In the matter of an application by Mariel Jessica Sutton
[2016] NTSC 9

PARTIES:	THE LEGAL PROFESSION ACT 2006 AND IN THE MATTER OF AN APPLICATION BY SUTTON, Mariel Jessica
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	LP 26 of 2015 (21533502)
DELIVERED:	19 FEBRUARY 2016
HEARING DATES:	7 JANUARY 2016
JUDGMENT OF:	HILEY J

CATCHWORDS:

LEGAL PRACTITIONERS (NORTHERN TERRITORY) – Application for admission to practice as a lawyer – application referred by Legal Practitioners Admission Board– fit and proper person – suitability matters – Disclosure Guidelines for Applicants for Admission to the Legal Profession - duty of full and frank disclosure – duty of candour –– misleading statement in initial affidavit regarding Centrelink debt following overpayment of Youth Allowance – not deliberately misleading – not reckless laxity of attention to necessary principles of honesty – subsequent acknowledgement of errors – proper appreciation of obligations of candour and honesty.

Legal Profession Act 2006 (NT) s 11(h), s 25, s 30(1)(a)-(b), s 32(1), (3); *Legal Profession Admission Rules* r 10, r 18; *Disclosure Guidelines for Applicants for Admission to the Legal Profession.*

In the matter of an Application by Thomas John Saunders [2011] NTSC 63; *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655; *Re Deo* (2005) 16 NTLR 102, applied.

Re Hampton [2002] QCA 129; *Thomas v Legal Practitioners Admission Board* (2005) 1 Qd R 331, distinguished.

Re Gadd [2013] NTSC 13; *Re OG (A Lawyer)* (2007) 18 VR 164; *Re Onyeledo* [2015] NTSC 60; *Wentworth v NSW Bar Association* (1992) 176 CLR 239, referred to.

REPRESENTATION:

Counsel:

Applicant:	M Crawley
Law Society Northern Territory:	W Roper

Solicitors:

Applicant:	De Silva Hebron
Law Society Northern Territory:	Law Society Northern Territory

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

In the matter of an application by Mariel Jessica Sutton
[2016] NTSC 9
No. LP 26 of 2015 (21533502)

BETWEEN:

IN THE MATTER OF

THE LEGAL PRACTITIONES ACT 2006

AND:

IN THE MATTER OF AN APPLICATION BY

MARIEL JESSICA SUTTON

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 19 February 2016)

Introduction

[1] Mariel Jessica Sutton (the **Applicant**) applied to be admitted as a local lawyer pursuant to s 25 of the *Legal Profession Act 2006* (NT) (the **Act**). Her application was accompanied by an affidavit made by her on 8 July 2015 (the **First Affidavit**). Following consideration of her application by the Legal Practitioners' Admission Board (the **Board**) she was requested to provide more information by way of a further

affidavit in relation to an overpayment made by the Department of Human Services (**Centrelink**), which she had disclosed in paragraph 20 of her affidavit.[1]

[2] The Applicant had received Youth Allowance from 28 March 2014 on the basis of her studying full-time in a course which was to end on 1 November 2014. She became ineligible for that allowance on or about 14 July 2014 when she commenced employment as a graduate clerk with De Silva Hebron Barristers and Solicitors (**De Silva Hebron**), and was to continue studying only as a part-time student from 22 July 2014. She continued to receive the allowance until 28 August 2014, which meant that she had been overpaid an amount of $1465.28. She repaid this debt by fortnightly instalments between October and December 2014.

[3] The Applicant did not disclose this detail in the First Affidavit. After making enquiries with Centrelink she provided a further affidavit on 7 October 2015 (the **Second Affidavit**).

[4] The Board considered her application again on 15 October 2015 and resolved to refer to the Court, pursuant to s 32(1) of Act, the issue of whether or not the Applicant is a fit and proper person to be admitted to the Supreme Court. A memorandum dated 19 October 2015 entitled "Application for Admission by Mariel Jessica Sutton" signed by the

[1] Letter dated 15 July 2015 reproduced at Annexure MJS1 to the Affidavit of Mariel Jessica Sutton made 7 October 2015 (the Second Affidavit). See page 21.

Chairperson of the Board (**the Memorandum)** was sent to the Chief Justice.[2]

[5] The main concerns of the Board were the inadequacy of the Applicant's disclosure in paragraph 20 of the First Affidavit and her assertions that she was not aware of her obligations to Centrelink and her apparent lack of candour in her Second Affidavit in trying to explain "a relatively minor infraction".

[6] Written submissions were provided on behalf of the Applicant and by the Law Society Northern Territory (**LSNT**) acting as amicus curiae. The Applicant gave evidence at the hearing of her application on 7 January 2016 and was cross-examined by counsel for LSNT.

Relevant facts

First Affidavit

[7] In her affidavit of 8 July 2015 the Applicant disclosed a number of matters including incurring and failing to pay parking fines and suspension of her driver's licence as a result of unpaid parking fines,[3] two or three traffic infringements for speeding and one for driving

[2] The memorandum is Annexure "KAG1" to the affidavit of Kellie Anne Grainger sworn 16 December 2015.
[3] First Affidavit [12] – [14] and [18].

through a red light,[4] and a previous debt to Centrelink on account of an overpayment of benefits after she ceased to be a full-time student.[5]

[8] By way of explanation for her failure to pay the parking fines and the consequent suspension of her driver's licence, the Applicant said that she only found out about the suspension of her licence when she was attempting to pay a parking fine and was told by someone at the Fines Recovery Unit that a letter had been sent to her address. She said that she did not receive such a letter and explained that she had been having problems receiving mail at her home address from others such as her mobile telephone provider, Power and Water Corporation and her orthodontist. She lives in a block of units and stated that she was receiving advertising material which sometimes was thrown away or removed by her neighbour, and that letters were sometimes found in folded bundles of advertising material left half in and half out of her letter box.[6]

[9] The Applicant also attached two certificates of good fame and character, one from a retired police officer and one from a senior lecturer at a university. Although those certificates referred to the Applicant's speeding infringements, parking fines and to the suspension of her licence for unpaid parking fines, they did not

[4] First Affidavit [19].
[5] Ibid [20].
[6] Ibid [16].

indicate any knowledge of the red light infringement or the Centrelink overpayment.

[10] In paragraph 20 of her affidavit the Applicant said this about the overpayment made by Centrelink:

> I have had a debt to Centrelink for over payment. This arose because I had been receiving benefits on the basis that I was a full time student. The payment continued when I was only doing part time study. I was unaware that this affected the benefit I received as I believed I would only need to inform Centrelink after I commenced employment and earned threshold. I only found out about the overpayment to me when I attended Centrelink to cancel the benefit on the basis that I was going to commence full time employment and therefore would be earning over the threshold to be receiving payment. When advised that I had been overpaid on the basis of my university workload I asked the Centrelink employee if I could pay it back in one payment from my pay from my new employment. The Centrelink Representative advised that I would receive a letter and I could arrange a payment plan. I arranged a payment plan with Centrelink and have paid back all of the money which had been overpaid to me. It was not my intention to defraud Centrelink and it caused me great embarrassment to find out that I had received an overpayment.

[11] The Board considered her application for admission at its meeting on 14 July 2015. On 15 July 2015 the Secretary of the Board wrote to the Applicant advising her that her application had been considered and that:

> The Board was not satisfied with the level of detail set out in your supporting Affidavit concerning the disclosure of Centrelink overpayments. The Board has therefore deferred your application until the next meeting to enable you to provide further information.

> You are required to obtain a copy of the Centrelink file and provide this to the Board via a supplemental Affidavit. The Board will require copies of all notices and letters sent to you setting out your reporting obligations, the period of time over which the overpayment occurred and the amount of the overpayment.
>
> If you wish your application to be considered again at the next meeting which is scheduled for 13 October, please ensure that any further information is provided to the Board by the 7 October 2015.

Further information concerning Centrelink overpayment

[12] On 17 July 2015 the Applicant attended the Centrelink office in Darwin to request a copy of her Centrelink file. She was told that the file could not be provided as it had been closed. She asked if she could be told of the date when she had attended Centrelink and was advised of the overpayments. The person at Centrelink looked at her computer screen and informed the Applicant that this occurred on 8 September 2014. The Applicant said that "this surprised me as in my mind I had thought it was not as long as that since I had started at De Silva Hebron and the time I went into Centrelink."[7]

[13] The Applicant then made a request under the *Freedom of Information Act 1982* (Cth) (**FOI request**) and attached a copy of the Board's letter of 15 July 2015. Although that letter required the Applicant to obtain a copy of the Centrelink file, her request was construed to only cover "all documents provided by Centrelink to Mariel Sutton between

[7] Second Affidavit [54]

1 January 2014 and 31 December 2014. In particular all documents relating to the repayments made and the reporting obligations for circumstances".[8] I understand that the solicitors for both the Applicant and the Law Society of the Northern Territory have attempted to obtain a complete copy of the relevant Centrelink file but their requests were unsuccessful. Consequently, the parties have not been able to provide the Court with all relevant information, in particular, more information about relevant oral communications between the Applicant and Centrelink such as the conversation which the Applicant was told occurred on 8 September 2014, other communications from the Applicant to Centrelink, and information about the "Centrelink letters online" facility.[9]

[14] With the assistance of the information that was provided following her FOI request the Applicant was able to give her further detailed attention to the matter and made the Second Affidavit on 7 October 2015.

[15] In that affidavit the Applicant listed the 30 documents that had been sent to her by Centrelink. Some were emails addressed to her Hotmail email address, some were SMS messages sent to her mobile telephone number, and others were letters initially addressed to an address in

[8] Letter dated 28 July 2015 reproduced at pages 28-29 of the Second Affidavit.
[9] This facility is referred to in a letter dated 11 April 2014, reproduced at page 40 of the Second Affidavit. It appears that that letter was addressed to the Applicant at 12 Fergusson Street Anula NT, which had apparently been the address of her parents before they moved to Adelaide some months prior to April 2014.

Anula (where her parents had previously lived) and subsequently to her address at the unit at Coconut Grove where she has been living since about December 2013. The Applicant said that she only specifically recalled receiving two of those communications, namely a letter dated 8 September 2014 and a letter dated 11 October 2014 [sic].[10]

[16] The only information conveyed in 9 of the 15 emails and SMS messages was that there was a "new Centrelink letter available online". Such emails went on to inform the recipient of the need to create a myGov account and log onto Centrelink services online. The Applicant said in her oral evidence that she did not have such an account and did not attempt to access any letters online by using the Centrelink letters online facility. She also said that she has found copies of the emails in her inbox (three of which were unread) and that they did not attach a copy of any of the letters which were stated to be available online.[11]

[17] The documents reveal that the Applicant's initial request for Centrelink benefits, which was made on 28 March 2014,[12] was rejected for various reasons including her failure to provide certain information. By letter dated 12 May 2014,[13] she was told of a number of documents that were still required and was informed that her claim could be reassessed if she provided those documents within 13 weeks. On 14 May 2014 a

[10] The document identified at item 27 in [8] of the Second Affidavit is in fact dated 13 October 2014, not 11 October 2014.
[11] Second Affidavit [25] – [28].
[12] Ibid page 38.
[13] Ibid page 51.

document was sent to the Applicant advising her that a decision had been made that she would be paid Youth Allowance from 28 March 2014. I infer from this that she probably received the letter of 12 May 2014 and responded by providing the necessary information. I say "probably" because there were subsequent communications from Centrelink still requiring her to provide additional documents to prove her identity.[14]

[18] The initial part of the 14 May 2014 communication[15] stated:

> A decision has been made that you will be paid Youth Allowance from 28 March 2014. Your Youth Allowance is based on you studying full-time at Charles Darwin Uni – Tertiary, Tertiary Group B course with the course ending on the 1 November 2014. If your study load changes or if you cease study you should let us know within 14 days. You can earn up to $415 a fortnight before your income affects your payments because you are now studying or training full-time. If you earn less, you can accumulate up to $10,300 in an Income Bank.

[19] Then followed several pages of information which included a long paragraph which started with the following sentences:

> What you must tell us. You must tell us within 14 days about events or changes in circumstances affecting your payment. … You can tell us about these changes via self-service (online or phone), in writing (fax or post) or visiting one of our service centres.

[20] Some of the other documents referred to matters which were not relevant (such as documents enquiring about her medical condition)[16]

[14] See for example letter dated 26 May 2014 at 58.
[15] Second Affidavit page 54.
[16] Second Affidavit [10] – [21].

or were misconceived (such as the letter of 1 September 2014).[17] The letter of 1 September 2014 stated that "[w]e are unable to pay you Youth Allowance from 22 July 2014 because you do not meet the age requirements."[18]

[21] The Applicant specifically recalled receiving the letters of 8 September 2014 and 11 October 2014 [sic] because she was expecting them following her attendance at the Centrelink office on 8 September 2014.[19]

[22] The letter of 8 September 2014[20] referred to the overpayment:

> Why this amount is payable. As you ceased studies on 21 July 2014 you were not entitled to receive Youth Allowance from 22 July 2014. As a result you have been overpaid $1465.28. We are required to recover this amount. Details of the amount payable for Youth Allowance Period Received Entitled Amount 22 Jul 2014 to 28 Aug 2014 $1465.28.

[23] The letter of 11 October 2014 [sic] was a formal letter from Centrelink advising the Applicant of the amount owing and that it was payable on 7 October 2014.[21]

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[17] Ibid page 72.
[18] The Applicant was born on 2 December 1989. I understand that an eligible person can receive the Youth Allowance until they turn 25. See [22] – [23] of the Affidavit of Mariel Jessica Sutton made 7 October 2015.
[19] Second Affidavit [9].
[20] Ibid page 74. Unlike a few of the documents in the Centrelink material, for example the document dated 21 August 2014 (at page 71) and the document dated 13 October 2014 (at page 76), this document appears to be an electronic communication to rather than a letter as such. For convenience, I shall continue to refer to this document as a letter, that being the language used by the applicant and others during this proceeding.
[21] Ibid page 76.

Second Affidavit

[24] The Applicant's affidavit of 7 October 2015 comprises 73 paragraphs and has nine annexures.

[25] After listing the 30 emails, SMS messages and letters sent by Centrelink following her FOI request, the Applicant provided information under the headings "Letters and emails" ([9] – [29]), "Background to Centrelink overpayments" ([30] – [51]), "Disclosure" ([52] – [65]), "Problems with receiving post" ([66] – [67]) and "Character references" ([68] – [72]).

[26] Although the Applicant did not specifically recall receiving any of the Centrelink communications (apart from the letters of 8 September and 11 October 2014 [sic]) she did recall a number of conversations with Centrelink representatives, and copying and providing proof of identification documents. She commented on references in some of the Centrelink documents to her medical condition, a Low Income Health Care Card, and exemptions from Income Management, none of which would appear relevant to the benefits which she was receiving, namely Youth Allowance.

[27] The Applicant confirmed that she had received the emails and the SMS messages of 8 April, 11 April and 16 April 2014. Three of the emails were unread. She has no recollection of receiving those SMS messages. At [29] she said:

> I acknowledge that Centrelink did send me a large number of correspondences which outlined my reporting obligations. However, with the benefit of hindsight, I now see that I did not give that correspondence the attention that it deserved and this is something I very much regret.

[28] Under the heading "Background to Centrelink overpayments" the Applicant said that she had separated from a long term partner in late November 2013 and moved into a property by herself a week later. She said that this was a significant change in her circumstances as she had never lived alone before or lived solely off her own income. The Applicant said that she first sought financial assistance on 28 March 2014 when she contacted Centrelink. At that time she was undertaking four subjects at Charles Darwin University, which constituted full-time study. If she successfully completed these subjects during the first semester she would only have two subjects to undertake in the second semester, which was to commence in July 2014.[22]

[29] The Applicant said that she understood that she would have to advise Centrelink of changes in her circumstances such as the cessation of her studies and the commencement of full-time employment. Having subsequently read the Centrelink correspondence, she acknowledged that if she did receive the correspondence:

> I did not read them to the extent they deserved as I did not understand my reporting obligations in the terms set out in those letters. As a result I did not properly appreciate my reporting obligations and I therefore did not know or understand

[22] Second Affidavit [30] – [35].

> that I was required to advise Centrelink that in Semester 2 of 2014 that I was only undertaking two subjects.[23]

[30] At [38] of her affidavit the applicant said:

> I appreciate that this is not a reasonable excuse, and that as a recipient of benefits it was my responsibility to be aware of the conditions for receiving such benefits. I now understand that I did not give the correspondence from Centrelink the attention they deserved, particularly now that I have the benefit of hindsight. I have learnt a considerable lesson from this experience and now understand the importance of giving correspondence my thorough attention so that I understand both my rights and responsibilities in relation to entities with whom I have dealings.

[31] The Applicant commenced working with De Silva Hebron on 14 July 2014, as a graduate clerk. She was very unwell at the time and put her focus into her new job. She received her first payment for her new job on 24 July 2014.

[32] The Applicant said that she attempted to telephone Centrelink to inform them that she had started working full-time within the first fortnight of starting work, and again after she had received her first payment. She said that she was unable to get through to a person in order to discuss the cessation of payments, due to the necessity to quote her Centrelink reference number when requested to do so by Centrelink's automated answering machine. The Applicant said she gave up in frustration and did not try to call again. She acknowledged

[23] Second Affidavit [37].

that “I should not have done that and accept that I should have persevered in accordance with my obligations.”[24]

[33] I pause to observe that she could and should have taken other steps, such as following the procedures recommended in the letter of 14 May 2014, namely online, fax or post, or by visiting a Centrelink office, one of which was situated not far from the De Silva Hebron offices.

[34] The Applicant said that:

> On 8 September 2014 I finally attended at Centrelink in Darwin city and spoke to a Centrelink representative. I am unsure what the impetus was to attend on that particular day, but I recognised that I had been forestalling dealing with the issue, and felt embarrassment that I was still receiving benefits while working full time and had not dealt with the problem.[25]

[35] According to the Centrelink documents, the Applicant was sent a letter dated 26 June 2014 referring to an exemption from Income Management,[26] and a letter dated 21 July concerning a Student Start-up Scholarship that she would be paid if studying full-time in an approved scholarship course.[27]

[36] On 21 August 2014, the Applicant was sent a letter stating, inter alia:

> Our records show you may no longer be a full-time student.
>
> If you are still studying, please ensure you are enrolled as a full-time student to remain eligible for payment. …

[24] Second Affidavit [42].
[25] Ibid [43].
[26] Ibid page 64.
[27] Ibid page 68.

> Please check and update your study details using the Student Express Plus App or via our online services at www.humanservices.gov.au to avoid any over payment.
>
> …
>
> If you are no longer a full-time student and require further income support assistance from Centrelink, please call 132850 to reduce possible overpayment and investigate alternative payments.[28]

[37] I think it likely that one or both of the letters of 21 August 2014 or 1 September 2014 (about the cessation of her Youth Allowance from 22 July 2014 because of her age) were received and read by her, and reminded her of the need to contact Centrelink.

[38] The Applicant said that when she attended Centrelink on 8 September 2014 she took documentation, including her contract of employment and a payslip. She said that she started to explain that she had commenced working full-time and had come to advise Centrelink of that. The Centrelink representative interrupted her to ask whether she was currently studying full-time, to which she replied "no". The representative advised her that she was no longer entitled to receive benefits because she needed to undertake full-time study to be entitled.[29] During her oral evidence the Applicant stressed that the Centrelink representative seemed interested only in this circumstance, and not in the fact that she was fully employed.

[28] Second Affidavit page 71.
[29] Ibid [44].

[39] In her affidavit the Applicant said that as well as being embarrassed about having left it so long to notify Centrelink that she had commenced full-time employment, she was also embarrassed to learn that quite apart from that fact she was not entitled to benefits because she was only doing two subjects, a matter of which she now acknowledges she should have been aware.[30]

[40] The Applicant asked the Centrelink representative whether she could repay the overpayments then, but was informed that the debt would need to be assessed and passed over to Dun and Bradstreet Pty Ltd for collection. She subsequently received the letter of 8 September 2014, and contacted Dun and Bradstreet Pty Ltd to arrange for repayment by fortnightly instalments. The last payment, $0.28, was made on 30 December 2014.

[41] At paragraphs [48] and [49] the Applicant said that the "issue was [her] apathy in attending to the problem as [she] did not realise the importance of informing Centrelink" of the changes in her circumstances within the 14 day timeframe. She acknowledged that she should have advised Centrelink earlier than she did. She denied seeking to obtain any special advantage and pointed out that she did not actively provide any false information to Centrelink. She said:

> For this I am truly sorry, as I now understand the gravity of the situation and the fact that such behaviour can constitute fraud.

[30] Second Affidavit [45].

[42] The Applicant said that when she had filed her original affidavit she "disclosed the debt almost in passing". She disclosed the debt in the same amount of detail as she did in relation to the other disclosures regarding traffic infringements and parking fines. She did not turn her mind back to the circumstances of the debt in detail as she knew it had been paid.[31]

[43] At [51] the Applicant said:

> I now understand that the disclosure in the First Affidavit was insufficient as it did not specify any detail in relation to the circumstances of the debt, the quantum, or how the debt was paid back. I now truly understand the importance of requesting that information prior to filing the affidavit. It has assisted me significantly in recalling the events in a more precise manner. I understand that my obligation in ensuring that I was full and frank was to have done that, and that I failed this when I filed the affidavit. I have learnt a significantly important lesson in ensuring that if there are documents which can assist someone in recalling events, it is important to call upon those documents first, as a priority.

[44] Under the heading "Disclosure" the Applicant said that when she was drafting the First Affidavit she was aware that the Centrelink debt should be disclosed, "but it did not cross my mind that it was something that would be considered to be an issue particularly considering the debt had been paid in full approximately seven months

[31] Second Affidavit [50].

earlier."[32] Consequently, "I did not turn my mind in any great detail to the circumstances surrounding incurring the debt".[33]

[45] The Applicant said that prior to filing the First Affidavit she spoke to Mr Peter Orr, an associate at De Silva Hebron, about the circumstances of the debt. She asked him to peruse a draft of her affidavit. She also showed a draft to her principal, Mr David De Silva. Apart from suggesting minor amendments neither of them suggested any need to provide further detail about the Centrelink debt. She said that she now understands the importance of full and frank disclosure.[34]

[46] In relation to [20] of the First Affidavit the Applicant said the following, at [63] to [65] of the Second Affidavit:

> 63. Having now read through my paragraph 20 of the Affidavit many times, I understand it is an inaccurate portrayal of the circumstances surrounding the overpayment. As it says in paragraph 20, 'I have a debt to Centrelink that arose because I was receiving benefits on the basis I was a full-time student, the payment continued when I was doing full-time study'. What I should have clarified in that paragraph, was that I did not appreciate that studying two subjects only meant I was disentitled from benefits, and that appreciation did not arise until I attended Centrelink on 8 September 2014.
>
> 64. I also note in paragraph 20 of the Affidavit that I state, 'I only found out about the overpayment to me when I attended Centrelink on the basis that I was going to commence full time employment'. I do not know why it is that it is worded incorrectly, and I certainly did not mean it to be an inaccurate portrayal. What I now know is that sentence should have said is 'on the basis that I had commenced full-time employment'.

[32] Second Affidavit [52].
[33] Ibid [53].
[34] Ibid [56] – [62].

> 65. As stated above, I now understand that I failed in my obligations to be full and frank when I filed the Affidavit. This was not my intent, but I have now had the opportunity to reflect at length on my obligations in regard to fullness and frankness in practice, and the absolute necessity to obtain any documentation which can assist in this regard as a first priority, and not as an afterthought.

[47] At [66] – [67] the Applicant referred to continual problems with receiving mail since she moved into her present address in December 2013, and steps that she has since taken to circumvent those problems.

[48] At [68] – [72] the Applicant said that she had not considered the Centrelink debt when she requested the character references from Dr Ford and Mr Humphrey. On 2 October 2015 she sent detailed emails to both referees outlining the circumstances of the debt and her lack of disclosure in the First Affidavit. The Applicant attached copies of the First Affidavit and the Board's letter of 15 July 2015, and included drafts of further certificates for them to sign. Both referees subsequently provided further certificates of good fame and character, acknowledging this further information and repeating their previously expressed opinions that the Applicant is a fit and proper person to be admitted to the legal profession and is and always has been a person of good fame and character.

Concerns expressed by the Board

[49] Section 25 of the Act provides that the Court may, after considering a recommendation of the Board and any representations made by the Law

Society Northern Territory, admit a person as a local lawyer if the Court is satisfied of two matters: that the person is eligible for admission to the legal profession ((s 25(2)(a)(i)) - the "eligibility requirements" are set out in s 29(1)); and that the person is a fit and proper person to be admitted to the legal profession ((s 25(2)(b)) - the "suitability requirements" are referred to in s 30).

[50] Section 30 of the Act requires the Court or Board, in deciding if a person is a fit and proper person to be admitted to the legal profession under the Act, to consider each of the "suitability matters" in relation to the person to the extent a "suitability matter" is appropriate (s 30(1)(a)), and "any other matter it considers relevant" (s 30(1)(b)).

[51] Section 11 sets out a list of "suitability matters". These include such things as whether the person is currently of good fame and character, whether the person has been convicted of an offence (and if so the nature of the offence etc), whether the person has practised law without being duly authorised, whether the person is or has been subject of disciplinary action in relation to any profession or occupation, whether the person's name has been removed from the roll of legal practitioners, whether the person has contravened a law about trust money or trust accounts, and whether the person currently has a material inability to engage in legal practice.

[52] In respect of s 30(1)(b), which refers to other matters considered relevant, the Board has adopted the Disclosure Guidelines for Applicants for Admission to the Legal Profession (the **Disclosure Guidelines**) published by the Law Admissions Consultative Committee.[35] Applicants for admission are required to comply with the Disclosure Guidelines and to acknowledge that they have read and understood the Disclosure Guidelines, and have had regard to them when preparing their affidavit in support of their application for admission.

[53] The Chairperson of the Board set out the main concerns of the Board in the Memorandum. At its meeting on 15 October 2015 the Board was satisfied that the Applicant met the eligibility requirements for admission to the legal profession. It did not express any concern about the suitability matters referred to in ss 30(1)(a) and 11 of the Act. Its concerns related to the disclosure requirements of the Disclosure Guidelines.

[54] The Memorandum quoted the following paragraphs which appear on page 3 of the Disclosure Guidelines near the end of a section entitled "The Duty of Disclosure":

> Stated in general terms, however, the duty of disclosure extends to *any* matter which reflects negatively on the applicant's honesty, candour, respect for the law or ability to meet

[35] A copy of the Disclosure Guidelines is reproduced at Annexure "KAG3" to the affidavit of Kellie Anne Grainger sworn 16 December 2015.

> professional standards. An applicant should provide a full account of any such matter in the applicant's disclosure, including a description of the applicant's conduct. The description should not be limited merely to listing criminal charges or other consequences of the conduct. As already noted, there is an increasing expectation that *any* matters relevant to assessing an applicant's honesty will be disclosed.
>
> An applicant should also avoid editing, or selecting only those matters which the *applicant* believes should be relevant to the decision to be made by the Admitting Authority. Rather, an applicant should disclose every matter that might fairly assist the Admitting Authority or a Court in deciding whether the applicant is a fit and proper person.

[55] The Memorandum also referred to paragraph 5 of the Disclosure Guidelines which sets out examples of matters which an applicant may need to disclose, in addition to those set out in s 11 of the Act. Example (h) is "Social security offences". The Memorandum stated that:

> The Board views Centrelink overpayments as falling within this category notwithstanding that charges may not have been laid against an applicant.

[56] The Board's initial concerns, after considering [20] of the First Affidavit, were the Applicant's failure to disclose that the overpayment was due to her failure to notify Centrelink of the change of her study load from full-time to part-time, and her assertion that she was unaware that such a change affected her entitlement to the benefit. The Board "questioned the credibility of that assertion at the outset and was concerned regarding the scant details in the affidavit" and that the

Applicant may not have been entirely frank and truthful in her affidavit.[36]

[57] After receiving the Second Affidavit, "the further explanation offered by the applicant heightened the Board's concerns as to whether she had been entirely frank" in relation to the overpayment.

[58] The Board considered that some of the Applicant's explanations as to why she had misunderstood her reporting obligations following the reduction in her study load from full-time to part-time "lacked credit". Firstly, the Board did not accept her claim that she did not recall receiving or seeing 28 of the 30 items of correspondence, despite the correspondence being dated only some 12 months before.[37] Secondly, the Board considered that the Applicant's claim that she did not pay proper attention to Centrelink correspondence appeared inconsistent with her claim of not having seen or received the bulk of the correspondence and with her apparent knowledge of six circumstances that would trigger a reporting obligation but not of the need to report a change from full-time study to part-time study. All those reporting obligations would have been drawn to the Applicant's attention in the letter of 14 May 2014.[38]

[36] See page 2 of the Memorandum.
[37] Paragraph 1 on page 3 of the Memorandum.
[38] Paragraph 2 on page 3 of the Memorandum.

[59] The Board was also of the view that the Applicant's explanation, in [41] – [42] of the Second Affidavit, for not contacting Centrelink earlier,[39] lacked credit. This was particularly so in light of the fact that she was receiving benefits which she knew she was not entitled to since she began working full-time, and the Centrelink office was very close to where she worked.[40] The Board also considered that [48] of the Second Affidavit[41] demonstrated an unacceptable indifference to her reporting obligations in the circumstances.[42]

[60] The Board was also concerned by, and unimpressed with, the Applicant's apparent attempt to shift the responsibility to Mr Peter Orr and Mr David De Silva, by stating that she had shown them drafts of her initial affidavit and that neither of them suggested any need to provide further detail about the Centrelink debt.[43]

[61] After expressing these concerns the Memorandum states:

> Overall, the Board was of the view that there was a lack of candour by the Applicant in trying to explain a relatively minor infraction. The lack of candour is a serious matter for an applicant for admission and the Board was of the view that this warrants proper testing of the Applicant's credibility via the oral evidence process. The Board therefore resolved to refer determination of whether the Applicant is a fit and proper person to be admitted to the Court pursuant to section 32(1)(a) of the Act.[44]

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[39] See [32] - [37] above.
[40] Paragraph 3 on page 3 of the Memorandum.
[41] See [41] above.
[42] Paragraph 4 on page 3 of the Memorandum.
[43] Paragraph 5 on page 3 of the Memorandum. See [45] above.
[44] Pages 3.9 to 4.1 of the Memorandum.

[62] The Applicant was notified of the Board's decision and was subsequently provided with a copy of the Memorandum.

Further affidavit evidence and written submissions

[63] Mr De Silva, Principal at De Silva Hebron made an affidavit dated 8 December 2015. He supervises the Applicant, who still works with his firm as a graduate clerk. During her term of employment, which commenced on 14 July 2014, he has found her to be trustworthy, honest and forthright, clever and able to understand difficult legal issues reasonably quickly, and eager to commit to a career as a lawyer. He considers her to be "a person who would be an asset to the legal profession".

[64] Mr De Silva stated that on about 6 July 2015 the Applicant asked him to consider a draft affidavit for admission that she had prepared. He was fully aware of the issue concerning Centrelink and the extent of the disclosure she had provided to the Board in the draft affidavit. He thought that she had fully covered the issue in the draft and did not see the need to advise her to include more extensive disclosure than that she had included in the draft. The only suggestions Mr De Silva made concerned clarity of expression, grammar and the like.

[65] After Mr De Silva was informed that the Board had not accepted the Applicant's application and required further information in relation to the Centrelink debt, he continued her employment as a graduate clerk.

[66] On about 6 October 2015 the Applicant asked Mr De Silva to peruse a draft of her supplementary affidavit. He considered that the affidavit was very detailed and did not think anything more was needed. He informed the Applicant of that view and suggested that she include a paragraph explaining that he had looked at her original affidavit prior to it being filed. The Applicant then told him that she had also shown the affidavit to Mr Peter Orr, a senior lawyer at De Silva Hebron, prior to it being filed. Mr De Silva recommended that she also include a reference to that in her supplementary affidavit. Based on Mr De Silva's suggestions the Applicant included [57] and [58] in the Second Affidavit. He did not make those suggestions in order to enable the Applicant to shift the blame or responsibility for not including more information in the First Affidavit. Rather he made his suggestions in an attempt to illustrate the circumstances around her making the First Affidavit and to indicate that she had in fact sought the advice of more experienced practitioners to ensure that the affidavit satisfied the requirements for admission.

[67] The Applicant also filed an affidavit of her father, Mr Stephen Anthony Sutton, made 8 December 2015. He lives in Adelaide but travels to Darwin on a semi-regular basis. During his visits to Darwin he stays with the Applicant at her unit at Coconut Grove. He has observed the unsatisfactory state of the letterboxes for the four units in the complex where the Applicant lives, including mailboxes overstuffed with

advertising material, and advertising material on the ground sometimes accompanied by non-advertising mail. Mr Sutton was present on one occasion when the Applicant's electricity supply was suspended, apparently as a result of the Applicant not responding to mail from the electricity supplier which she did not see.

[68] The Applicant filed an "Outline of Submissions of the Applicant" dated 21 December 2015 (the **Applicant's Submissions**). In that outline:

> 13. The Applicant accepts the overpayment arose from her failure; that she did not appreciate the seriousness of her inaction but should have done so, and that such conduct can constitute fraud.
>
> and
>
> 15. The Applicant accepts the criticisms of the shortcomings in her first affidavit; explains fully the circumstances of the overpayment, and accepts all responsibility for her actions.

[69] In relation to the Applicant's current fitness for admission the Applicant submitted:

> 18. The then failure to appreciate the seriousness of her inaction, the cavalier disregard for correspondence from Centrelink, and her failure to give priority to timely communication with Centrelink, reflect poorly on the Applicant and highlight a significant degree of immaturity at that time.
>
> 19. However, it is submitted the evidence clearly establishes that the Applicant has learned from her mistakes. The evidence suggests her conduct while employed as a graduate clerk points to her now being a fit and proper person for admission, and not someone from whom the public need be protected.

[70] Submissions of the Law Society Northern Territory dated 6 January 2016 (**LSNT Submissions**) were filed. Those submissions identified relevant legal principles and discussed the application of those legal principles to the facts.

[71] After noting the Applicant's acceptance that the Centrelink overpayment was a matter requiring disclosure and that the disclosure which she originally made was insufficient, the LSNT submitted that:

> 28. Assuming the Court accepts the explanations for the failure to comply proffered by the Applicant,[45] the question is whether the Applicant's Second Affidavit goes far enough in recognising the deficiencies inherent in the first so as to demonstrate that the Applicant is now fully aware of her ethical obligations with respect to disclosure, has demonstrated remorse in respect of any past failures to meet those obligations, is unlikely to repeat the same and consequently is deserving of admission.

[72] It is common ground that the question before the Court is the Applicant's current fitness.

[73] The main focus of the LSNT Submissions was [20] of the First Affidavit.

> 32. Relevantly the subject paragraph conveys that the Applicant attended upon Centrelink with the intention of cancelling her receipt of benefits, in the expectation of commencing employment sometime after that attendance.
>
> 33. It was only upon such an attendance, that the Applicant deposes to having become aware that she had been in receipt of benefits to which she was not entitled.

[45] Which distill down to protestations of inadvertence rather than any deliberate lack of candour.

[74] I agree with this submission, particularly having regard to the third, fourth and fifth sentences in [20]. Indeed I agree that [20] was misleading in that it created the false impression that the Applicant attended on Centrelink to cancel her benefits before she commenced her employment. Paragraph [20] also implied, correctly, that her university workload had already changed from full time to part time and that was the reason why she was required to refund the overpayment.

[75] The Applicant was wrong in what she implied about the time when she attended on Centrelink and wrong in so far as she believed that a reduction in her university workload was not reportable and would not render her ineligible for the Youth Allowance.

[76] The LSNT submitted that:

> 37. While the Applicant's Second Affidavit suggests that the deficiencies in her disclosure of matters relevant to the Centrelink overpayment were due to failures in recollection remedied by receipt of the Centrelink file,[46] nowhere does the Applicant demonstrate an understanding that the subject deficiencies amounted to a misleading as opposed to merely inaccurate portrayal of the relevant facts.[47]
>
> 38. Without an explicit acceptance by the Applicant of the misleading nature of paragraph 20, this Honourable Court is entitled to harbour concerns as to whether the Applicant has in fact progressed to the point of being deserving of admission.
>
> 39. Moreover, the Applicant's Second Affidavit is notably silent as to:

[46] Second Affidavit at [50] and [51].
[47] The closest the Applicant comes to demonstration of the necessary understanding is in [64] of the Applicant's Second Affidavit.

> (a) why she delayed in attending upon Centrelink following the commencement of full time employment, beyond suggestions of mere apathy;[48]
>
> (b) whether she in fact ultimately informed Centrelink as to:
>
> (i) that employment; and
>
> (ii) when the same commenced.
>
> 40. With respect to the Applicant, these are matters which should have been comprehensively addressed and explained in her affidavit evidence.

Oral evidence

[77] The Applicant gave evidence at the hearing on 7 January 2016. She attempted to address the main concerns expressed in the LSNT Submissions which were provided the previous day.

[78] The Applicant said that she did intend to notify Centrelink as soon as she found out about her employment with De Silva Hebron. When she started there she was "a bit sick" and putting a lot of emphasis into her job because it was exciting. The Centrelink debt and the benefits that she was receiving were not a high priority at that time. She said she put it to the back of her mind and did not deal with the issue until later.

[79] When asked by her counsel whether she was still of the same view in relation to the importance of Centrelink the Applicant said:

> No. I understand just how important it is to understand your reporting obligations with Centrelink, just how important it is to ensure that you do tell them within the 14 day reporting period

[48] Second Affidavit at [49].

> and how important it is to understand … all of the information prior to my affidavit filing.

[80] She expressed a similar acknowledgement during cross-examination.

[81] The Applicant had no recollection as to what induced her to go to Centrelink on 8 September 2014. Indeed she only says that it was that date because that was what she was told by the person at Centrelink more than 10 months later, on 17 July 2015, when she began trying to get a copy of her Centrelink file. It was put to her that she only went to Centrelink when she did because she had received the letter of 8 September 2014. She said, and I accept, that she had not received that letter before she went to Centrelink. Rather the letter was sent to her following the meeting, during which she was told that she would be sent a letter in the mail that would explain what she needed to do and how much she needed to pay back.

[82] The Applicant said she provided Centrelink with a copy of her employment contract and, she thinks, a couple of payslips. She told the lady there that she had commenced working at De Silva Hebron on 14 July 2014 and received her first pay on 24 July 2014.

[83] After she received the letter of 8 September 2014 the Applicant contacted the debt agency, Dun and Bradstreet, and arranged for the debt to be repaid.

[84] Counsel for the Applicant asked her about the circumstances in which she had prepared the First Affidavit. She said that she had no documentation in relation to the Centrelink overpayment at that time and was surprised when, following receipt of the Centrelink file, she became aware of the content and quantity of the Centrelink correspondence. She was also shocked to learn, on 17 July 2015, that she had attended Centrelink as late as 8 September 2014.

[85] When asked about [20] of the First Affidavit and her explanations in [63] – [65] of the Second Affidavit the Applicant accepted that [20] was misleading and said:

> I do accept responsibility for it being misleading and I am disappointed in myself for not taking the time to accurately recollect what happened.

[86] The Applicant was cross-examined comprehensively by counsel for the LSNT. The cross-examination included questions about the Applicant not paying her parking fines on time and her failure to mention her red traffic light infringement in her application for a criminal history check on 30 June 2015.

[87] The Applicant agreed that she was careful to set out in her affidavit details of her parking fines, licence suspension and red light infringement. She said that after submitting her application for the criminal history check she was brainstorming things that she needed to disclose in her affidavit and in that process recalled the red light

infringement. It was put to her that she should have included in [20] the same level of detail about the Centrelink overpayment as she had provided in relation to those matters.

[88] It was also put to the Applicant that she knew that she may be exposed to prosecution for a social security offence if she did not bring to an end the receipt of Centrelink monies to which she was not entitled. She said she did not know this. She said that Centrelink was very casual about the way they treated the debt and that there was never any reprimand or punitive measures taken by Centrelink. It was only after she had read the Disclosure Guidelines several times that it occurred to her that the reference to "Social Security offence" could also require disclosure of a Centrelink overpayment such as hers. I agree that there does not appear to have been any suggestion on the part of Centrelink that the Applicant would be prosecuted or otherwise punished for her conduct. The formal letter of 13 October 2014[49] stipulated the due date for the payment of the debt and warned the Applicant of action that could be taken for the recovery of the debt in the event that the debt was not repaid. It said nothing about punitive action.

[89] Counsel for LSNT also questioned the Applicant about whether she received the letter of 8 September 2014 before or after she attended the Centrelink office, suggesting that she only went to Centrelink after she had received that letter. I accept her evidence to the effect that she

[49] Second Affidavit page 76.

received the letter in the mail sometime after the meeting, because she was expecting it. In any event, I do not think anything turns on this point. I have already noted that she had probably already received some of the earlier correspondence such as the letters of 21 August 2014 or 1 September 2014.[50]

[90] Counsel put to the Applicant that she had not disclosed to Mr De Silva and Mr Orr that she had been in receipt of Centrelink payments after she had commenced working with them. She said that she did disclose that to them, pointing out that this is evident from the fact that she showed them both a draft of the Second Affidavit which included this information.

[91] The Applicant was also cross-examined about [20] of the First Affidavit and agreed that it was misleading to suggest that she had approached Centrelink before commencing full-time employment. She reiterated that she realised this part of [20] was wrong after receiving the Centrelink material and giving further and detailed consideration to this issue following the Board's request for further information in its letter of 15 July 2015. She said:

> And so I know it's misleading. I am very disappointed that I didn't take the steps to make sure that it was accurate reflection of the circumstances when I drafted this I didn't think it was important really … because it says disclose things that you think might be of relevance but I didn't attribute any great

[50] See [36] and [37] above.

> importance to it. And I know that's a mistake but that's how I was thinking at the time of drafting of this original affidavit.

[92] In answer to counsel's suggestion that she intended to convey the impression that she approached Centrelink prior to commencing her employment as that would be less damaging to her application for admission the Applicant reiterated that she did not think that her admission would be affected on account of having had the debt which had been repaid some time ago.

Relevant legal principles

[93] The Applicant referred to the decision of Riley CJ *In the matter of an Application by Thomas John Saunders*[51] and the authorities referred to therein as setting out the relevant matters and guiding principles to be considered by the Court, in particular that:

(a) The obligation is on the Court to attempt to ensure the public is protected from persons who are not suitable for admission; [52]

(b) The obligation on the applicant is to make candid and comprehensive disclosure regarding anything which may reflect adversely on the fitness and propriety of the applicant to be admitted to practise;[53]

[51] *In the matter of an Application by Thomas John Saunders* [2011] NTSC 63 (*Saunders*).
[52] Ibid [5].
[53] Ibid [6].

(c) Ultimately, the obligation is on the applicant to establish to the satisfaction of the Court that she is currently of good fame and character and a fit and proper person to be admitted.[54]

[94] *Saunders* also involved an applicant who had been overpaid benefits by Centrelink. However the circumstances were far more serious than in the present matter. The overpayment had occurred over a period of years, during which the applicant was working. The applicant was fully aware that he was not entitled to continue to receive the benefits but deliberately refrained from notifying Centrelink, and indeed completed additional applications for benefits, because he was hoping to save more money before repaying Centrelink. He was convicted of five offences related to these activities, some of which were acts of commission as distinct from mere omission. In the course of sentencing submissions counsel on his behalf had misled the magistrate in a number of serious respects. This had not been disclosed to the Board. Although the applicant gave evidence before Riley CJ, he continued to minimise his culpability and made no efforts to ensure that the false impressions which he had created were corrected. Nor did he provide evidence that enabled the Court to assess any rehabilitation on his part, and thus to demonstrate that notwithstanding his previous misconduct he was now a fit and proper person to be admitted to practice.

[95] Per Riley CJ in *Saunders*:

[54] *In the matter of an Application by Thomas John Saunders* [2011] NTSC 63 [7] and [8].

> [6] In support of an application for admission the applicant must file an affidavit specifying that the applicant is of good fame and character,[55] and must also disclose if the applicant has been convicted of an offence other than an excluded offence.[56] In so doing the applicant is obliged to approach the Board, and later the Court, "with the utmost good faith and candour, comprehensively disclosing any matter which may reasonably be taken to bear on an assessment of fitness for practice".[57] The obligation is upon the applicant to make candid and comprehensive disclosure regarding anything which may reflect adversely on the fitness and propriety of the applicant to be admitted to practise. The obligation of candour does not permit deliberate or reckless misrepresentation pretending to be disclosure.[58] The applicant must be frank with the Board and, through it, the Court. Full and accurate information must be provided to the Board by the applicant. It is not sufficient if such information is incomplete, or if the whole of the relevant information only emerges in response to enquiries from the Board.[59]
>
> [7] It is for this Court to examine the evidence placed before both the Board and the Court to determine for itself whether the applicant is a fit and proper person to be admitted to the Supreme Court. In so doing, the Court has the same powers as the Board and the decision of the Court is taken to be a decision of the Board for the purposes of the Act.[60]
>
> [8] In the proceedings before this Court the burden rests upon the applicant to satisfy the Court that he is, at this time, of good fame and character and a fit and proper person to be admitted.

[96] The LSNT stressed the following passage in *Incorporated Law Institute of New South Wales v Meagher*[61] which has frequently been cited and

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[55] *Legal Profession Admission Rules*, r 10.
[56] Ibid r 18.
[57] *Re Hampton* [2002] QCA 129 (*Hampton*) at [26].
[58] *Re OG (A Lawyer)* (2007) 18 VR 164.
[59] *Thomas v Legal Practitioners Admission Board* (2005) 1 Qd R 331 (*Thomas*).
[60] *Legal Profession Act*, s 32(3).
[61] *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655 (*Meagher*) at page 681.

applied in other cases,[62] and stressed the words that I have emphasised by use of underlining:

> The errors to 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, if 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 credit 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.

[97] The LSNT Submissions included the following:

> 20. … it is clear that:
>
> > (a) a failure in the duty to be full and frank in disclosure of "any matter which may reasonably be taken to bear on an assessment of fitness for practice";[63] and
> >
> > (b) a failure to appreciate the nature and importance of that same duty of candour;[64]
>
> are capable of constituting disqualifying factors.
>
> 21. The failure to be candid in disclosure may disqualify an applicant from being capable of satisfying the Court that they are a *"fit and proper person"*, even in circumstances where it was not strictly necessary to disclose.[65]

[62] See for example *Wentworth v NSW Bar Association* (1992) 176 CLR 239 at 251; *Re Deo* (2005) 16 NTLR 102 (*Deo*) at [6]; *Saunders* at [5]; *Re Gadd* [2013] NTSC 13 (*Gadd)* at [14].
[63] *Saunders* at [6].
[64] *Deo* at [52]; *Hampton* per White J at [37].
[65] *Deo* at [68].

> 22. In this last regard a subjective element is introduced. If an applicant believes something ought be disclosed, that applicant is then under a duty to disclose the same in a full and frank fashion.[66]
>
> 23. The disqualifying nature of a failure to disclose is incapable of remedy by subsequent disclosure of relevant information, arising only in response to queries from the Board.[67]
>
> 24. If there has been a failure to disclose, the motivation for that failure assumes particular importance.[68]
>
> 25. It does not follow that an intention to mislead or to be less than fulsome in disclosure is required so as to prevent an applicant from satisfying the Court that they are a fit and proper person. It is sufficient if the circumstances demonstrate
>
> > (a) a wilful or reckless indifference to the obligation of candour;[69] or
> >
> > (b) *"a lack of understanding of the stringent nature of"* that same obligation.[70]
>
> 26. Where there has been a failure to comply with the obligation to disclose, the task of satisfying the Court that an applicant is a fit and proper person for admission, is a difficult one. In this regard and in *Hampton*, de Jersey CJ relevantly states:
>
> > *"If it emerges an applicant has not, in some significant respect, been frank with the court, then the application should ordinarily be rendered doubtful at least."*[71]

[98] Whilst I accept those submissions, paragraph [23] and the quotation in paragraph [26] require some elaboration and qualification. The applicant in *Hampton* had failed to disclose three sets of circumstances, one being that he had been placed on 12 months' probation following disciplinary proceedings against him under s 104 of the *Nursing Act*

[66] *Re Og* (2007) 18 VR 164 at [123]; *Gadd* at [15] and [61].
[67] *Saunders* at [6]; *Hampton* per de Jersey CJ at [26] to [28]; *Thomas* at 334; *Re Onyeledo* [2015] NTSC 60 (*Onyeledo)* at [37].
[68] *Deo* at [68]; *Gadd* at [61].
[69] *Deo* at [133]; *Gadd* at [63] and [64].
[70] *Onyeledo* at [37].
[71] At [27].

(Qld), another being that he was dismissed from his employment and his registration as a nurse cancelled as a result of his improper conduct on another occasion. These circumstances only came to light following investigations carried out by the Solicitors' Board (Qld) after another person objected to the applicant's admission as a solicitor because of his asserted lack of professionalism while a registered nurse.

[99] The applicant in *Thomas* had failed to disclose nine charges of fraudulent misappropriation to which he had pleaded guilty, and another charge some seven years before that of fraudulently obtaining money. Details about these matters only emerged following several requests by the Board for further information. In response to the contention that the only purpose of requiring candid disclosure was "to ensure that the Board has all information it requires to make a fully informed decision in the public interest" the Court of Appeal said, at 334:

> That is not so. By making candid and comprehensive disclosure of relevant information an applicant demonstrates a proper perception of his or her duty and will thereby seek to demonstrate his or her good character. It is not a sufficient answer to say, as was said, that the Board ended up with all relevant information. The significant feature is that it was furnished only gradually and then only in response to express and repeated requests from the Board.

[100] The real point being made in these cases and the other passages referred to in *Saunders* and *Onyeledo* is that reflected in paragraphs 20(b) and 25(b) of the LSNT Submissions. The candour of an applicant

in the disclosure process is important not only to ensure that all relevant material is before the Court but also to demonstrate that the applicant has a proper perception of his or her ethical obligations and is a fit and proper person to practice as a lawyer.

[101] Per Martin (BR) in *Deo*, at [68] – [69]:

> In some circumstances, the failure of an applicant to disclose relevant material might be excused on the basis of an erroneous but understandable error of judgment. In other circumstances it may be assessed that, strictly speaking, disclosure of the particular information was not required. In all of those situations, however, of particular importance is the applicant's motivation for not making the disclosure. In the circumstances under consideration, I am satisfied that the applicant omitted the draft application from his affidavit… in a continuation of his attempt to minimise the adverse material disclosed to the court.
>
> Finally, irrespective of the view taken as to whether it was, strictly speaking, necessary to disclose the draft application, the significance of the unsatisfactory evidence given by the applicant in this regard remains. In his evidence on this aspect the applicant demonstrated a continuing and disturbing lack of candour.

[102] The main issues in the present matter involve consideration of the following questions:

(a) How serious was the Applicant's conduct in relation to the Centrelink overpayment?

(b) How serious was the Applicant's inadequate disclosure about the Centrelink overpayment and or other relevant matters? In particular, by wording [20] of the First Affidavit as she did:

(i) Was the Applicant not full and frank "in some significant respect"?

(ii) Did she deliberately try to mislead the Board or act with "reckless laxity of attention to necessary principles of honesty"?[72]

(c) Did the Applicant rectify her errors in the Second Affidavit so as to ensure that the Board then had all necessary information about the Centrelink debt?

(d) Has the Applicant acknowledged her inappropriate conduct, in particular misleading the Board and her failures to provide all relevant information to the Board, and demonstrated a proper appreciation of the important obligations of candour and honesty?

(e) Is the Applicant a fit and proper person for admission to practice as a lawyer?

Consideration

[103] Whilst I recognise that the ultimate question as to whether the Applicant is a fit and proper person for admission to practice as a lawyer will be answered by reference to all of the material before the Court, I propose to focus on the matters raised by the Board and by the LSNT, in what I consider to be the order of their seriousness.

[72] *Meagher* at [681] and *Saunders* at [6].

[104] In short they are:

(a) the misleading implication in [20] of the First Affidavit that the Applicant notified Centrelink of her disentitlement to further benefits before, not after, she commenced her employment;[73]

(b) the Applicant's failure to disclose that the overpayment of benefits was due to her failure to notify Centrelink of the change of her study load from full-time to part-time and her assertion that she was unaware that such a change affected her entitlement to Youth Allowance;[74]

(c) the Applicant's explanation for her delay before contacting Centrelink to notify it of her change of circumstances;[75]

(d) the references in the Second Affidavit to her having shown drafts of her affidavits to Mr De Silva and Mr Orr.[76]

Misleading implication that she went to Centrelink before she commenced her employment

[105] I agree and find that [20] gave the impression that the Applicant contacted Centrelink before she commenced full-time employment, and

[73] See [73] and [76] above.
[74] These were the initial concerns of the Board. See [56] to [58] above.
[75] See [59] above. See too [39] of the LSNT Submissions quoted at [76] above.
[76] See [60] above.

thus was misleading.[77] She unequivocally accepted that this was misleading, in the course of her oral evidence.[78]

[106] I consider that this misleading conduct was serious because one might assume that the Board (and the Court) would take a particularly dim view of an applicant who continued to receive Centrelink benefits after commencing full-time employment. I can understand why the Board and the LSNT, even after receiving the Second Affidavit, would have reservations about her suitability to be admitted to practice unless satisfied that her conduct was inadvertent rather than deliberate or reckless and until she acknowledged that it was misleading and expressed appropriate remorse.

[107] Much of the contrition which the Applicant expressed in the Second Affidavit relates to her failure to provide "full" disclosure of the circumstances of the Centrelink debt.[79] Her only acknowledgement of her misleading implication that she attended on Centrelink prior to commencing her employment appears at [64] and [65] of the Second Affidavit.[80] Even then, if the critical sentence had been written in the way she suggests, it would still have been disingenuous and misleading without further explanation. By the time she went to Centrelink she knew full well that she had been receiving benefits to which she was not entitled.

[77] See [73] - [76] above.
[78] See [84] - [85] above.
[79] See for example Second Affidavit [50] – [53].
[80] Reproduced in [46] above.

[108] This suggests a concerning lack of insight as to the very important obligations of a person, particularly one who seeks admission as a lawyer, to avoid misleading conduct particularly when making an affidavit. It goes without saying that before one makes a statement which may be misleading one should check the relevant facts. To make a misleading statement without doing that is very careless at the least and possibly reckless, even if not wilfully so.

[109] The Applicant's statement in [64] that "I do not know why it is that it is worded incorrectly, and I certainly did not mean it to be an inaccurate portrayal" and her suggested albeit clumsy re-wording of the critical sentence, coupled with her acknowledgements in [65] that she "failed in [her] obligations to be full and frank" and that "this was not [her] intent", if true and genuine, go some way towards suggesting that she was not deliberately trying to mislead the Board into thinking that she approached Centrelink prior to commencing her employment.

[110] Having now heard the Applicant give evidence and cross-examined extensively, I accept that she was not intending to mislead the Board and that she now understands and acknowledges this important error on her part.[81]

[81] See [85] above.

Change from full-time studies to part-time studies

[111] As I have noted, the Board's primary concerns related to the Applicant's failures to disclose that the overpayment was due to her failure to notify Centrelink of the change to her study load, and her assertion that she was not aware that such a change affected her entitlement despite the large number of communications from Centrelink.[82]

[112] Only 10 of the 24 documents sent prior to the meeting on 8 September 2014 were or may have been letters,[83] and a number of those did not relate to her Youth Allowance. Most of the other documents, namely the three SMS messages and the email communications, did not themselves contain the relevant information. Rather, they directed the recipient to the Centrelink online facility where a letter could be found. Whilst she should have, and may well have, accessed those letters, I do not find it surprising that she could not recall the contents of all of them a year or so later, particularly those which were irrelevant or misconceived.

[113] As I have previously inferred, I think it likely that the Applicant did receive and act on the letter of 12 May 2014 and would have seen the letter of 14 May 2014 which informed her that her application for

[82] See [56] - [58] above.
[83] Note my earlier comment in footnote 20 about the Centrelink material, nearly all of which appears to have been in electronic form rather than in the form of a hard copy letter posted to a postal address.

Youth Allowance was successful. Whilst the first main paragraph in that letter (which I have quoted above at [18]) stated that she should advise Centrelink within 14 days if her study load changes or if she ceases study, the extensive list of circumstances which were reportable, considerably more than six or seven, is contained in a very lengthy and complex paragraph later in the document. I do consider that she should have realised that a reduction from full-time to part-time study should have been notified to Centrelink. But I accept that this would not have been as relevant for her to take into account as the fact of her commencing full-time employment, this having occurred prior to the time when the part-time study was to commence. Although it might be reasonable to assume that a person studying part-time might still be paid some Youth Allowance, provided they were not earning above a certain threshold amount, she would have known that her entitlement would cease completely upon her commencing her employment at De Silva Hebron. I can understand and accept the latter as being her primary reason for knowing that she was obliged to notify Centrelink.

[114] The Applicant has acknowledged that she did not give the Centrelink correspondence the attention required and did not properly appreciate her reporting obligations, and now understands the importance of giving her thorough attention to correspondence.

[115] With respect, I do not consider her failure to inform the Board that the overpayment was due to her failure to notify Centrelink of the change

to her study load was very material. She did disclose that the overpayment occurred because she was no longer a full-time student and that she did not notify Centrelink of her changed circumstances in sufficient time to prevent overpayment.

Explanation for delay before notifying Centrelink of her change in circumstances

[116] The Board expressed concern about the Applicant's explanations for not contacting Centrelink earlier and her apparent indifference to her reporting obligations.[84] I share those concerns.

[117] I agree that the Applicant's reasons for her delay before contacting Centrelink are unsatisfactory and that she did not seem sufficiently concerned about the need to do so in a timely way. As I said above at [33] she could and should have acted more promptly than she did. Indeed, she should have prepared for the need to notify Centrelink when she first knew that she would start working full-time and decided to reduce her study workload accordingly. She should have anticipated that her new job would be challenging and may well distract her from attending to important personal matters such as doing whatever had to be done to ensure that she would not continue to be paid benefits after she started work.

[84] See [59] above.

[118] However I do not consider that her statements concerning her recollections of Centrelink correspondence, her understanding about her obligation to report a change from full-time study to part-time study, or her reasons for not reporting the change earlier, were deliberately false.

[119] I agree with the submission made on her behalf at [18] of the Applicant's Submissions:

> The then failure to appreciate the seriousness of her inaction, the cavalier disregard for correspondence from Centrelink, and her failure to give priority to timely communication with Centrelink, reflect poorly on the applicant and highlight a significant degree of immaturity at that time.

[120] Once she had gone to Centrelink and was told how to make the repayments, she made arrangements to attend to that immediately.[85]

[121] Following the Applicant's oral evidence and the affidavit evidence of Mr De Silva and the two character references, I consider that the Applicant has learnt from her mistakes. She now realises the importance of carefully perusing and attending to relevant communications and complying with obligations such as those that were required of her by Centrelink at the time[86] and would be required of her in the future.

[85] See [83] above.
[86] See for example [79] - [80] above.

Showing drafts of her affidavits to Mr De Silva and Mr Orr

[122] The Board's concern about the Applicant's apparent attempt to shift the responsibility to Mr De Silva and Mr Orr, by stating that she had shown them drafts of her initial affidavit and that neither of them suggested any need to provide further detail about the Centrelink debt, was addressed by Mr De Silva in his affidavit of 8 December 2015. It was he, not the Applicant, who suggested that she include those additional paragraphs.[87]

Conclusions

[123] I consider the Applicant's conduct in relation to the Centrelink overpayment was not very serious in the scheme of things. She was remiss in not notifying Centrelink earlier than she did that she would be commencing full-time employment and would no longer be studying full-time. The Applicant was also remiss in ignoring a significant number of communications from Centrelink and in failing to take steps to ensure that she would receive all communications, if not by mail to her postal address, then by using the Centrelink letters online facility and accessing communications when notified of them by email or SMS. I accept that she had some personal issues at about that time including health issues and the distractions of full-time study and subsequently a new job.

[87] See [64] - [66] above.

[124] In relation to [20] of the First Affidavit I consider that the Applicant was not full and frank “in some significant respect”, primarily the misleading implication that she contacted Centrelink prior to commencing her employment. I do not think that her failure to expressly state that the overpayment resulted from her failure to notify Centrelink of her change from full-time study to part-time study was particularly material in the circumstances.

[125] Whilst the duty of full and frank disclosure requires an applicant to provide all information likely to be relevant to the Board’s consideration, views will differ as to the level of detail that might be relevant and as to the extent to which an applicant must seek out documents and make other enquiries of third parties in order to provide sufficient detail. I note for example that the amount of detail initially provided in relation to the Centrelink overpayment was comparable to the level of detail provided in relation to the Applicant’s parking fines, suspended licence and red light infringement. However I do consider that the temporal proximity between her continuing receipt of Centrelink benefits and the commencement of her employment and the cessation of full-time study required her to provide more detail than she did. She should have taken more time and care to obtain the necessary relevant information before making her affidavit.

[126] The Applicant’s main transgression was to include statements in [20] of the First Affidavit that created the misleading impression that she

reported the change in her circumstances before she commenced employment. She was very careless, perhaps reckless, in creating that impression. However, I find that she was not deliberately trying to mislead the Board and that her laxity of attention was not a reckless laxity of attention to the necessary principles of honesty.

[127] I consider that, in the Second Affidavit, the Applicant did rectify the errors so as to ensure the Board then had all necessary information about the Centrelink debt. However until I heard the Applicant's oral evidence and read the affidavit of Mr De Silva and the Applicant's Submissions, I had some doubts about her acceptance of the misleading nature of [20] of the First Affidavit and whether she had a real appreciation of the important obligations of and underlying candour and honesty.

[128] I am satisfied that the Applicant is now aware of the need for full and frank disclosure, in particular to the Court, and the need to avoid making statements that may be misleading. This experience will have made her realise the need to diligently attend to important and relevant correspondence and other matters, and to devote appropriate time to attend to matters of detail. I expect that her ability to further improve those and other skills will develop with further assistance from Mr De Silva and others in the course of her practice.

[129] I also consider that the Applicant has learnt of the need to act honestly and carefully at all times when dealing with others, both in relation to personal matters and also when dealing with fellow lawyers and the Court.

[130] I am satisfied that the Applicant is now a fit and proper person to be admitted as a lawyer. I am particularly influenced in this regard by the views expressed by Mr De Silva in his affidavit.[88] He has continued to employ her for some 18 months, notwithstanding the issues involved in this matter and the fact that during that time she has not been able to appear or act as a lawyer. In reaching this view I have also taken into account the fact that, apart from the issues arising from [20] of the First Affidavit, the Board appeared satisfied of the other matters concerning the Applicant's suitability. I have also take into account the two character references and my observations of the Applicant in the witness box.

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[88] See [63] above.