters.[36] He agreed that being in a rush is not a reasonable excuse for putting inaccurate material before the court.[37]

[49] It was suggested to the applicant that he could have sought legal assistance in relation to the completion of his affidavits. He stated that this was limited. He said, although he works with lawyers in his current position with the Australian Government Solicitors in Sydney, he did not feel that the nature of his relationship with those lawyers would allow him to ask for their assistance in writing the affidavits. The applicant stated that he did not wish to bother Mr Rex Wild QC as he was a busy professional. He admitted he could have asked Mr Howard Bell for assistance. He indicated he had wanted to prepare his admission documents himself.

[50] In re-examination it was pointed out that the Certificates of Proceedings attached to the first affidavit were dated 3 weeks prior to the affidavit being sworn. Based on this fact, Counsel for the applicant questioned the applicant as to why at that time he "was in a rush". The applicant proceeded to explain that "it turned out to be a reasonably complex process."[38] .

[51] The applicant further explained in relation to legal assistance sought, that he was initially unaware of the complexity of the process and was under the

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36 T page 29.
37 T page 30.
38 T pages 56-57.

impression that he could complete the affidavits without the assistance of a qualified legal practitioner. However, upon realising how complicated the process was, he engaged a solicitor.

Evidence about the Applicant's Current Character

[52] Annexure E1 is the certificate of good fame and character prepared by Mr Howard Charles Bell OAM, legal practitioner. He describes the professional history of the applicant, stating that he has previously worked as a paralegal at the WorkCover Authority for a period of 12 months in NSW where he worked on prosecutions and various "sensitive legal matters." Further, he stated the applicant now works for the Australian Government Solicitor as a paralegal and has worked there for over 7 months where "he is responsible for overseeing large sums of trust monies on a daily basis, and he just recently completed the purchase of over 20 million dollars worth of water entitlements for the Commonwealth of Australia in NSW ... ". He states the applicant is actively involved in community volunteering work with 'CANA Communities' of which Mr Bell is a board member.

[53] Mr Bell acknowledged his awareness of the prior criminal history of the applicant and the outcome of each proceeding. Mr Bell attested to the applicant's honesty and integrity in his professional capacity and thus his suitability for admission.

[54] Annexure E2 is the second certificate of character written and sworn by Mr Rex Wild QC, a senior member of the Northern Territory legal profession

and former Northern Territory Director of Public Prosecutions. Mr Wild's reasons for providing the certificate are set out. Mr Wild explained that he used to play competitive hockey with the applicant between 1993 –1996 and has remained in contact with the applicant's father. Mr Wild explained his understanding of the criminal history of the applicant, stating that the applicant "candidly admitted that he fell into bad company". Further, "he has disclosed to me what at first blush seems to be a significant history of offending". Mr Wild acknowledges that although he was the Director of Public Prosecutions at the time of the actual and alleged offending, he was not made aware of the offending when he was in that role. Mr Wild goes on to explain his view that for those charges which were dismissed and did not proceed to trial, the applicant is entitled to the presumption of innocence.

[55] Mr Wild acknowledges the applicant's family ties in Indonesia and his volunteer work in a homeless shelter in inner-city Sydney. Finally, Mr Wild notes the applicant's work as a paralegal for the Australian Government Solicitor in Sydney and the honesty and integrity with which he has handled matters in this position, including dealing with large sums of trust monies. Mr Wild concludes by stating he is assured that the applicant's "bad days are behind him" and that he believes the applicant is now a fit and proper person for admission.

Discussion of the Issues

[56] After hearing the applicant and noting the original disclosures made, by providing the formal Certificates of Proceedings of each and every charge he

has faced and the copy of the Court of Appeal decision, I am satisfied the applicant intended to disclose all past misconduct to the Board that he believed he was obliged to disclose. He disclosed not only the one charge he pleaded guilty to but also the later charges where a court found he had no case to answer or found he was not guilty.

[57] None of the details provided in the Certificates of Proceedings are doubted. I agree he should have given a description himself of the surrounding circumstances of each charge to give a fuller account, but I find the omission to give a description of events from his own perspective was not deliberate.

[58] None of the matters disclosed by the applicant appeared in the Police Criminal History. None were brought to the attention of the Board by any other party. Of course, he should have followed the guidelines more carefully and included the Police History, but as it turns out he disclosed much more than was on the history.

[59] The offence he pleaded guilty to was committed approximately nine years before he applied for admission. It is a suitability matter under s 11(1)(c) *Legal Profession Act* (NT). The offence for which he was acquitted on appeal was alleged to have occurred approximately six years before he applied for admission. Other offences he was acquitted of were alleged to have occurred between approximately five and nine years before the application for admission. It seems reasonable, given the effluxion of time,

for the applicant to have obtained the correct details, (dates, particulars, outcomes), from the Magistrates Court by way of the Certificate of Proceedings to at least give accurate details in terms of formal particulars to the Board. The reasonable concern of the Board was that this did not reveal the full factual circumstances.

[60] In my view the omission to describe the circumstances fully in the first affidavit when he disclosed the formal details of all proceedings is not in the same category as the cases where the omission or lack of candour is deliberate or reckless. I agree he should have given an examined description of events, but I do not accept the failure to do so was a deliberate omission.

[61] In *Re Deo,* Martin (BR) CJ referred to the past conduct of that applicant as being relevant to his application for admission and the obligation to disclose. Proper disclosure demonstrates an applicant has a proper perception of their duty. If there is a failure to disclose information, the applicant's motivation for not making the disclosure is of particular importance.[39] I am satisfied the applicant here intended to disclose the details he thought were required. The lack of further description of the surrounding circumstances, effectively his subjective understanding and recollections of the circumstances of the offending is not of the scale or quality described in *Re Deo*. In relation to the applicant there, Martin (BR) CJ said:

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[39] *Re Deo* (2005) 16 NTLR 102 at [68].

> " … I am satisfied that the applicant has repeatedly displayed a lack of candour with the court and over a significant period has sought to avoid placing before the court material that he perceived might be adverse to his application, but which he knew would be regarded by the court as of significance to the question whether he is a fit and proper person to be admitted to practise."

[62] Given the disclosures made by the applicant, I would not make the same finding here. In as much as his motivation for the offending that he pleaded guilty to is not disclosed, (as submitted by counsel for the Law Society), it is implicit, if not express that the applicant took advantage of a suspicious situation with his then associates, when his personal circumstances were of a poor quality. His disclosure in the second affidavit goes to further matters than the particulars of the single charge he pleaded guilty to, although this disclosure was potentially adverse to his application. In my view this illustrates he has been prepared to disclose what he remembers, even those details that may not otherwise have come to light.

[63] There is a heavy burden on applicants seeking admission to ensure they proceed fully and frankly and with candour in relation to disclosure of issues that may be adverse to their application.[40]

[64] Unlike the case of *Re Deo,* I am not satisfied the applicant demonstrated a "serious and reckless laxity in his approach to his application for admission".

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[40] *Thomas v Legal Practitioners Admissions Board* (2005) 1 QD R 331 at [334]; *Re OG* (2007) 18 VR 164.

[65] There is no issue here, as there was in *Saunders*[41] of the applicant not accepting responsibility that he engaged in criminal conduct. When he described the full circumstances of the first disclosure, it did place the offending in a more serious light than the bare particulars because he described he had been on selling other goods obtained that were suspected of being stolen. The handling of these other goods that would appear not to have been the subject of a charge constitutes conduct relevant to fitness. This conduct is closely associated both to the underlying facts of the charge he pleaded guilty to and to the counts he was acquitted of on 14 July 2004. In my view the disclosures about the surrounding conduct in the second affidavit and in his evidence illustrates his acceptance of responsibility to a significant level and his willingness to disclose adverse circumstances.

[66] In relation to the second disclosure, (for which he was acquitted on appeal), the Law Society submits his conduct was more serious than the disclosure indicates as he was working as a security officer at the store from which goods were stolen. It follows he was under a duty to prevent loss from the store. Notwithstanding his acquittal, the applicant stated in the second affidavit: "I accept that it was partly my own actions that lead to the events above. If I had done was (sic) I should have done and either confronted Justin Lovett or reported the incident I wouldn't have been implicated in this incident". In my view accepting and disclosing that he believes he was

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41 (2011) 29 NTLR 204.

at fault, although not at the level of committing a criminal offence, indicates a high sense of moral responsibility and openness about the circumstances.

[67] In answer to the Law Society's letter of 21 January 2013 seeking information on this point, the applicant explained how he had at first thought there was something odd occurring at the store; he was working in a different part of the store but when he did approach a particular person they seemed "fine". Further details are given by the applicant but it seems clear the applicant accepts he misjudged the situation. Given the acquittal and given in any event his regret at not being more pro-active, I would not make an adverse finding in relation to his character on the basis of his added duties as a security officer and failure to prevent loss. That further details were given in a third affidavit should not be held against him when he was effectively answering a particular inquiry by the Law Society.

[68] I agree the applicant was obliged to address these matters, however, once he understood the obligation went beyond the formal record and to full factual disclosures, he made significant and potentially adverse disclosures.

[69] The finding of guilt for the offence of possession of goods reasonably suspected of being stolen is a matter of suitability under the Act and along with the associated conduct disclosed of having sold other goods and having misled police are matters that go to fitness and to good fame and character. Unlike the case of *Saunders*,[42] this applicant has clearly accepted

[42] *In the matter of an application by Thomas John Saunders* (2011) 29 NTLR 204, at [24] and [28].

responsibility. To illustrate the contrast, in *Saunders* Riley CJ found in relation to that applicant:

> In all the circumstances I find that the applicant knew at the time of the offending that he was committing a criminal offence. His subsequent assertions to the contrary are fanciful and reflect an effort on his part to minimise his culpability. They demonstrate that, at the time of giving evidence, he was not fully accepting of responsibility for the course of criminal conduct he had undertaken.
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> ...
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> In my opinion to attempt to explain the offending by reference to a failure on the part of Centrelink is to fail to accept and acknowledge the level of criminality involved in the deliberate and calculated withholding of information by the applicant over a period of months.

[70] That is not the case here. I would be unable to make such a finding. The applicant has well accepted his previous wrongdoing.

[71] Given the time since the offending and the associated conduct, (I refer here primarily to 2003) and especially given the applicant's completely different lifestyle[43] where he now works in situations involving a high degree of trust on a sustained level, in my view these matters while of course serious, do not count against the applicant in the same way as they would have at an earlier time.

[72] In relation to the charges that have not resulted in findings of guilt, it is important that he like any person be given the full benefit of an acquittal. I accept, however, that the *Legal Profession Act (2006)* and the test for fitness

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[43] See eg. paras [33], [52] – [55], [82].

to be admitted as a legal practitioner embraces misconduct that falls short of criminal conduct.[44] Although under different legislation, the observation in *Re De Castillo* is apt.[45] Matters of ordinary experience that put the court on notice as to fitness should be disclosed. In *Re De Castillo* the applicant had been acquitted after trial for murder. The court there held that fact should have been disclosed.

[73] In relation to the charges relevant to part (b) of disclosure one, there was a formal finding of no case to answer in relation to all counts. As indicated, there was, however conduct surrounding those offences that is referrable to the applicant's disclosure about having sold stolen or suspect property. This was referred to in the reasons of the learned magistrate.[46] As discussed above, this was disclosed by him when explaining the broader facts relevant to the possession of goods reasonably suspected of being stolen and to the charges resulting in the finding that there was no case to answer. It is an issue of conduct adverse to him that is relevant to fitness. Misleading statements to police, although it is difficult to be precise about what they were, are also examples of conduct relevant to fitness. It is separate conduct from the charges dismissed on the basis of there being no case to answer.

[74] The offences of assault and impersonate a police officer referred to in disclosure three, were clearly dismissed by the learned magistrate hearing

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44 Eg. such as plagiarism: *OG* (2007) 18 VR 164.
45 (1998) 136 ACTR 1.
46 T 14 July 2004.

the matters.[47] Unlike the disclosures made in disclosure 1(b), I can discern no surrounding discreditable behaviour. The charges were denied by the applicant. The learned magistrate hearing the charges said the evidence fell "well short" of proof.[48]

[75] Aside from the matters raised by virtue of Disclosure 1 which obviously impact on whether the applicant is a fit and proper person, I do not find any further discreditable conduct.

[76] The Law Society's submissions expressed concern about the applicant's statement in his third affidavit about being "rushed" and "in a hurry" to complete his first affidavit. I agree this is of concern given the pressures that legal practitioners work under. It is not an excuse for placing inaccurate material before the Court. I do not take the applicant to be suggesting this was an excuse for any mistakes but was an explanation based on his understanding of relevant dates for submission of material as well as personal and employment issues. In evidence the applicant has explained in some detail about his circumstances, why he felt the need to rush and why he did not seek legal assistance at an earlier time. In my view it would be wise for applicants whose admission application is complicated to obtain advice.

[77] The Law Society also raised the fact that the applicant was studying law at the time of the misconduct, therefore showing a disrespect for the law and

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47 T 21 July 2008 at 2-7.
48 T 21 July 2008 at 7.

the conduct was antithetical to the applicant's legal study. The applicant explained in his affidavit of 5 February 2013 that he tried to study law during the relevant period but given his circumstances outlined in the earlier material, he withdrew from courses between July 2001 and July 2005 and was not actively studying during this time. I agree this may be relevant in some cases but is not of significant weight in these circumstances.

[78] I accept the applicant was not a youth at the time of any of the misconduct. He was, in relation to all incidents was between 23 – 25 years of age. At that age he was still young. He has however obviously matured and accepted responsibility for the previous conduct. The evidence is that he moved to Sydney and some time ago has resolved not to have contact with the persons he was associating with. Although his misconduct in the past is relevant, I must also consider his current situation.

[79] His previous conduct and his attitude since then may be contrasted with the applicant in *Saunders.*[49] His Honour Riley CJ considered in that case whether that applicant had demonstrated an attitudinal shift, and a change in behaviour over time. His Honour made the point that this had to be determined by reference to his current conduct rather than his past conduct.

[80] *Re Saunders* involved the applicant receiving financial benefit from failing to accurately report income to Centerlink and thus receiving more money than he otherwise would have. He claimed to have been unaware, or did not

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[49] (2011) 29 NTLR 204.

at the time turn his mind to the criminality of his conduct. That claim was rejected by His Honour.[50]

[81] Riley CJ discussed the timing of the assessment of fitness:

> It is not disputed that the nature of the offending meant that the applicant was not a fit and proper person to be admitted at the time of the offending. The issue is whether he is a fit and proper person at this time. The applicant has not provided either the Board or the Court with any substantive information regarding his conduct and behaviour during the intervening period. Nothing of substance has been placed before the Court to demonstrate his rehabilitation.[51]

[82] In my view the applicant here has provided significant detail demonstrative of rehabilitation. I have already summarised some of that material.[52] The applicant states he has taken the deliberate step of avoiding the people he was involved with and moved away from Darwin to Sydney. He is now married and the father of two children and states he is a more mature person and responsible father. As well as finishing his Bachelor of Laws degree he has almost completed his Master of Law degree at the University of Sydney. He has worked for four years as a paralegal. Both positions have involved being in a position of trust. He volunteers at a homeless shelter and hopes to volunteer at a Community Legal Centre should he be admitted.

[83] In *Cohen v Legal Practitioners Admissions Board (No 2)*,[53] the Queensland Supreme Court found an applicant to be a fit and proper person despite his previous misgivings and criminal history. This included bankruptcy, driving

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50 At [19].
51 At [40].
52 See at paras [33], [53], [53], [54], [55].
53 [2012] QCA 106.

offences, and his company's failure to lodge BAS statements. It was the applicant's attitude towards his corporate directorship which principally founded the challenge to his fitness and propriety.

[84] McMurdo P discusses the temporal nature of the fit and proper test as established by the case law:

> In light of Mr Cohen's unimpressive background, deciding whether he has demonstrated his suitability for admission as a difficult and finely balanced question, despite his recent work with Ms Douglas and her strong evidence in his support. In determining the suitability of an applicant for admission as [a] legal practitioner, the court is not concerned to punish an applicant for past misconduct but seeks to ensure the public is well served by the legal practitioner in whom they place their trust, and to maintain the confidence in the legal profession as an institution which serves the public.[54]
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> ...
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> What can be said in Mr Cohen's favour on the issue of disclosure to the board is that, at least since 2009, it has been full and frank. He has shown persistence, resilience and determination in attempting to satisfy this court of the rightly stringent suitability requirements for admission which followed from his unsatisfactory past.[55]

[85] Ultimately, the three judges in this matter decided that the onus had been discharged and that the applicant had proven he was a suitable to be admitted as a legal practitioner.

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54 *Cohen* at [12].
55 *Cohen* at [14].

[86] *Re Hampton*[56] involved a male nurse charged with discreditable conduct, inappropriate dealings with females in his capacity as a nurse, and also performing a nursing service while not registered as a nurse.

[87] Counsel for the applicant distinguished *Re Hampton* from the current facts as in *Re Hampton*, although no conviction was recorded by the relevant magistrate, the applicant made no disclosure as to the charges against him. I agree there is a significant difference. Similarly, in *Re OG*,[57] concerning an applicant who engaged in academic misconduct, (plagiarism), it was submitted it was not so much the conduct that prevented admission, but rather the extent to which the misconduct was disclosed.

[88] In *Re Tkacz*,[58] the Western Australian Supreme Court held that the applicant there should be admitted to practise despite a prior criminal history. His prior criminal history was a conviction after trial of being a public officer who, without lawful authority, acted corruptly in the performance or discharge of the functions of his office so as to gain a benefit.[59] He was acquitted of a further count. Counsel for the applicant in the present case compared the current fact situation with this case by referring to the period of time between the offending and the application for admission. In *Re Tkacz* the conviction was imposed three years before the application to be admitted, whereas here, the finding of guilt was in 2004, eight years before application was made to be admitted.

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56 [2002] QCA 129.
57 (2007) 18 VR 164.
58 (2006) FLR 171.
59 Contrary to s 83(c) *Criminal Code* (WA).

Conclusion

[89] I conclude the relevant conduct to be considered in relation to whether the applicant is a fit and proper person is the conduct leading to the finding of guilt for the charge of possession of goods reasonably suspected of being stolen together with the conduct that was not the subject of any charge but has been disclosed by the applicant concerning possession and selling of other goods that may have been suspect. Associated misleading answers to police are also relevant. This conduct took place in 2003. The nature of the misconduct is of the type that the court is particularly concerned about in relation to admission as a legal practitioner as it involves dishonesty. There are, however, other factors to be considered.

[90] The finding of guilt, ("conviction" under the *Legal Profession Act*) was in June 2004. It is clearly a suitability matter under s 11(1)(c) *Legal Profession Act*. Because of the circumstances under which the offence was committed, the length of time since the commission of the offence; the obvious rehabilitation of the applicant; the age of the applicant at the time and the current circumstances of the applicant, in my opinion this does not deprive him of *now* being considered to be a person of good fame and character. The court is permitted under s 30(2) of the *Legal Profession Act* to consider a person fit and proper despite a suitability matter because of the circumstances. In my opinion the circumstances exist to enliven s 30(2) of the Act.

[91] Although the related conduct of possession and selling goods other than the mobile phone was not the subject of a charge, it is still conduct to be considered under s 30(1)(b) "any other matter it considers relevant". Misleading conduct towards police at the time is similarly relevant. For similar reasons however, as with the charge of possess property reasonably suspected of being stolen, I do not consider the previous associated misconduct to be a bar to this applicant being regarded as a fit and proper person and someone who is now of good fame and character. Apart from the misconduct specified, I do not consider the charges resulting in acquittal or associated conduct, after examination, to be matters relevant to fitness.

[92] I conclude the earlier inadequate disclosure has been explained and was not deliberate on the part of the applicant. The inadequacy has been rectified.

[93] Although at the time of the offending the applicant would not have been a fit and proper person and would have had no claim to being of good fame and character, both the applicant and his circumstances have changed markedly. The Certificates of good fame and character by Mr Bell and Mr Wild QC indicate this is a well sustained and entrenched change.[60] The applicant is *now* of good fame and character. The Law Society does not assert the contrary, although in my view it was appropriate that the Law Society scrutinize the relevant aspects of the applicant's conduct and disclosures. I have no doubt that after being subject to this level of scrutiny the applicant

[60] Paras [52] – [55].

is well aware of his obligations to the court in terms of candour and accuracy.

[94] The declaration is that the applicant is a fit and proper person to be admitted as a legal practitioner of this court.

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