CITATION:	*Heffernan v Law Society Northern Territory* [2022] NTSC 90
PARTIES:	HEFFERNAN, Felicity v LAW SOCIETY NORTHERN TERRITORY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2019-02807-SC
DELIVERED:	30 November 2022
HEARING DATE:	12 July 2022
JUDGMENT OF:	BARR J

CATCHWORDS:

LEGAL PROFESSION – Appeal – Cancellation of unrestricted practising certificate – Whether appellant fit and proper person – Suitability matters – Duty of full and frank disclosure – Appellant made application for Northern Territory unrestricted practising certificate – Appellant failed to disclose adverse findings made in the course of public sector disciplinary investigation in Western Australia – Conscious decision not to disclose – Unrestricted practising certificate issued to appellant – Appellant made application to renew unrestricted practising certificate – Again failed to disclose adverse findings made in public sector disciplinary investigation in Western Australia – After renewal, appellant failed to disclose adverse findings made against her by the Western Australian Crime and Corruption Commission – Significant breaches of obligations of disclosure and candour in dealings with the Law Society – Cancellation affirmed – Appeal dismissed.

Legal Profession Act 2006 (NT) s 11(1)(a), s 11(1)(g), s 47, s 56(a), s 57(2)(c), s 89(1)(c)

Prothonotary, Supreme Court (NSW) v Darveniza [2001] NSWCA 113, 121 A Crim R 542; *New South Wales Bar Association v Murphy* (2002) 55 NSWLR 23; *Stanoevski v The Council of the Law Society of NSW* [2008] NSWCA 93; *Barlow v Law Society of the ACT* [2013] ACTSC 68, (2013) 272 FLR 470; *Connop v Law Society Northern Territory* [2016] NTSC 38

REPRESENTATION:

Counsel:

Appellant:	A Lo Surdo SC, C Roberston
Respondent:	T Liveris

Solicitors:

Appellant:	Clinch Long Woodbridge Lawyers
Respondent:	Law Society Northern Territory

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Heffernan v Law Society Northern Territory [2022] NTSC 90
(2019-02807-SC)

IN THE MATTER OF

FELICITY HEFFERNAN
Appellant

AND:

LAW SOCIETY NORTHERN TERRITORY
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 30 November 2022)

[1] The Law Society Northern Territory (in these reasons referred to as "the Law Society") is a body corporate with perpetual succession established by s 635(1) *Legal Profession Act 2006* ("the LPA"). The Council of the Law Society manages the affairs of the Law Society, and is responsible for the way in which the Law Society exercises its powers and performs its functions.[1]

[2] On 31 October 2019, the Law Society determined to cancel the appellant's unrestricted practising certificate, pursuant to s 57(2)(c) of the LPA. The decision was made by the Council of the Law Society, for reasons contained

1 *Legal Profession Act 2006* ("LPA"), s 638, s 639.

in a very detailed statement of reasons provided to the appellant and dated 5 November 2019. In brief, the Law Society was satisfied that the appellant was "not presently a fit and proper person to hold an unrestricted practising certificate".[2]

[3] The decision to cancel took effect from 5 November 2019.

[4] On this appeal, brought pursuant to s 89(1)(c) of the LPA, the Law Society is required to establish that the appellant is not a fit and proper person to hold (or continue to hold) a practising certificate. The appeal is an appeal de novo: the Court stands 'in the shoes of the Law Society', exercising original jurisdiction, and itself determines whether the appellant's practising certificate should be (or should have been) cancelled.[3]

[5] Between 16 January 2016 and 5 July 2018, the appellant was employed by the Department of Primary Industries and Regional Development of Western Australia (DPIRD).[4] She was the Director, Legal and Commercial, Agriculture and Food Division of DPIRD.

[6] Because the appellant was not practising as a lawyer, her employment with DPIRD is accurately characterised as being "in another profession or occupation" within the meaning of that expression in s 11(1)(g) of the LPA.

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2 See s 11(1)(a) LPA: "suitability matters".

3 *Connop v Law Society Northern Territory* [2016] NTSC 38 at [17].

4 The Department was previously called the Department of Agriculture and Food (DAFWA).

[7] On 19 July 2017, David (Ralph) Addis, Director-General of DPIRD, notified the Corruption and Crime Commission of Western Australia ("the CCC") of "suspected serious misconduct" concerning the appellant. The notification was referred by the CCC to the Public Sector Commission, which referred the notification back to DPIRD. The result was that Mr Addis had to deal with the matter. On 28 August 2017, he wrote to the appellant setting out alleged breaches of discipline and providing her with an opportunity to respond to the allegations. The fifth alleged breach was as follows:

> It is alleged that in carrying out your duties you:
>
> 5. Provided misleading information and/or responses in relation to the PMC to the office of the Minister for Regional Development, Agriculture and Food (the Minister), and others including departmental officers and the State solicitor's Office.[5]

[8] Mr Addis was subsequently asked by the appellant's legal representative for particulars of the fifth alleged breach, which were provided under cover of a letter dated 3 October 2017, as follows:[6]

To whom was the allegedly misleading information provided?	When was it provided?	In what context was the alleged misleading information provided?	In what respect was it misleading?
Ms Allison Wilson (A/Director Strategy and Governance) and liaison with Minister's Office Mr Nick Egan (A/State Solicitor) Dr Ron Edwards (former PMC Chair) Audit and Integrity	June 2017 & July 2017	In response to queries raised on who approved the use of surplus closure costs to engage Mr Peter Evans and Ms Amber Russell	You claimed to have "contacted decision makers in DAFWA and Treasury" to use surplus closure costs funds to engage Mr Evans and Ms Russell. However, you could not provide reliable evidence to support this claim. *Please refer to Observation 1.2 in the Preliminary Report for further detail and supporting exhibits.*

5 The reference to the 'PMC' was to the former Potato Marketing Corporation.

6 CB pp. 348-349.

team			
Ms Alison Wilson (A/Director Strategy and Governance) and liaison with Minister's Office	June 2017	In response to queries being raised with regards to Mr Peter Evan's rate.	You made a false statement regarding the contracted rate of Mr Evans stating that a much lower rate had been negotiated compared to his former Band 4, However, the evidence showed that the contracted hourly rate of $200 was much higher than Mr Evans' CEO and PMC Instructing Officer rate of $119 when he was employed at the PMC. *Please refer to Observation 1.8 in the Preliminary Report for further detail and supporting exhibits.*
Mr Peter Metcalfe (Executive Director, Grains and Livestock) Dr Ron Edwards (former PMC Chair	December 2016	When seeking support for using surplus funds for contracting Mr Evans and Ms Russell	You changed your reasoning for urgent contracting and protection of surplus funds by stating to Mr Metcalfe that funds would potentially be returned to growers resulting in an embarrassing situation for the State Government and DAFWA. Whilst to Dr Edwards, you stated that you were using the surplus closure monies for contracting staff which would otherwise be returned to DAFWA. *Please refer to Observation 1.9 in the Preliminary Report for further detail and supporting exhibits.*
Ms Alison Wilson (A/Director Strategy and Governance) and liaison with Minister's Office Mr Nick Egan (A/State Solicitor)	June 2017 & July 2017	In response to queries on origin and nature of $300k superannuation error	You stated that you found the Cabinet approval for the PMC close out funds included a superannuation error that involved $300K. After Ms Taylor (DAFWA CFO) informed you that there was no record of a $300K superannuation error, you then changed your statement to the SSO to say that there were surplus funds of $300K that involved a portion of overpayment of superannuation. *Please refer to Observation 2.2.2 in the Preliminary Report for further detail and supporting exhibits.*
Ms Alison Wilson (A/Director Strategy and Governance) and liaison with	June 2017 & July 2017	In response to queries with regards to the engagement of Ms Amber Russell	You stated that Ms Russell was one of two former PMC staff that knew the most about the Galati litigation. However,

Minister's Office Audit and Integrity team			Ms Russell only had two months experience on Galati matters. You were also canvassing other job opportunities for Ms Russell at DAFWA in December 2016. You also made the false statement that you had only known Ms Russell from the PMC, when evidence showed you had worked together before. *Please refer to Observation 3.1 and 3.2 in the Preliminary Report for further detail and supporting exhibits.*
Workforce Planning Committee of DAFWA	March 2017 & April 2017	When recruiting students for a Grains project, you included Mr Liam Moltoni as an intern under the MOU between DAFWA and UWA.	The MOU between DAFWA and the UWA Faculty of Law covered a pilot student unpaid internship opportunity at DAFWA. Mr Liam Moltoni was neither a law student nor a student from the UWA Faculty of Law. He was a Bachelor of Commerce from Curtin University. *Please refer to Observation 4.1 in the Preliminary Report for further detail and supporting exhibits.*

[9] As at 8 November 2017, the appellant had not provided a response to Mr Addis. In the absence of any such response, Mr Addis wrote to the appellant on 8 November 2017 to notify her that he would initiate a discipline investigation pursuant to s 82A of the *Public Sector Management Act 1994* (WA). He informed the appellant that he would appoint an independent investigator to undertake the discipline investigation. He also gave her notice of his intention to suspend her from duty, on full pay, to take effect on 15 November 2017.[7] The appellant made no submissions to contest the suspension, which was confirmed by the acting Deputy Director-

7 CB pp. 350-351.

General on 17 November, with effect from 15 November 2017 and until further notice.

[10] After the investigation had been carried out, Mr Addis wrote to the appellant by letter dated 23 April 2018. On 1 May 2018, Mr Addis sent a further letter, in substantially similar terms, to the appellant, care of her solicitor. The contents of the second letter are reproduced below (formal parts omitted):

> BREACH OF DISCIPLINE – FINDING AND PROPOSED ACTION
>
> I refer to my earlier correspondence dated 28 August 2017 in relation to a suspected breach of discipline. ….
>
> The independent disciplinary investigation, carried out by Allied Integrity Solutions, has now concluded and I have reviewed the investigator's final report and all available information, including your responses to the allegations which have been taken into consideration by the investigator. I now wish to inform you that I have, based on the evidence gathered and on the balance of probabilities, found the allegations have been substantiated.
>
> In this context it is relevant to set out the findings which are that you:
>
> 1. Failed to comply with State Supply Commission Procurement Policies and departmental procurement policies and procedures in the engagement of Mr Peter Evans (former CEO of Potato Marketing Corporation) on a contract for services arrangement.
> 2. Wrote to Ms Amber Russell (PMC employee) on 29 December 2016 offering a transfer from PMC to the former Department of Agriculture and Food Western Australia (DAFWA) for which you had no delegated authority. The letter included incorrect information as to the period of time that Ms Russell had worked for the PMC.
> 3. Committed funds for the engagement of both Mr Evans and Ms Russell without appropriate authorisation, and breached the decision on the usage of funds provided for PMC closure.
> 4. Circumvented and misused the Memorandum of Understanding between DAFWA and UWA for unpaid work experience placement/internship by engaging interns as paid 'casual' employees. One of the interns engaged through this process,

Mr Liam Moltoni, did not meet the criteria of the MOU as he was neither a law student nor a student from the UWA Faculty of Law.

5. Provided misleading information and/or responses in relation to the PMC to the Office of the Minister for Regional Development, Agriculture and Food (the Minister), and others including departmental officers and the State Solicitor's Office.

As a senior officer within the legal area, who can and is expected to act autonomously for the most part, I need to have total trust in you to do so. This involves recognition on the limits of your authority and compliance with those instruments that regulate the Public Sector. I am not satisfied that you are prepared to do either. The findings reflect more than a momentary lapse.

In accordance with 82A(3)(b) of the *Public Sector Management Act 1994* (the Act), I wish to inform you that based on the above findings I propose to terminate your contract of employment with notice.

My proposal to terminate your contract of employment has not been taken lightly. In your role as the Director Legal & Commercial, a senior leadership position within the department, it is incumbent on you to have the highest standards of probity, and a responsibility to be familiar with and observe relevant process requirements and standards of conduct. You also have previous management experience in the public sector and should be familiar with the relevant requirements and standards of conduct. In the public sector there is an expectation that all employees regardless of classification level, role or position, understand these requirements. I consider the pattern of behaviour reflected in the five allegations to be very concerning. It is also noted that in your responses to the allegations you appear to have not taken responsibility or accountability for your decisions and actions, which is also of concern. I have lost confidence in you and I do not feel I will be able to regain it

Your proposed dismissal is a view that I have not lightly formed. Before finally deciding on this I am providing you with the opportunity to provide a response. Your response is required by close of business Tuesday 15 May 2018 and I will take your response into consideration before making my final decision.

In order to conclude this matter I seek your response to the proposed action. Failure to respond by this date or electing not to provide me with a written response will result in me confirming the termination of your contract of employment being effective at the close of business on Tuesday 29 May 2018.

As requested by Mr Heathcote I also attach for your information a copy of the investigator's report.

[11] It may be noted that, on a finding that allegations had been substantiated, dismissal was the most severe sanction available for a breach of discipline.[8] The possible consequences started with "no further action" and, in increasing order of severity, went to a reprimand, a fine, a transfer to other duties within DPIRD, a transfer to another Public Sector Agency, reduction in salary, reduction in substantive classification, and finally dismissal.

[12] It may also be noted that the Director-General stated his conclusion that the appellant did not have the "highest standards of probity" expected of her "as a senior officer within the legal area", who held "a senior leadership position within the department". Mr Addis considered that the five adverse findings reflected a pattern of behaviour which was more than a momentary lapse. He was concerned also by the fact that the appellant appeared not to have taken responsibility or accountability for her decisions and actions. He informed the appellant that he had lost confidence in her and that he did not feel he would be able to regain it.

[13] Mr Addis gave the appellant the opportunity to respond to his stated intention to terminate her contract of employment. He allowed 14 days, to close of business 15 May 2018, for her response.

[14] In a subsequent letter, dated 22 May 2018,[9] Mr Addis allowed the appellant an extension to 18 June 2018 to respond to the proposed dismissal. That extension was granted because a medical certificate had been provided to the

8 Letter Ralph Addis to appellant, 8 November 2017, CB p. 351.

9 CB p. 359-360.

effect that the appellant would be unfit for work (or to respond to work matters) for four weeks. At the same time, Mr Addis removed the appellant's suspension, effective on and from 22 May, "to accommodate the circumstances of [her] ill-health and enable her to access her sick leave entitlements". The reason for the lifting of the suspension was made clear, as was the fact that Mr Addis still awaited the appellant's response to the proposed dismissal. The following paragraphs in his letter of 22 May 2018 illustrate the obvious point that the lifting of the suspension did not detract in any way from Mr Addis's intention to dismiss the appellant:

> … The suspension with pay will be reimposed unless Ms Heffernan seeks further time on medical grounds to respond to the proposed penalty. Pay during this further period will need to be supported by an approved application for sick leave.
>
> Should Ms Heffernan be unfit for a further period of time, I will require further medical certification, and required her to attend the Department's nominated medical practitioner/s for a detailed assessment. Given the circumstances that the disciplinary process is becoming protracted, and in order to bring this matter to a conclusion, I will need a full understanding of her medical circumstances. From this assessment, I would seek comprehensive medical report/s which identify Ms Heffernan's illness, the way in which it prevents her from being able to provide a response, and when she is like to be able to provide one.

[15] In the circumstances, the appellant would have had no reasonable basis to believe that the lifting of her suspension amounted to a "reinstatement" which in some way signified acceptance that she had not engaged in any wrongdoing. The appellant does not put her case in those precise terms, but in her affidavit sworn 6 April 2022, she said that it did not occur to her that she had an obligation to disclose to the Law Society anything that arose out

of her employment with the Department, for a number of reasons, including that she was not "subject to any ongoing disciplinary sanctions such as suspension", having been reinstated on 22 May 2018. As the letter from Mr Addis made clear, the reason that the appellant was not subject to ongoing suspension was because of her claimed ill-health, but the disciplinary process was ongoing and Mr Addis was awaiting the appellant's response.

[16] On 4 July 2018, the appellant tendered a letter of resignation. The letter read as follows:[10]

> I hereby give notice of my resignation from my employment with DPIRD with effect from DATE 4th August 2018 being one months' notice from today's date.
>
> I am unwell at present and I don't anticipate being well enough to attend to any of my duties during my notice period. Accordingly, I'd be grateful if you would consider waiving the DPIRD's entitlement to notice of the termination of my employment so that I can focus on recovering my health and relieve myself of the need to further engage with any of the DPIRD's staff.
>
> I await your reply.
>
> [Signed "F Heffernan" and dated by hand "4th July 2018"]

[17] It appears that the Department retrospectively acceded to the appellant's request and accepted that her resignation should take effect from 4 July 2018.

[18] The appellant resigned without responding to the notice of intention to terminate her employment. The appellant acknowledges through her counsel

10 TB p. 37.

that the investigation remained open.[11] Her concession is to some extent inconsistent with the appellant's evidence in which she claimed that she understood that the proposed termination had been resolved: "I understood, when I resigned on 4 July, that was the end of all matters".[12] It is difficult to reconcile the appellant's claimed understanding with the content of Mr Addis's letter of 1 May 2018 and subsequent correspondence.

[19] On 25 July 2018, the appellant's legal representative informed the Department:[13]

> You can continue with the disciplinary process as you see fit. Felicity is not well enough to participate in it.

That appeared to be a concession by the appellant that the disciplinary process was ongoing, or at least that it had not been concluded as at 25 July 2018, three weeks after her resignation.

[20] On 7 August 2018, the appellant signed an application to be made to the Law Society for an unrestricted practising certificate. Section 8.3 of the application form read as follows:[14]

> **8.3. Fit and proper person, suitability matters**
>
> *I understand that the Society must not grant a PC unless satisfied that I am a 'fit and proper person' to hold the PC.*
>
> *I understand that I must disclose to the Society any matter which is material to the question of whether I am a fit and proper person*

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11 Appellant's closing submissions, 12 July 2022, Relevant Facts, par 10: "… the appellant resigned without responding to a notice to terminate her employment, leaving the investigation open."

12 T 28.5.

13 Email Steve Heathcote to DPIRD, TB 38.

14 CB p. 267.

including 'suitability matters'. Section 47 lists matters that can be taken into account by determining if an applicant is a 'fit and proper person'. Suitability matters are defined in s.11. By way of example, suitability matters include unresolved complaints or investigations in this or other jurisdictions, insolvency, or a material inability to practice, such as ill health.

There is further information relevant to the question of whether I am a fit and proper person:

☐ NO ☐ YES ☐ Details previously provided to the Society, or
☐ Details:

[21] In response to section 8.3, the appellant ticked the "No" box. She thereby represented that there was no further information material to the question of whether she was a fit and proper person. Moreover, at section 11 of the application form, she declared:[15]

> There is no further information relevant to the consideration of this application which has not previously been disclosed to the Society.

[22] At the time she made the application, the appellant was aware that the Law Society could take into account any 'suitability matter' relating to her,[16] and that the 'suitability matter' in s 11(1)(g) LPA, set out below, was possibly relevant:

> (g) whether the person:
>
> (i) is the subject of current disciplinary action, however expressed, in another profession or occupation in Australia or a foreign country; or
>
> (ii) has been the subject of disciplinary action, however expressed, relating to another profession or occupation that involved a finding of guilt ….

15 CB p. 268.

16 See s 47(2) LPA.

[23] Although the term "disciplinary action" is not relevantly defined in the LPA, I consider that the term should be given its ordinary meaning, and not construed narrowly, having regard to purposes and objects of the LPA.[17] It is appropriate to adopt the definition of "disciplinary action" in the context of employment law in *Butterworths Australian Legal Dictionary*,[18] as follows:

> Reasonable lawful action taken against an employee in the nature of, or promoting discipline[19]…Generally, disciplinary action includes a decision by an employer to defer paying an increment to the employee, or to reduce the rank, classification, position, grade, or pay of the employee; to impose a fine or forfeit pay; to annul the appointment of an employee on probation; or to suspend or dismiss an employee…

[24] The appellant made a conscious decision not to disclose to the Law Society (1) the fact that there had been a discipline investigation in Western Australia and (2) the adverse findings made by Mr Addis after his review of the independent investigator's report. In relation to those non-disclosures, the appellant's evidence in cross-examination was as follows:[20]

> Did you see at part 8.3 pf the practising certificate application that it gives some examples of what suitability matters include. Do you see that? --- Yes
>
> In front of you now, where it includes "unresolved complaints or investigations in this or other jurisdictions"? --- I believed it was resolved.
>
> And do you see it also says, amongst other things, "A material inability to practice such as ill health"? --- Yes, I read that.
>
> When you read that, and when you ticked, as you have put a big tick on "No" to the question of whether there is further information relevant to

---

17 *Connop v Law Society Northern Territory* [2016] NTSC 38 at [290].

18 Dr Peter Nygh and Peter Butt (eds), Butterworths Australian Legal Dictionary (Butterworths, 1997).

19 *Commission for Safety and Rehabilitation of Commonwealth Employees v Chenhall* (1992) 37 FCR 75 at 83-84.

20 T 25.

> the question of whether you are a fit and proper person, the history that you had just left in the Department in WA was in your mind, wasn't it? --- I read in s 11 that there had to be a finding of guilt, which is a criminal court.
>
> So did you think about the Departmental history and decide that it wasn't necessary for you to disclose it? --- It was my understanding that it was finished.
>
> Yes, but did you – when you ticked "No", did you think about the Department – did you ask yourself whether you needed or should disclose it and conclude that you didn't or did you not think about it at all? --- I didn't think about it beyond that it was not a finding of guilt, the report. I've never been disciplined. I've never been sacked and I understood my face didn't fit and it was finished.
>
> HIS HONOUR: In answer to the question though, whether you reflected back on those matters, is it the case that you did reflect back on those matters and decided that they didn't need to be disclosed --- That is correct, your Honour.

[25] Based on her evidence, the appellant did not consider herself to be the subject of current disciplinary action, because she understood that "it" (a reference to the discipline investigation in Western Australia) had been "resolved" and was "finished". In fact, the investigation remained open, as she now concedes. The basis on which the appellant might reasonably have thought that the investigation was no longer current was that her resignation, submitted before Mr Addis made good the foreshadowed dismissal, had brought the discipline investigation to an end. In this respect, the appellant may have had a reason to believe that the relevant disciplinary action was no longer current, given that no further steps had been taken by Mr Addis and indeed it is unclear what further steps could have been taken by him after the Department accepted the appellant's resignation. As a result, the appellant's assessment that the suitability ground in s 11(1)(g)(i) LPA did

not apply to her may have been reasonable. However, I consider that the discipline investigation in Western Australia and the adverse findings made by Mr Addis should have been disclosed by the appellant as matters which were material to the question of whether she was a fit and proper person. The matters required to be disclosed by section 8.3 are not confined to suitability matters. The appellant should have ticked the 'Yes' box in section 8.3 and provided details for the Law Society to consider. Further, the appellant should not have made the declaration in section 11 referred to in [21] above. In my assessment, it was untrue.

[26] Even if the appellant believed that the suitability ground in s 11(1)(g)(i) LPA did not apply to her, on the ground that the relevant disciplinary action was no longer current, the appellant's stated belief that the suitability ground in s 11(1)(g)(ii) LPA did not apply to her is questionable. She was very aware that she had been the subject of disciplinary action, specifically a discipline investigation pursuant to s 82A of the *Public Sector Management Act 1994* (WA), relating to "another profession or occupation". The allegations, which included providing misleading and false information, were found to have been substantiated. The fact that the breaches were found proven was, for practical purposes, a "finding of guilt" within the meaning of s 11(1)(g)(ii) LPA. The appellant's stated belief that a finding of guilt had to be made by a criminal court is doubly questionable because the sub-paragraph refers to disciplinary action in relation to a profession or occupation, and such disciplinary action is most unlikely to be a criminal

prosecution. Disciplinary proceedings (whether in the context of employment law generally, or in the context of a profession, for example, proceedings for unprofessional conduct or professional misconduct) are civil in nature and have nothing to do with criminal proceedings. It beggars belief that an experienced lawyer truly believed that s 11(1)(g)(ii) did not apply to her because she had not been found guilty by a criminal court, or that there had not been a "finding of guilt" in circumstances where adverse allegations had been found substantiated on the balance of probabilities. The only further issue to be decided was whether the appellant was to be dismissed, or whether some lesser penalty might be imposed. In crude terms, she had been found guilty and was awaiting sentence at the time she resigned. In any event, irrespective of the appellant's claimed subjective belief, I consider that the discipline investigation in Western Australia and the adverse findings made by Mr Addis should have been disclosed by the appellant as matters which were material to the question of whether she was a fit and proper person, for the same reasons given in [25] above.

[27] On 4 September 2018, the Law Society issued the appellant's 2018/19 unrestricted practising certificate, which was effective from 3 September 2018 to 30 June 2019.

[28] However, the appellant's problems in Western Australia had not gone away. On or about 18 November 2018, she received a witness summons to attend in person to give oral evidence to the CCC. The summons stated that the scope and purpose of the examination was "to determine whether any public

officers at the Department of Primary Industries and Regional Department [*sic*] (formerly the Department of Agriculture and Food) engaged in serious misconduct by corruptly using their position, between December 2015 to June 2018, to benefit others".

[29] It was put to the appellant in cross examination that, on reading the witness summons, she must have immediately thought that it referred to her. She denied that was the case. I set out an extract from her evidence: [21]

> You must have immediately thought that that included you?---I did not immediately think that. That is false.
>
> You were a public officer at the department during that time frame weren't you?--- I was not. ..... I did not work there in December 2015 or at any time in 2015.
>
> You commenced employment at the department in January 2016 and remained there through to June – or in fact July 2018, didn't you?--- July 4th.
>
> Yes. So you are squarely within the period of the summons are you not?--- No, I'm not, because I didn't work there in December 2015.
>
> Ms Heffernan, you understand – you have had prosecutorial experience haven't you?--- 20 years ago.
>
> You understand what the scope of 'between dates' is and what that means, don't you, in a summons like this?---I am summoned as a witness.
>
> Is it your evidence, Ms Heffernan, that because you didn't work there in December 2015 in the department, that the summons did not apply to you at all?---My evidence is that I received a letter from Ralph Addis telling me that the Commission had no interest and has reporting you earlier and that when I received this I was summoned as a witness.
>
> I just want to understand your remark about what the importance of December 2015 is. Putting aside what Ralph Addis may or may not have said, when you received this summons and you read it, it applies during almost the entire period of your employment in the department, doesn't it?--- That's not how I read it. .....

21 T 33-34.

... you were employed at the department during almost the entire period of the scope of this summons weren't you?---I was employed from 16 January to 4 July was my understanding.

Yes, January 2016 to July 2018?---Yes.

So, Ms Heffernan, when you read the summons you immediately thought that you were within its – clearly within its scope?---I was summoned as a witness.

You knew that that the alleged breach of discipline and the matters which Mr Addis had found substantiated, although you disagreed with it, covered this exact type of issue, didn't you?--- I did not.

The initial alleged breach of discipline and opportunity to respond that was provided to you gave notice of conduct ... that you failed to comply with procurement policies. Do you remember responding to that allegation?---Yes.

That you offered transfer of funds to which you had no delegated authority, do you remember responding to that allegation?---Yes.

That you gave incorrect information in a letter? Do you remember that?---I didn't give incorrect information in a letter.

Do you remember the allegation?---Yes.

The allegation that you committed funds to engage Mr Evans and Mr Russell without appropriate authorisation. Do you remember that allegation?---Yes.

And that you provided misleading information and responses to the ministerial office, the PMC and the Office of the Minister for Regional Development. Do you remember that allegation?---Yes.

And there is another that you circumvented and misused a Memorandum of Understanding between the department and the UWA for unpaid work. Do you remember that allegation ---Yes.

So, returning back to the summons, which is requiring you to attend to be examined as to whether any public officers of the department engaged in serious misconduct by corruptly using their position, when you received the summons you must have known that that was squarely directed at the matters you had been alleged to have been involved in and found to have been involved in?---I did not.

[30] The evidence extracted in the previous paragraph raises significant concerns in relation to the appellant's credit, character and fitness, both in the past and currently. The appellant did not answer the question in relation to her

understanding of 'between dates', instead obstinately replying, "I am summoned as a witness" and later "I was summoned as a witness". Her asserted contemporaneous understanding that the summons did not apply to her (except as a witness), because she had not commenced working for the Department in December 2015, is inconsistent not only with the appellant's many years of experience in the law but also the fact that she is an educated adult of presumably normal or above normal intelligence.

[31] The appellant gave a further reason for her claimed understanding that the CCC summons did not apply to her (except as a witness). She said that she had received a letter from Mr Addis telling her that the Commission "had no interest".[22] The letter referred to was an email from Mr Addis to the appellant dated 21 September 2017, in which Mr Addis had written "[I] can advise that the CCC considered the matter falls outside its jurisdiction".[23] While that suggested reason was not as fanciful as the first reason given by the appellant, I do not accept that, after the adverse findings made in the Departmental investigation, the Addis letter was still operating on the appellant's mind to cause her to believe that her conduct was not of interest to the CCC. Her evidence, to the effect that she did not make any connection between the subject matter of the CCC witness summons and the subject matter of the previous discipline investigation, is not credible. I do not accept the appellant's evidence that, at the time she received the summons,

22 T 33.6.

23 Appellant's exhibit 'A'.

she thought that her conduct was not within the scope of the CCC investigation.

[32] In December 2018, the appellant attended and was examined before the CCC. The questions asked of her and the answers given are not in evidence in this appeal. I do not draw any adverse inference in relation to the absence of that material. I note that the appellant's lawyers requested a transcript of the evidence given by the appellant to the CCC and a copy of any exhibits tendered during her examination. The CCC not only refused the request but also indicated that it would likely seek to set aside any subpoena issued to obtain the requested material.[24]

[33] On 4 April 2019, the appellant signed an application form for a renewal of her practising certificate for the practice year 1 July 2019 to 30 June 2020. In response to section 4.3 of the application form, under the heading: "Fit and Proper Person, Suitability Matters", the appellant crossed the box "No" in response to the following:

> I understand that the Society must not grant a PC unless satisfied that I am a 'fit and proper person' to hold the PC.
>
> I understand that I must disclose to the Society any matter which is material to the question of whether I am a fit and proper person including 'suitability matters'. Section 47 lists matters that can be taken into account in determining if an applicant is a 'fit and proper person'. Suitability matters are defined in s 11.
>
> There is further information relevant to the question of whether I am a fit and proper person:
>
> ☐ No

24 Letter CCC to Dean Woodbridge, 22 December 2021, TB 71.

[34] Not only did the appellant answer "No" to section 4.3, she also completed a written declaration in section 8 as follows:[25]

> There is no further information relevant to the consideration of this application which has not previously been disclosed to the Society.

[35] The appellant's explanation for the non-disclosure of matters relevant to whether she was a fit and proper person, was as follows:[26]

> When I read the application form, and particularly Note 3 on page 4, I did not believe that the circumstances surrounding my resignation of employment with DPIRD, nor the summons to appear at the CCC, the questions posed of me and my responses to them, amounted to matters that I was obliged to disclose. I did not think them to be equivalent to me suffering a conviction or being charged with a serious offence, so requiring disclosure as part of the application.
>
> I did not consider these events to be matters of such seriousness such as convictions or serious offence charges.

[36] The appellant denied in cross examination that that she answered "No" to section 4.3 because it "might bear against the consideration of whether [she was] a fit and proper person" for the renewal of the practising certificate.[27]

[37] It may be noted that the Law Society did not issue the appellant's unrestricted practising certificate for 2019/2020 until 26 June 2019. In my opinion, however, the appellant's obligations of disclosure and candour were ongoing, to the time of issue of the practising certificate and beyond. The appellant apparently now concedes this to be the case.

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25 CB 281.

26 Affidavit of the appellant sworn 6 April 2022, pars 261-262, CB 196.

27 T 36.8.

[38] On or about 20 May 2019, the appellant received a letter from the CCC dated 10 May 2019. The letter was headed "Draft report into whether public officers engaged in serious misconduct by corruptly using their position". Enclosed with the letter was the draft report, a 51-page document.[28] The report referred to sham arrangements entered into by the appellant to pay a consultant, Dr Howard Carr, and a former public officer, Mr Peter Evans. Significant proposed findings, adverse to the appellant, included the following:

- She was afforded great discretion in view of her legal experience but she abused the trust placed in her on at least two matters.[29]

<u>In relation to Dr Carr</u>

- Ms Heffernan entered into an arrangement with a Partner at Herbert Smith Freehills solicitors to circumvent the requirements of a government ordered public sector recruitment freeze in order to allow Dr Carr, whose employment contract had expired, to continue to benefit by doing work for DPIRD. Thereafter to facilitate payment to Dr Carr, she falsified a letter of engagement.[30]
- Dr Carr was a public officer who knowingly participated in a scheme to continue his employment in contravention of the recruitment freeze. The participation included backdating a crucial engagement letter which effectively misled auditors and senior members of DPIRD.[31]
- What is clear is that Ms Heffernan implemented a dishonest solution to resolve the issue of Dr Carr's non-payment.[32]
- Ms Heffernan drafted a new engagement letter for Dr Carr. [She] signed the engagement letter on or shortly before 13 December

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28 Exhibit 'R-B'.

29 Draft report, par [3].

30 Draft report, par [5].

31 Draft report, par [6].

32 Draft report par [32].

2016. … She directed Dr Carr to sign the document and to falsely backdate it to 9 June 2016. He acquiesced.[33]

- Ms Heffernan used the engagement letter as the basis to authorise payments to Dr Carr totalling approximately $106,000.[34]

  In the Commission's opinion, both Ms Heffernan and Dr Carr engaged in serious misconduct by falsifying the engagement letter of 9 June 2016.[35]

In relation to Mr Evans

- Between them, Ms Heffernan and Mr Evans brought about a situation where Mr Evans was, in effect, paid a full redundancy (close to $400,000) then immediately hired as a consultant to assist in the ongoing litigation … (at a cost of just under $100,000).[36]
- Ms Heffernan was bound by professional rules of conduct as well as her obligations as a public servant. She breached these in a manner that transcends mere carelessness.[37]
- A carefully worded closeout note was signed by Mr Evans on 15 May 2017 stating that he had carried out 400 hours work at $200 per hour, plus GST. Mr Evans was however paid for 432 hours, the original amount he was to be prepaid. The discrepancy was picked up by internal auditors. Ms Heffernan was under pressure to explain matters.[38]
- Both Mr Evans and Ms Heffernan misled internal auditors about the additional 32 hours.[39]
- The explanations provided by Ms Heffernan and Mr Evans in the context of the evidence about the additional hours are implausible. In the Commission's opinion, Ms Heffernan and Mr Evans engaged in serious misconduct by misleading internal auditors and corruptly preparing false records to justify payment for a portion of hours Mr Evans never worked.[40]
- In the Commission's opinion, both Ms Heffernan and Mr Evans intentionally misled auditors. They did so for an ulterior purpose,

33 Draft report par [33], [34].

34 Draft report par [36].

35 Draft report par [44].

36 Draft report, par [11].

37 Draft report, par [13].

38 Draft report, par [62].

39 Draft report, par [63].

40 Draft report, par [70].

to justify the previous expenditure of public money in May 2017 for work which had never been carried out, nor could be supported by contemporaneous records or other evidence.[41]

- Mr Evans used his position as a senior public officer to enrich himself at the State's expense.[42]
- The Commission has formed an opinion of serious misconduct over the actions of each of them.[43]
- [Ms Heffernan] ought to have epitomised honesty and integrity and acted in DPIRD's best interests, not least because she was in a position of trust and given greater autonomy. Instead, she dishonestly put the interests of others ahead of DPIRD and the State.[44]

[39] The content of the draft CCC report gave some indication of the issues about which the appellant had been examined in December 2018. The draft report made clear that the Commission's investigation was directed at the alleged conduct of the appellant (and two other persons). I consider it unlikely that the examination of the appellant did not touch upon the same conduct. The appellant deposed in somewhat vague terms that she had been questioned about "commercialisation matters, including Dr Carr". She also referred to being questioned on "commercialisation and procurement" in the former Department. During that questioning, she said that documents were shown to

41 Draft report, par [233]. The paragraph is probably wrongly numbered, since it follows after par [287], and hence should probably be par [288].

42 Draft report, par [14].

43 Draft report, par [15]. The term 'serious misconduct' is to be read in the context of the *Corruption, Crime and Misconduct Act 2003* (WA), s 4.

44 Draft report, par [18].

her. Some of those documents were signed by her.[45] She further deposed as follows:[46]

> I did not believe that any allegation of misconduct was made against me specifically, or that I was the subject or target of any CCC investigation.

[40] Whether or not the appellant truly believed that she had not been a subject or target of the CCC investigation, she must have realized that she was a target as soon as she read the draft CCC report in late May 2019. Moreover, she must have realised that the CCC was intending to make a finding of serious misconduct for her dishonesty in the creation of false documents. However, notwithstanding that her application for renewal of her practising certificate was pending, that is, the new certificate had not issued, the appellant did not inform the Law Society about the draft CCC report. She sought and obtained permission from the CCC to notify her professional indemnity insurer about the substance of the draft CCC report, but did not seek permission from the CCC to notify the Law Society.

[41] The appellant said in cross examination that she did not turn her mind to the need to alert the Law Society to the contents of the draft report. She said that she now knows better. Her evidence was as follows:[47]

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45 Affidavit of the appellant sworn 6 April 2022, pars 250-251, CB 195.

46 Affidavit of the appellant sworn 6 April 2022, par 254, CB 195.

47 T 40.4. The appellant made a similar statement to the effect that, with her current knowledge, she would "disclose everything", in reference to the 2018 departmental investigation.

> … But I now know, in 2022, that it doesn't matter what you get, you should give it to the Law Society, err on the side of caution. So, at the time in 2019, I didn't have that knowledge.

[42] The appellant made an extensive response to the draft CCC report. She asserts that she believed that her response "addressed the significant inaccuracies and errors in the draft report" which, in her view, had resulted in her "being seen in a negative and inaccurate light".[48] The CCC took a very different view in relation to the appellant's response, as revealed in its final report:[49]

> Ms Heffernan made extensive submissions regarding all matters, with detailed reference to many documents. She did not however address the behaviour which forms the basis of the Commission's opinion of serious misconduct. That is the creation of purported letters of engagement for Dr Carr and Mr Evans when each was false. The letters were used as authority to expend State funds.

[43] On 25 June 2019, the respondent renewed the appellant's unrestricted practising certificate for the 2019/20 year, effective 1 July 2019.

[44] The final CCC report was released on 5 July 2019, following which the appellant notified her employer and her professional indemnity insurer of it. She did not notify the Law Society. In her most recent affidavit, the appellant deposed that, if she had known that the CCC report was required to be disclosed to the Law Society immediately on its release, she would

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48 Affidavit of the appellant sworn 6 April 2022, par 280, CB 198.

49 Exhibit 'R-C': *Abuse of Power at the Department of Primary Industries and Regional Development*, report dated 5 July 2019, par [16].

have disclosed it, in the same way that she disclosed it to her insurer and her then employer.[50] Her evidence in cross-examination was as follows:[51]

> Had I known I had an obligation to disclose the summons, the draft report, or that I had attended an examination as a witness, I would have disclosed. And in my second affidavit, I made it clear [that], had I known when I got the final report that I should have again communicated with the Law Society, that I would have. But at that time in 2018 and 2019, I did not know that that was a requirement. Now I do know in 2022, that is a requirement.

[45] The final CCC report noted that, as a public officer and a lawyer, the appellant had a duty of honesty and integrity, and then set out the following adverse conclusions and recommendation:

> The Commission's investigation revealed that Ms Heffernan demonstrated reckless non-compliance with procedure resulting in significant unauthorised expenditure of public funds in defiance of Cabinet decisions. [par 335]
>
> In doing so, she showed a preparedness to act dishonestly by falsifying records and deceit. In the Commission's opinion, Ms Heffernan engaged in serious misconduct. [par 336]
>
> The Commission recommends that an appropriate authority or independent agency gives consideration to prosecuting Ms Heffernan for her conduct in preparing false letters of engagement of Dr Carr and Mr Evans and for her conduct misleading internal auditors. [347]

[46] The Law Society became aware of the contents of the published CCC report and, by letter dated 1 October 2019, gave the appellant notice that it believed that she was no longer a fit and proper person to hold a practising certificate, and that it proposed to take action to cancel her current

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50 Affidavit of the appellant sworn 6 April 2022, par 290, CB 199.

51 T 41.7.

unrestricted practising certificate. The Law Society's letter included the following statements:

> The publication of the Report raises a serious concern about whether or not you are currently of good fame or character. [par 14]
>
> The allegations made against you that were investigated by the CCC were very serious, including the falsification of documents and failing to comply with the procedures for the expenditure of public funds, and go to the heart of key character traits for a legal practitioner – honesty and integrity. [par 15]
>
> You have failed to disclose to the Society the existence of either the DPIRD disciplinary investigation or the CCC investigation into your conduct. This failure occurred over an extended period of time given it was not disclosed on any of your PC application forms, in any ancillary or supporting documents provided to the Society around the time of either PC application nor subsequent to the publication of the Report. [par 16]

[47] In relation to the Western Australian disciplinary investigation, the Law Society's letter stated:

> The Council further considers that you were also aware of the DPIRD disciplinary investigation at the time of applying for your first NT PC in August 2018 given that you were suspended in November 2017, this application was made after the expiry of your WA PC on 30 June 2018 and you had apparently resigned from DPIRD in mid-2018 whilst under a disciplinary investigation. [par 18]

[48] The Law Society gave the appellant 21 days, to close of business 22 October 2019, to make submissions as to why the proposed cancellation should not take place. The appellant's then lawyer wrote to the Law Society by letter dated 2 October stating that written submissions would be provided. No such submissions had been received by the Law Society as at 23 October 2019, on which date an officer of the Law Society wrote to the appellant's lawyer by email to inform him that the matter would be considered by the Council of

the Law Society on 31 October 2019. The appellant's lawyer then said that a response would be provided prior to 31 October. He was informed that it would be a matter for the Council's discretion whether submissions received after the due date of 22 October would be considered.[52] The appellant and her lawyer were put on notice that the Council of the Law Society would make a determination in accordance with s 57(2) LPA on 31 October 2019. However, no further correspondence was received from the appellant or her lawyer prior to the Council meeting which took place on 31 October 2019.

[49] On 31 October 2019, the Law Society made a decision to cancel the appellant's practising certificate pursuant to s 57(2)(c) LPA on the ground specified in s 56(a) LPA that she was no longer a fit and proper person to hold an unrestricted practising certificate.

Consideration

[50] As mentioned in [4], an appeal from the Law Society's decision to cancel a practising certificate pursuant to s 89(1)(c) of the LPA is an appeal de novo. The 'appeal' is an original proceeding to determine whether the certificate should be cancelled.[53] The opinion of the Court is substituted for the opinion of the Law Society. On hearing the appeal the Court may make the order it considers appropriate, pursuant to s 89(5) of the LPA. As Hiley J explained in *Connop v Law Society Northern Territory*,[54] it would be open to

52 LPA, s 57(1)(d), s 57(2).

53 *Dennis v Law Society of New South Wales* (Court of Appeal, 17 December 1979, unreported) per Moffitt P at 12-13, cited in *Veghelyi v Council of the Law Society of New South Wales* (1989) 17 NSWLR 669 at 675.

54 *Connop v Law Society Northern Territory* [2016] NTSC 38 at [17].

this Court – standing in the shoes of the Law Society – to cancel, suspend or amend the appellant's practising certificate as it considers appropriate (or do none of those things), pursuant to s 57(2)(c) of the LPA.

[51] The grounds for amending, suspending or cancelling a local practising certificate (that is, a certificate issued under the provisions of the LPA) are set out in s 56 of the LPA. The ground relied on by the Law Society and the ground relevant to this appeal is stated in s 56(a): that the appellant is "no longer a fit and proper person to hold the certificate".

[52] In *New South Wales Bar Association v Murphy*,[55] Giles JA observed:

> … Refusal, cancellation or suspension of a practising certificate upon determination of unfitness to hold a practising certificate is not punitive of the legal practitioner. It is protective of the public in the same manner as removal from the roll. Fitness to hold a practising certificate is to be assessed having in mind the high standards required of legal practitioners in the practice of their profession. The standards are required because the relationship between legal practitioner and client, between legal practitioners, and between legal practitioner and court is one of trust in the performance of professional functions, and because there must be confidence in the public and those engaged in the administration of justice that legal practitioners will properly perform those functions.

[53] Under s 47 of the LPA, various matters may be taken into account in considering whether a person is a fit and proper person to hold a local practising certificate. They include any "suitability matter" relating to the person, which includes the specific matters referred to in s 11(1)(g),[56] as

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55 *New South Wales Bar Association v Murphy* (2002) 55 NSWLR 23 at [113].

56 Reproduced in [22] above. See the discussion in [23] – [26].

well as "whether the person obtained an Australian practising certificate because of incorrect or misleading information".[57]

[54] The Law Society contends that central issue in this appeal is the appellant's lack of candour and failure to comply with disclosure obligations at the time of making applications for unrestricted practising certificates in 2018 and 2019. The Law Society points to the appellant's failure to disclose adverse matters, combined with her declarations two years in a row that there was no further information relevant to the question of whether she was a fit and proper person. This is said to demonstrate an ongoing lack of understanding of her obligations of disclosure and candour. The Law Society further contends that the appellant's attempted justification of her ongoing lack of disclosure demonstrates that she lacks a proper understanding of her ethical obligations and the requisite honesty and competence to hold an unrestricted practising certificate.

[55] The Law Society bears the onus of proof on the balance of probabilities in relation to the ultimate issue in the appeal. It has proven a series of serious non-disclosures, referred to by me in [21], [24]-[26], [33]-[35], [40], [44] and in other parts in these reasons. I am satisfied that those non-disclosures have been proven on the balance of probabilities.

57 LPA s 47(2)(a).

[56] The appellant has sought to discharge the evidentiary burden,[58] to establish that the proven non-disclosures should not have resulted (or should not result) in the cancellation of her unrestricted practising certificate.

[57] The appellant contends that she had no legal obligation to disclose the findings of the Departmental investigation or her suspension because "neither was a current disciplinary action as at the time she applied for her 2018 PC".[59] She contends that she resigned, and that no "disciplinary action" had been taken against her before or after her she resigned. Specifically, she points to the fact that she had not been dismissed.[60] I reject that contention insofar as it suggests that the term "disciplinary action" (appearing in s 11(1)(g) LPA) refers only to the final stage or act in the Western Australian discipline investigation. It is tolerably clear that the terms "current disciplinary action" and "disciplinary action" in sub-pars (i) and (ii) of s 11(1)(g) refer to a disciplinary process, not only the ultimate outcome. On my interpretation, the institution of an investigation is itself "disciplinary action". This is made particularly clear by the term "*current* disciplinary action" which suggests an ongoing process which has not been finalized.

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58 In *Stanoevski v The Council of the Law Society of NSW* [2008] NSWCA 93 at [59], Campbell JA (Hodgson JA and Handley AJA agreeing) referred to the shifting evidentiary onus as follows: "...the Tribunal was not improperly casting an onus of proof onto the appellant. All it was doing was recognising that the proved facts of the various acts of professional misconduct led to the appellant being under an onus of adducing evidence. That is an entirely proper way of proceeding". The case was an appeal from a decision to remove a practitioner's name from the roll, in which the onus of proof of the ultimate issue – whether the appellant was not a fit and proper person to remain on the roll – was on the Law Society.

59 Appellant's closing submissions, 12 July 2022, par 25.

60 Ibid, par 27.

[58] In any event, the appellant contends that she was entitled to assume, on reasonable grounds, that her resignation on 4 July 2018 had brought to an end all matters in contention between her and the Department which had been the subject of the discipline investigation. For reasons made clear in the discussion at [22] – [26] above, I reject the substance of the appellant's contention. The matters required to be disclosed by section 8.3 of the application form for an unrestricted practising certificate were not confined to suitability matters and not restricted to the s 11(1)(g) matters. The appellant's negative answer to section 8.3, by which she represented that there was no further information material to the question of whether she was a fit and proper person, and her declaration at section 11 (that there was no further relevant information not previously disclosed) revealed at best a lack of awareness of professional standards and at worst a deliberate false statement.[61]

[59] In relation to the need to properly disclose matters which may relate to the fitness of a lawyer to practise, the position of an applicant for a practising certificate is no different to that of an applicant for admission, as regards ethical obligations and obligations of candour.[62] In this respect, the appellant failed in successive years.

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61 See *Prothonotary, Supreme Court (NSW) v Darveniza* [2001] NSWCA 113; 121 A Crim R 542 at [14], per Sheller JA, Powell JA and Hodgson CJ in Eq agreeing at [19], [20].

62 *Connop v Law Society Northern Territory* [2016] NTSC 38 at [34].

[60] The appellant submits in the alternative that, if this Court were to determine that she was required to disclose the foregoing matters to the Law Society when she made application for a practising certificate and subsequent application for renewal of the practising certificate, the Court should excuse her failure to make the relevant disclosures on the basis of an erroneous but understandable error of judgment.[63] I reject that submission. I find that the appellant's explanations were contrived in order to explain the inexplicable, that is, that it did not occur to a lawyer of her standing and experience to make full disclosure of adverse matters in relation to her suitability: as to whether she was currently of good fame and character and as to whether she was a fit and proper person to hold an unrestricted practising certificate.

[61] I bear in mind that the holder of an unrestricted practising certificate must be a person who is suitable to conduct a law practice as a principal and be qualified to engage in unsupervised legal practice.[64]

[62] In relation to the failure to disclose anything in relation to her involvement with the CCC, the appellant submits that she was entitled to believe, on reasonable grounds that, at the time she submitted her application for the renewal of her unrestricted practising certificate on 4 April 2019, she was not the target of the CCC investigation and hence that she had no obligation to disclose to the Law Society that she had received the summons to give

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63 See *In the matter of an application by Deo* [2005] NTSC 58; 16 NTLR 102 at [68].

64 *Barlow v Law Society of the ACT* [2013] ACTSC 68, (2013) 272 FLR 470 at [73] per Refshauge, Burns and Marshall JJ.

evidence or that she had given evidence to the CCC.[65] I do not accept that the appellant believed that she was not a target of the CCC investigation as at 4 April 2019. I refer to my observations in [30] – [31] in relation to the appellant's spurious explanation for her claimed belief that the CCC summons did not relate to her other than as a witness. I also refer to [39] above in which I described the appellant's vague evidence about the subject matter of her examination before the CCC.

[63] In relation to the appellant's failure to disclose the draft CCC report, I refer to my finding in [40] above to the effect that, even if she did not believe that she had been a subject or target of the CCC investigation before late May 2019, she must have realised that she was a target as soon as she read the draft report. In this respect, the appellant submits as follows:[66]

> The appellant now appreciates, but did not at the time, that the draft CCC report which was provided to her in late May (that is, after her application for the renewal of her PC was made on 4 April 2019) and the final CCC report which was released on 5 July 2019 should have been disclosed to the respondent. She did not appreciate that her obligations of disclosure were ongoing and, had she known, she would have made appropriate disclosures to the respondent. The failure to do so did not involve any dishonesty or a deliberate attempt to mislead the respondent.

[64] The submission is based on the appellant's evidence referred to at [41] and [44] above. Although her evidence as to lack of awareness at the relevant time is not inherently improbable (albeit damning in terms of lack of understanding of the professional ethical obligations of disclosure and

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65 Appellant's closing submissions, 12 July 2022, par 53(b).

66 Appellant's closing submissions, 12 July 2022, par 54.

candour owed to the Law Society), I found her evidence generally so unsatisfactory that I do not accept her evidence on this issue. However, I am prepared to accept that she now has insight in relation to the need to make appropriate disclosures in connection with any application for a practising certificate, and as to the consequences for failing to make such appropriate disclosures.

[65] I have taken into account all of the evidence, including evidence which was not available to the Law Society, for example, documents relevant to the Departmental discipline investigation in Western Australia and its outcome, evidence of the appellant's response (or lack of response vis-à-vis the Law Society) in relation to the draft CCC report and the final CCC report, and the appellant's explanations in relation to those matters. I have also taken into account the appellant's evidence, evidence of her good character provided by others,[67] and the submissions of the parties.

[66] In my judgment, the Law Society has established that the cancellation of the appellant's practising certificate was fully justified, both at the time and viewed in retrospect. To the extent that the evidentiary burden shifted to the appellant,[68] she has failed to persuade me that the proven non-disclosures

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67 Summarized in Appellant's closing submissions, 12 July 2022, par 58.

68 In *Stanoevski v The Council of the Law Society of NSW* [2008] NSWCA 93 at [59], Campbell JA (Hodgson JA and Handley AJA agreeing) referred to the shifting evidentiary onus as follows: "...the Tribunal was not improperly casting an onus of proof onto the appellant. All it was doing was recognising that the proved facts of the various acts of professional misconduct led to the appellant being under an onus of adducing evidence. That is an entirely proper way of proceeding". The case was an appeal from a decision to remove a practitioner's name from the roll, in which the onus of proof of the ultimate issue – whether the appellant was not a fit and proper person to remain on the roll – was on the Law Society.

should not have resulted in the cancellation of her unrestricted practising certificate.

[67] Pursuant to s 89(5) LPA, this Court has a wide power to make any order "it considers appropriate" on hearing the appeal.

[68] I consider that I must focus on the particular unrestricted practising certificate cancelled by the Council of the Law Society on 31 October 2019. I note that that certificate would in any event have expired on 30 June 2020. The appellant did not take steps to have the appeal listed prior to that expiry date, or otherwise to seek a stay of the cancellation or the restoration of the certificate. Further, the appellant did not make application for a practising certificate for the practice year 1 July 2020 to 30 June 2021, or the subsequent year. I consider also that I should restrict myself to consideration of events in the years prior to 31 October 2019, taking into account evidence which has emerged subsequently and which sheds light on that period. These considerations have led me to conclude that I should not make a finding as to whether or not the appellant is presently a fit and proper person to hold an unrestricted practising certificate. If I were to make such a finding, it would exist in a vacuum, in circumstances where there is no pending application by the appellant for any kind of practising certificate.

[69] Moreover, I do not believe that a proper consideration of the appellant's current fitness could take place without a court or tribunal inquiring into the

basis for the significant adverse findings made against the appellant by the CCC in the final report dated 5 July 2019.[69] This appeal has largely concerned what the appellant failed to do, not what she may have done as a senior public servant in Western Australia in 2016 and 2017.

[70] I am satisfied on the balance of probabilities that, from 7 August 2018 to 31 October 2019 inclusive, the appellant was not a fit and proper person to hold an unrestricted practising certificate.

[71] I make orders as follows:

1. The Court affirms the decision of the Law Society made 31 October 2019 to cancel the appellant's unrestricted practising certificate.
2. The appeal is otherwise dismissed.
3. The question of costs is reserved.

[72] In the event that the issue of costs is not resolved by agreement between the parties, I direct that the appellant provide written submissions within 28 days as to why an order should not be made that she pay the costs of the Law Society, certified for senior junior counsel. The Law Society have 21 days within which to file submissions in reply. I will then deal with the issue of costs on the papers.

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69 It should be noted that any opinion expressed by the CCC that serious misconduct has occurred is not, and is not to be taken as, a finding or opinion that a particular person is guilty of or has committed a criminal offence or a disciplinary offence – see Respondent's exhibit 'C' [346].