QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Purdie v Queensland Law Society* [2021] QCAT 291
PARTIES:	**KENNETH JAMES PURDIE** (applicant) **V** **QUEENSLAND LAW SOCIETY** (respondent)
APPLICATION NO/S:	OCR407-19
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	20 September 2021
HEARING DATE:	1 September 2020
HEARD AT:	Brisbane
DECISION OF:	Justice Daubney, President
ORDERS:	**The application to review a decision filed on 18 December 2019 is dismissed.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – PRACTISING CERTIFICATES – CANCELLATION AND SUSPENSION – where the applicant was a legal practitioner director of a firm – where the firm became insolvent – where the applicant continued running the firm when it could not meet its tax and superannuation obligations – where the applicant failed to provide the respondent with monthly reports – where the applicant received director penalty notices – where the applicant liquidated the firm and transferred assets into a phoenix company — where the applicant was previously issued a creditor's petition – where this constituted a "show cause" event under the *Legal Profession Act 2007* (Qld) – where the applicant did not give notice of the "show cause" event – where the respondent cancelled the applicant's practising certificate – where the applicant subsequently applied for an employee level practising certificate – where the respondent refused to grant the employee level practising certificate – where the applicant seeks a review of that decision – whether the respondent made the correct or preferable decision – whether the applicant is a fit and proper person to hold a practising certificate *Legal Profession Act 2007* (Qld), s 3, s 6, s 9, s 24, s 46, s 51, s 68, s 69 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 20

A Solicitor v Council of the Law Society of New South Wales (2004) 216 CLR 253
Attorney-General of the State of Queensland v Legal Services Commissioner & Anor; Legal Services Commissioner v Shand [2018] QCA 66
Council of the Law Society of New South Wales v Wehbe [2018] NSWCATOD 14
Council of the Law Society of NSW v Andreone (No 1) [2014] NSWCATOD 49
Deputy Commissioner of Taxation v Purdie [2014] QDC 222
Law Society of New South Wales v Foreman (1994) 34 NSWLR 408
Law Society of NSW v Koffel [2010] NSWADT 149
Legal Profession Complaints Committee v A Legal Practitioner [2013] WASAT 37
New South Wales Bar Association v Murphy (2002) 55 NSWLR 23; [2002] NSWCA 138
Prothonothary of the Supreme Court of New South Wales v Leon Nikolaidis [2010] NSWCA 73
Prothonotary of the Supreme Court of New South Wales v Montenegro [2015] NSWCA 409
The Council of the Law Society of New South Wales v Adams [2011] NSWADT 177
The Southern Law Society v Westbrook (1910) 10 CLR 609
Thomas v Legal Practitioners Admissions Board [2004] QCA 407

APPEARANCES & REPRESENTATION:

Applicant:	P G Jeffery (counsel) i/b Ide Lawyers
Respondent:	S C Russell (counsel) i/b Queensland Law Society

REASONS FOR DECISION

[1] The Applicant, Kenneth James Purdie, was admitted as a solicitor in Queensland in September 2005.

[2] In 2010, the Respondent, the Queensland Law Society ("QLS"), granted him an unrestricted principal practising certificate.

[3] On 6 December 2018, the QLS exercised its power under s 69 of the *Legal Profession Act 2007* (Qld) ("LPA") to cancel the Applicant's practising certificate with effect from 29 January 2019 ("the Cancellation Decision"). It gave reasons for that decision on 7 January 2019 ("the Cancellation Reasons"). The Applicant had been subject to a "show cause" event under the LPA because he was the legal practice director of Harris Sushames Pty Ltd ("the ILP"), which was an incorporated legal practice under the LPA and through which the Respondent conducted the

practice of a law firm ("the Firm"). On 19 August 2018, the ILP had become an externally managed body corporate under the *Corporations Act 2001* (Cth).

[4] The ILP had outstanding employee superannuation liabilities dating back to 2012 and unpaid PAYG withholding amounts dating back to 2015. By the conclusion of the winding up of the ILP, the liquidator listed its total taxation liabilities (prior to distribution of assets) as $652,139.30. These tax liabilities had been mounting over the years. It is, however, clear on the evidence that it was not until the Applicant received Director Penalty Notices from the Australian Tax Office ("ATO") in August 2018 that he took any steps to address the ILP's solvency issue. The Director Penalty Notices crystallised the risk of him being personally liable for at least part of those tax debts. The Applicant admitted that this was the case when giving evidence before this Tribunal.[1]

[5] Following an earlier unsuccessful attempt to obtain a fresh unrestricted principal practising certificate, the Applicant, on 11 September 2019, applied to the QLS for a restricted employee practising certificate.

[6] On 21 November 2019, the QLS decided to refuse to issue the Applicant with a practising certificate ("the Refusal Decision") on the ground that the Applicant had not shown that he was a fit and proper person to hold a practising certificate. On 2 December 2019, the QLS gave the Applicant an information notice containing its reasons ("the Refusal Reasons").

[7] By the present application under s 69(3)(b) of the LPA, the Applicant seeks a review of the Refusal Decision.

[8] By way of further background, it is convenient to note that the Refusal Reasons expressly incorporate the statement of facts and circumstances set out in the Cancellation Reasons. Those facts and circumstances, none of which were in dispute, included the following:

> 6. Harris Sushames Pty Ltd (**the ILP**) engaged in legal practice in Queensland, so it was an incorporated legal practice for purposes of the Act (section 111(1) of the Act).
>
> 7. You were the sole legal practitioner director of the ILP.
>
> 8. On 26 May 2016, the Society carried out an investigation of the trust account of the ILP under section 263 of the Act.
>
> 9. A report was produced under section 264 of the Act on 19 May 2016 (attachment "5" to ES18.049, the **s.264 Report**). The s.264 Report revealed that:
>
> a. BAS (in respect of GST payments) was in arrears by $63,199. The ILP was to repay $3,000 per month with a balloon payment of $33,199 due on 21 February 2017.
>
> b. The company was behind in its superannuation contributions for employees by $127,898.54.
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> c. There were two signed blank trust account cheques.
>
> d. The ILP did not report a transaction over $10,000 to AUSTRAC.

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[1] Transcript of proceedings, 1-24.

10. As a result of the s.264 Report, the Society requested the ILP to provide monthly progress reports from 24 May 2016, explaining how it was dealing with the arrears of tax and superannuation payments.

11. The ILP provided progress reports to the Society on 13 October 2016, 1 December 2016 and 29 May 2017, but the Society has received nothing since.

12. On 2 August 2018, a director penalty notice was issued by the ATO for arrears of PAYG withholding tax (attachment "3" to ES18.049).

13. On 7 August 2018, a director penalty notice was issued by the ATO for arrears of superannuation guarantee charge (attachment "3" to ES18.049).

14. On 20 August 2018, the ILP was placed into liquidation. Rogers Reidy Chartered Accountants were appointed liquidators. The ILP ceased to operate.

15. From 20 August 2018 to 27 August 2018, you practised as a sole practitioner under the name and style of Purdie Law.

16. On 27 August 2018 you served a form 7 notice of show cause event advising of the liquidation (attachment "1" to ES18.049).

17. On 28 August 2018 you commenced practising as the sole legal practitioner director of Paterberg Pty Ltd (**Paterberg**).

Examination of your statement given under section 68(1)(b) of the Act and the supporting documents provided by you

18. On 17 September 2018, you served a statement under section 68(1)(b) of the Act setting out your submissions as to why, despite the show cause event, you continue to be a fit and property person to hold a practising certificate (attachment "2" to ES18.049) (**your statement**).

19. In your statement you submitted:

    a. You are not bankrupt, so can still be a director of a company.

    b. When a liquidator was appointed to the ILP, there was no risk to client funds, records or matters.

    c. The ILP maintained a transparent accounting system and when you were uncertain you consulted the Society for guidance.

    d. The transfer of client trust funds from the ILP to Paterberg would be made with the written authority of clients.

    e. Employees were terminated by the ILP and their employment and entitlements transferred to Paterberg.

    f. The assets of the ILP were transferred to Paterberg for fair value upon valuations being obtained.

    g. The financial difficulty of the ILP was brought about by a client who owed the ILP $261,000 and went bankrupt. That client's trustee in bankruptcy told the liquidator that it can expect to receive a dividend of 90 cents in the dollar of that debt, when some real property was sold.

h. That trustee declared a partial dividend of 50 cents in the dollar in August 2018.

i. You expected the first distribution to be made on by the trustee on 15 October and the second and final distribution in November 2018.

j. The ILP has always submitted BAS statements on time.

k. There have never been any significant issues raised by the external auditor or the Society's trust account auditors.

l. You have structured the new ILP, Paterberg, to significantly reduce overheads.

m. You are employing the services of a legal bookkeeper and have purchased Leap software.

n. The new practice has checks and balances in place going forward to ensure the viability of the business.

20. With your statement, you also provided copies of two director penalty notices (attachment "3" to ES18.049):

a. Director penalty notice dated 7 August 2018 issued by the ATO for failure to pay superannuation guarantee charge amounts, showing that amounts were owing for superannuation for the period from 1 April 2012 until 30 June 2016.

b. Director penalty notice dated 2 August 2018 issued by the ATO for failure to pay PAYG withholding tax amounts for the period from 1 December 2015 to 31 May 2018.

21. With your statement, you also provided the report [sic] the liquidator's report to creditors (attachment "4" to ES18.049) (**Liquidator's Report**). That report revealed:

a. On 20 August 2018 the business was sold as a going concern to a related entity, Paterberg.

i. Prior to the sale, valuations of the company's tangible assets were prepared.

ii. The company's work in progress was internally valued at $43,710.59.

iii. The company's intangible assets were valued internally at $2,600.

iv. The consideration for the sale of the business was Paterberg taking on some of the company's unpaid employee entitlements totalling $47,524.29 (annual leave and long service leave) and the assignment of a motor vehicle lease with an outstanding debt of $27,001.

b. Based on the information currently in the liquidators [sic] possession, he believes that the company's failure was caused by:

i. Poor financial control including lack of records;

ii. Poor strategic management of business;

iii. Inadequate cash flow or high cash use;

iv. Poor accounts receivable management;

v. Bad debts and insolvency of substantial debtor.

c. A list of creditors and estimated amounts of their claims were set out.

d. Estimated assets and liabilities:

i. <u>Assets</u>

- Graeme Kriedemann (a bankrupt)
  - there was a substantial amount of work in progress (WIP) which was unpaid.
  - On 4 September 2015, he became bankrupt.
  - On 26 November 2015 the ILP claimed $400,027 in the bankruptcy.
  - The quantum of that claim was later reduced to $261,155.
  - On 29 August 2018, the bankrupt sold a substantial real asset and it is expected that this will result in dividends of approximately 90 cents in the dollar.
  - Using that estimate, the company may receive $235,039.
- Ken Purdie – director's loan account of $115,233 at 30 June 2017.
- Cash at bank - $1,000.
- WIP - $43,710.59.
- Plant and equipment – car lease being taken over by Paterberg.
- Furniture and equipment - $3,215.
- Intangible assets - $2,600 – sold to Paterberg.

ii. <u>Liabilities</u>

- Priority employee creditors:
  - Dividend to priority creditors – on 22 August 2018, a sum of $5,352.50 was paid from company's account to employees for outstanding wages.
  - The Company owes $128,073.50 to employees for unpaid superannuation and penalties.
- Secured creditors:
  - ANZ - $99,832.

- Joseph Murphy - $32,916.57.

- Unsecured creditors:
  - ATO - $170,000,
  - Ferrari Warner accountants - $3,800.

e. Possible recovery actions – none identified.

f. Likelihood of receiving a dividend:

i. Employee creditors – it is highly likely that employee creditors will receive a dividend.

ii. Ordinary unsecured creditors – it is highly unlikely that any ordinary unsecured creditor will receive a dividend.

g. The creditor listing provides a summary of liabilities."

[9] After invoking that background, the Refusal Reasons then set out the following further facts and circumstances, none of which were in issue before this Tribunal:

7. Your practising certificate was cancelled on 29 January 2019, by giving you an information notice dated 7 January 2019 (attachment "B" to ES19.079).

8. That information notice set out the:

a. facts and circumstances forming the basis for the decision to cancel the certificate; and

b. reasons of the Executive Committee for its decision to cancel the certificate.

9. The facts and circumstances set out in that information notice of 7 January 2019 remain unchanged, except as set out following [sic].

10. At the time of its earlier decision of 7 January 2019, the Executive Committee considered whether the risk to the public could be mitigated by imposing conditions on your practising certificate and decided that it could not (paragraphs [65] and [75] of the information notice of 7 January 2019).

11. You then then [sic] made an application to the Society to work as a lay associate of Guy Sara & Associates, which was refused by the Executive Committee on 18 April 2019.

12. You exercised your right to apply to QCAT for review of the Executive Committee's decision to cancel your certificate. The review was to be heard on 1 August 2019. The parties appeared before QCAT and you agreed to discontinue to proceedings and make an application to the Society for an employee practising certificate. You said you would submit medical and forensic accounting reports in support of that application.

13. You made an application for a restricted employee practising certificate on 11 September 2019. In support of that application, you provided (attachment "A" to ES19.079):

- Submissions in support of you [sic] application;

- Letter from Dr S Mukherjee, psychiatrist, dated 3 September 2019;
- Letter from Ferrari Warner, accountants, dated 20 August 2019 including financial statements of the Three Legged Blue Toad Trust for the financial years ended 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017;
- submissions of counsel and two affidavits filed in the proceeding OCR036-19.

14. In the application for practising certificate you stated that you were to be employed by "Harris Sushames/Paterberg Legal" as a sole practitioner/legal practitioner director/employee of a law practice. When asked for clarification, you said you sought an employee practising certificate to be employed and supervised by Guy Sara & Associates.

15. Mr Sara has confirmed that he only trades under the name "Guy Sara & Associates". Mr Sara has also provided a letter to the effect that he is willing to supervise you if you are granted a restricted employee practising certificate (Attachment "J" to ES19.079).

16. The Society conducted a search and discovered the decision of *Deputy Commissioner of Taxation v Kenneth James Purdie* [2014] QDC 222 (Attachment "F" to ES19.079).

17. In that matter, the Deputy Commissioner of Taxation (**DCT**) claimed there was a debt due and recoverable against you pursuant to the *Taxation Administration Act 1953*. The statement of claim pleaded the existence of a running balance account deficit in respect of primary tax debts due under the BAS provision of the *Income Tax Assessment Act 1997*.

18. The DCT obtained default judgment against you on 15 May 2014 requiring payment of $220,364.53 including costs and interest. You failed to file a defence and said that you did not seek specialist legal advice until served with a bankruptcy notice on 10 June 2014.

19. On 14 August 2014, you applied to the District Court to have the judgment set aside on the basis that you did not know if the DCT was claiming that the tax was incurred by you personally or in your capacity as trustee (*DCT v Purdie* at [19]).

20. You purchased the law practice Harris Sushames Pty Ltd in December 2010 as trustee of a trust. By 2014, the law practice was experiencing financial difficulties (*DCT v Purdie* at [21]).

21. During 2012 and 2013, you made arrangements with the ATO to pay the tax outstanding. That arrangement was not adhered to (*DCT v Purdie* at [23]).

22. The debt arose from BAS liabilities self assessed by the trust on returns submitted and signed by Mr Purdie. As the sole trustee of the trust and having been personally involved in negotiations with the ATO over a lengthy period, you were in a position to be aware of the nature and source of the primary tax liability (*DCT v Purdie* at [24]).

23. The Court said as follows:

> '[27] The applicant's affidavit exhibits an undated deed purporting to have effect from 1 December 2010. The deed provides for the resignation of the applicant as trustee in favour of Harris Sushames Pty Ltd. The deed is signed by the applicant in his personal capacity and also by him on behalf of Harris Sushames Pty Ltd as incoming trustee of the Trust. The difficulty with this is that Harris Sushames Pty Ltd was not incorporated until 1 August 2014, after the date of judgment. While the date this deed was executed is not known, it could not have effect to appoint Harris Sushames Pty Ltd as a trustee until that entity came into existence with legal personality on 1 August 2014.
>
> [28] A further undated deed executed by Harris Sushames Pty Ltd claiming to have effect from 1 August 2014 purports to retrospectively ratify the earlier deed appointing the company as trustee as at 1 December 2010.
>
> [29] Counsel for the applicant declined to rely upon these documents in support of his submissions. That approach was well advised. As trustee of the Trust the applicant was personally liable for trust liabilities. The first deed could not have had the effect of appointing as trustee an entity which did not, at that time, exist in law. The second deed could not retrospectively change the legal person liable as against a third party for the debts of the Trust when the applicant had already been found by prior judgement of the Court to be the person so liable. In my view, these deeds could not found a basis for relieving the applicant of his personal liability for the tax debts incurred by the Trust.'

24. The application to set aside judgment was refused.

25. A bankruptcy search was also performed by the Society, which revealed that you had been served with a Creditor's petition by the Deputy Commissioner of Taxation on 2 December 2014 (Attachment "D" to ES19.079).

26. That petition was dismissed on 1 April 2015 (attachment "E" of ES19.079).

27. Being served with a creditor's petition is a 'show cause event', as defined in Schedule 2 of the Act.

28. Section 68 of the Act requires that if a show cause event happens, the practitioner must give notice to the Society as follows:

    (a) Within 7 days after the date of the event – notice, in the approved form, that the event happened; and

    (b) Within 28 days after the date of the event – a written statement explaining why, despite the event, the practitioner continues to be a fit and proper person to hold a local practising certificate.

29. You did not give notice of this show cause event to the Society either within the time specified in s.68 of the Act, or on your next renewal application which you made on 1 May 2015. Attachment "G" to ES19.079 is a copy of that renewal application where you answered "no" to both of the following questions:

- Have you been subject to any of the suitability matters mentioned in ss9 and 45 of the Legal Profession Act 2007 within the last 12 months which may affect your eligibility or fitness to hold a practising certificate?

- Have you been subject to any show cause event as defined in schedule 2 of the Legal Profession Act 2007 within the last 12 months which may affect your eligibility or fitness to hold a practising certificate?

30. In light of the creditor's petition of 2 December 2014, those statements were in fact untrue. Notwithstanding, you declared that all of the information and particulars set forth in the form were complete and accurate in every detail, which statement was also untrue.

31. The Society conducted a search of the ASIC register and obtained a copy of the form 5603 (end of administration return) filed by the liquidator at the termination of the liquidation of Harris Sushames Pty Ltd (attachment "H" to ES19.079).

32. The form 5603 revealed that at the end of the liquidation:

- Liabilities were:
  - Priority – Wages and Super incl SGC - $218,558.59;
  - Priority – Leave of absence - $42,265.37;
  - Secured creditors - $175,780
  - Unsecured creditors - $333,134.32
- Dividends paid to priority creditors for wages and superannuation were $128,200.83, which represented a dividend rate of 36.97% (which must mean that $128,200.80 was paid and $218,558.60 was unpaid, from an original total of $346,759.40, which amounts to a 36.97% dividend).

33. The Society also requested the liquidator to provide a full breakdown of item 4 (liabilities) listed on that form 5603. The liquidator confirmed that a final report was never prepared by the liquidator (aside from the form 5603), but gave a more detailed breakdown of the liabilities of Harris Sushames Pty Ltd at termination (attachment "I" of ES19.079):

Creditor Listing – Harris Sushames Pty Ltd	
SECURED CREDITORS	
Creditor Name	**Amount**
Australia and New Zealand Banking	100,491.43
Murphy, Joseph (Mr)	32,916.57
Specialist Equipment Leasing	42,372.00
	175,780.00
PRIORITY CREDITORS (EMPLOYEES AND SGC)	
Creditor Name	
Clarke, Scott (Mr)	9,090.90
Deputy Commissioner of Taxation	337,668.52
Fampton, Lesa (Ms)	8,791.87

Lindbergs, Sharon (Ms)	13,696.88
Palombo, Andrew (Mr)	14,265.72
Pehlivanovic, Lejla (Ms)	0
Purdie, Ken (Mr)	0
Schulte, Peta (Mr)	5,299.82
Less: Dividend paid	128,200.83
	260,822.96
UNSECURED CREDITORS	
Creditor Name	
Australia and New Zealand Banking	7,118.09
Deputy Commissioner of Taxation	314,470.78
Ferrari Warner Chartered	3,800.00
Hunter Premium Funding	2,283.00
Messages on Hold Australia Pty Ltd	798.45
QICS Law Pty Ltd (in Liquidation)	4,664.00
	333,134.32
Total for All Creditors	**$769,737.28**

The Refusal Reasons

[10] In the Refusal Reasons, the QLS comprehensively reviewed the circumstances on which its decision was based. These included, in summary:

(a) The Applicant's non-compliance with a request to provide the QLS with ongoing monthly reports about how the ILP was meeting its tax debts.

(b) His untrue statement that there had never been any significant issues raised by the external auditor or the QLS trust account auditors.

(c) The fact that the Applicant only took action on the debts after he had received the director penalty notices.

(d) The Applicant's conduct in causing the ILP to be liquidated and then causing some of the ILP's assets to be transferred to a new entity of which he was the sole legal practitioner director, namely Paterberg Pty Ltd ("Paterberg"). In this regard, the Refusal Reasons noted:

- You caused the ILP to be liquidated and the business of the ILP to be transferred to a related entity, Paterberg on 20 August 2018.
- However, the Liquidator's Report makes it clear that was not a transfer of the whole of the business carried on by the ILP, but only a transfer of:
    - most of the assets, except the director's loan of $115,233 (as at 30 June 2017) owed by you to the company; and
    - only two liabilities – some of the staff leave entitlements and the lease of a car.
- The remainder of the liabilities and the debt owed by you to the ILP were not transferred to Paterberg and remained with the ILP.

- It was not the sale of a business as a going concern, as you chose to transfer only the parts of the business that suited you.
- In your letter to the Society dated 27 August 2018 at attachment "1" to ES18.049, you state:

  > *'This course of action was brought on by a notice from the Australian Taxation Office placing the director on notice. The firm was placed into voluntary liquidation before any directors' penalties could be imposed. As a result the director of Harris Sushames was not placed into bankruptcy ...'*

- Upon your own admission, the reason for voluntarily appointing a liquidator to the ILP was to avoid personal liability being imposed by virtue of the director penalty notices.
- The Executive Committee was of the view that you created the new company, Paterberg, to continue the business of the ILP, which you then deliberately liquidated to avoid paying the debts of the ILP, to defeat creditors and to avoid personal liability.

(e) The Applicant contending that the ILP's insolvency was primarily due to the bankruptcy of a client who owed a large amount to the Firm. In fact, the client went bankrupt in September 2015, but the ILP had failed to pay superannuation contributions since 2012.

(f) The Applicant had given no good reason or explanation for the failure to pay superannuation contributions since 2012.

(g) The Applicant had given no evidence of action taken since 2015 when he became aware that the ILP could not pay its withholding tax debt to the ATO.

[11] The QLS also examined the evidence which the Applicant had put before it for consideration, comprising:

(a) A letter from his accountant attaching financial statements. The QLS noted:

> No submission [was] made by you or the accountant as to the relevance of these financial statements or what they demonstrate, apart from the fact that the practice was not producing enough profit for you to meet your expenses.

(b) A medical report from the Applicant's psychiatrist, Dr Mukherjee, in which he described, relevantly, a pattern of generalised anxiety triggered by psychosocial stresses since 2014.

[12] In its Refusal Reasons, the QLS also noted the following:

> 65. The Executive Committee considered the decision in *DCT v Purdie* (supra), which shows that you had been making arrangements with the ATO to pay outstanding debts since 2012. The DCT secured judgment for approximately $220,000 for outstanding BAS liabilities owed by you as sole trustee of a trust. In an attempt to avoid personal liability for the debt, you sought to adduce evidence of deeds which the court did not accept. It said that the first deed could not have had the effect of appointing a trustee which did not exist, and the second deed could not retrospectively change the legal person liable against a third party of the

> debts of the trust when that person had already been found by prior judgment of the court to be the person so liable.
>
> 66. The Executive Committee viewed that that conduct as similar to your conduct in liquidating the company to avoid personal liability when faced with director penalty notices for BAS and SGC. It demonstrates further that you seek to avoid personal liability and prefer your own interests to those of your creditors and employees.
>
> 67. You were served with a creditor's petition by DCT on 2 December 2014 which you failed to notify to the Society as a show cause event (s.68 of the Act) at the time it happened or later when you applied to renew your certificate. Your failure to make candid and comprehensive disclosure of relevant information demonstrates a lack of insight into the conduct and a lack of understanding of the duty to make full and accurate disclosure[2] [sic] The Executive Committee was satisfied that this also demonstrated that you are not a person of good character.

[13] The QLS concluded that the Applicant "lacked the character required to maintain the continuing confidence of the public, fellow practitioners, clients and the judiciary", and that he had not given the QLS any reason to believe he would follow the appropriate course of action in the future. The QLS therefore decided that it was currently unable to hold the Applicant out as a fit and proper person to hold a practising certificate, and refused his application.

This review application

[14] By s 20 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ("QCAT Act"):

(a) the purpose of this review is to produce the correct and preferrable decision; and

(b) the Tribunal must hear and decide the review by way of a fresh hearing on the merits.

[15] One of the main purposes of the LPA is to provide for the regulation of legal practice in Queensland "in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally".[3] Accordingly, s 24(1) of the LPA contains a general prohibition, subject to stated exceptions, on engaging in legal practice "unless the person is an Australian legal practitioner". That, in turn, calls for the person to hold either a current local practising certificate or a current interstate practising certificate.[4] As noted above, the Applicant's practising certificate had been cancelled with effect from 29 January 2019. He subsequently applied to be granted an employee level practising certificate, and it is the QLS decision to refuse to grant that employee level practising certificate which is the subject of this review.

[16] The power of the QLS to refuse to grant the employee level practising certificate was sourced in s 51 of the LPA, which relevantly provides:

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2 *Prothonotary of the Supreme Court of New South Wales v Montenegro* [2015] NSWCA 409.
3 LPA, s 3(a).
4 LPA, s 6(1).

51 Grant or renewal of local practising certificate

(1) A regulatory authority must consider an application that has been made to it for the grant or renewal of a local practising certificate and may—

(a) grant or refuse to grant the certificate; or

(b) renew or refuse to renew the certificate.

…

(4) The regulatory authority must not grant a local practising certificate unless it is satisfied that the applicant—

(a) was eligible to apply for the grant when the application was made; and

(b) is a fit and proper person to hold the certificate.

[17] Central to the QLS decision to refuse to grant the practising certificate was its determination that the Applicant was not a fit and proper person to hold a practising certificate. In relation to a person's suitability to hold a practising certificate, s 46 of the LPA provides:

46 Suitability to hold local practising certificate

(1) This section has effect for the purposes of section 51 and any other provision of this Act where the question of whether or not a person is a fit and proper person to hold, or to continue to hold, a local practising certificate is relevant.

(2) A regulatory authority of this jurisdiction, in considering whether a person is, or is no longer, a fit and proper person to hold a local practising certificate, may take into account any suitability matter relating to the person, and any of the following, whether happening before or after the commencement of this section—

(a) whether the person obtained an Australian practising certificate because of incorrect or misleading information;

(b) whether the person has contravened a condition of an Australian practising certificate held by the person;

(c) whether the person has contravened a relevant law or a corresponding law;

(d) whether the person has contravened—

(i) an order of a disciplinary body or the Supreme Court; or

(ii) an order of a corresponding disciplinary body, or of a court or tribunal of another jurisdiction exercising jurisdiction or powers by way of appeal or review of an order of a corresponding disciplinary body;

(e) without limiting any other paragraph, whether the person has failed to pay an amount for which the person is or was liable under a relevant law or a corresponding law, including, for example, an amount payable to the fidelity fund or other

costs or expenses for which the person is liable under a relevant law;

(f) whether, without limiting paragraph (e), the person has contravened a provision of a relevant law or a corresponding law about professional indemnity insurance;

(g) whether the person is or was a legal practitioner director of an incorporated legal practice while the practice is or was insolvent;

(h) whether the person is or was a director of a corporation while the corporation is or was insolvent;

(i) other matters the authority thinks are appropriate.

(3) A person may be considered a fit and proper person to hold, or to continue to hold, a local practising certificate even though the person is within any of the categories of the matters mentioned in subsection (2), if the relevant authority considers that the circumstances warrant the decision.

(4) If a matter was—

(a) disclosed in an application for admission to the legal profession in this or another jurisdiction; and

(b) decided by the Supreme Court or the board, or a Supreme Court of another jurisdiction or corresponding authority of another jurisdiction corresponding to the board, not to be sufficient for refusing admission to the legal profession;

the matter can not be taken into account as a ground for refusing to grant or renew, or for suspending or cancelling, a local practising certificate, but the matter may be taken into account when considering other matters in relation to the person concerned.

[18] "Suitability matters" are enumerated in s 9 of the LPA, and include whether a person "is currently of good fame and character" and whether the person has been a legal practitioner director of an incorporated legal practice while it was an externally administered body corporate.[5]

[19] A number of propositions relied on by the QLS in reaching the Refusal Decision are uncontentious and clearly applicable in the circumstances of the present case. These can be summarised as follows:

(a) the relevant question is whether the Society would be "… justified in holding out the [person] as a fit and proper person to be entrusted with the duties and responsibilities of a solicitor";[6]

(b) the mere fact of the commission of an act of bankruptcy, indictable offence or a tax offence (circumstances with which a fair analogy may be drawn to a director permitting a company to do those things) is not

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5 LPA, s 9(1)(a),(c).

6 *The Southern Law Society v Westbrook* (1910) 10 CLR 60 (Griffiths CJ), approved in *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253.

what matters; the Tribunal must look to the circumstances in which the conduct occurred;[7]

(c) legal practitioners carrying out legal practice as legal practitioner directors of incorporated legal practices are under an obligation to ensure that certain statutory fiscal liabilities of the practice (including the GST, PAYG and staff superannuation contributions) are met. The obligation is a professional one which exists independently of the liability itself and has variously been referred to as a "civic responsibility", "legal and civic duty", "fiscal/revenue responsibility" and "civic duty";[8]

(d) where the failure to pay statutory debts occurred over a lengthy period of time and were in significant amounts, there is support for the view that the continuing conduct of the business in the face of probable insolvency is, of itself, an interest of the proprietor capable of being preferred over the interests of staff and creditors;[9]

(e) whether a person is of "good fame and character" involves, amongst other things, the acceptance of high standards of conduct and acting in accordance with them, under pressure;[10] [and]

(f) a failure to make full and frank disclosure can demonstrate a lack of insight into past misconduct.[11]

[20] To that list, I would add the observation by Mahoney JA in *Law Society of New South Wales v Foreman*,[12] that a person's character "is tested not by what one does in good times but in bad". Lawyers are often busy and very often under stress, but that does not excuse them from observance of their professional obligations or maintenance of their professional standards.[13]

[21] It should also be accepted that there is a distinction between current and permanent unfitness to practice. The present review is not concerned with whether the Applicant's name ought be struck from the Roll. In such a case, the test is one of probable permanent unfitness.[14] Rather, the Tribunal's present task is to consider whether, in all the relevant circumstances, the Applicant has shown that he is currently a fit and proper person to be granted a practising certificate.

The Applicant's evidence

[22] The Applicant relied on an affidavit in which he set out his personal history and recounted his version of the circumstances which had led to his practising certificate being cancelled in 2019.

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7 *New South Wales Bar Association v Murphy* [2002] NSWCA 138, [107]; *Law Society of NSW v Koffel* [2010] NSWADT 149.

8 *Council of the Law Society of New South Wales v Wehbe* [2018] NSWCATOD 14, [133] (and the cases cited therein) ("*Wehbe"*).

9 *The Council of the Law Society of New South Wales v Adams* [2011] NSWADT 177, [70]; *Council of the Law Society of NSW v Andreone (No 1)* [2014] NSWCATOD 49, [112]; *Wehbe* [2018] NSWCATOD 14, [309]-[310].

10 *Prothonothary of the Supreme Court of New South Wales v Leon Nikolaidis* [2010] NSWCA 73, [21].

11 *Thomas v Legal Practitioners Admissions Board* [2004] QCA 407, [333] (de Jersey CJ), [335] (McMurdo P).

12 (1994) 34 NSWLR 408, 449.

13 *Legal Profession Complaints Committee v A Legal Practitioner* [2013] WASAT 37.

14 *Attorney-General of the State of Queensland v Legal Services Commissioner & Anor; Legal Services Commissioner v Shand* [2018] QCA 66.

[23] He was admitted as a solicitor in 2005, having previously worked for some 30 years as an ambulance paramedic. He obtained an unrestricted practising certificate in 2010.

[24] In his affidavit, the Applicant frankly acknowledged his management shortcomings. He said that he failed to manage his Firm efficiently enough to ensure it had sufficient funds to meet its tax and superannuation obligations. He said the debt grew over a number of years and he should have addressed the issues earlier. He referred to a number of actions which, with the benefit of hindsight, he now knows he could have taken to discharge his liabilities. He referred to having taken a private loan of $100,000 in 2014 to enable him to pay money to the ATO. He put up the balance of the equity in his home as security for that loan. He also sold another property he owned at the time.

[25] In his affidavit, the Applicant also gave detail of a number of emotionally distressing incidents in his personal life in 2014. That was also the year in which his marriage broke down.

[26] The Applicant placed particular emphasis for the ultimate insolvency of his Firm on what he admitted was a very poor business decision, namely, to carry a very large amount of unbilled work on behalf of one particular client, Mr Kriedemann, over a number of years. Mr Kriedemann went bankrupt in September 2015. By that time, the Applicant's Firm was carrying unbilled work in progress on behalf of that client in an amount of more than $400,000. Ultimately, the Applicant reached a settlement with Kriedemann's trustee in bankruptcy under which the Firm was paid some $260,000.

[27] The Applicant acknowledges that he should have handled this client's debt more efficiently.

[28] The Applicant set out some detail of his psychological health, saying that in his career as a paramedic he had developed a series of avoidance or denial strategies, and these had influenced the way he dealt with (or, more accurately, failed to deal with) issues such as the ATO debt. Since the cancellation of his practising certificate, he has been under treatment by a psychiatrist, who had diagnosed him from suffering from a major depressive disorder with moderate severity, and generalised anxiety disorder. In addition, the Applicant has received some psychological counselling. He has also undertaken a number of online webinars run by the ATO for small businesses.

[29] In relation to what he described as the "restructure" of his Firm as "Paterberg Legal", the Applicant said that he did not do this to avert his responsibility to the ATO or anyone else, but to enable him to continue to employ staff. He said he did this on accounting advice. He described the restructure, which was to result in savings which he said were to be directed to the ATO and not for his personal benefit. He said he ultimately gave Paterberg to Mr Guy Sara, another solicitor. The Firm's files and securities were given to Mr Sara. The small amount of the Firm's recoverable work in progress was used to pay staff. An employed solicitor and a conveyancing clerk went across to work for Mr Sara. No money changed hands between the Applicant and Mr Sara. The Applicant says he paid the Firm's outgoings up to the date on which Paterberg was taken over by Mr Sara.

[30] The Applicant deposed to having developed a close relationship under which he was professionally mentored by Mr Sara. He seeks an employee level practising

certificate to enable him to work under Mr Sara's supervision. He accepts that he would have no involvement in the management of the Firm or dealing with trust property.

[31] The Applicant said that he is in a very poor financial position, with limited assets and significant debts. He is in his mid-60s, with limited prospects of employment outside the legal profession.

[32] One of the matters which the QLS had taken into account in reaching its decision was the Applicant's failure to disclose having been served with a creditor's petition by the ATO. This was a "show cause event" under the LPA, which the Applicant was required, but failed, to disclose to the QLS.[15] The Applicant asserted in his affidavit that he had oral legal advice at the time that he did not have to report the creditor's petition. He says that in hindsight he should have reported, and is remorseful for this "serious oversight".

[33] In his affidavit, the Applicant otherwise corrected some matters of detail in the liquidator's report regarding the ILP. These are inconsequential for present purposes.

[34] The Applicant was cross-examined before the Tribunal. A number of themes emerged from the evidence given under cross-examination.

[35] The first was that the Applicant had, in fact, been defaulting on his tax and superannuation guarantee obligations within a short period of time after starting to practice under the ILP. These difficulties well pre-dated the time when the Applicant was acting for Mr Kriedemann, the client for whom he did so much unbilled work.

[36] The second is that the Applicant demonstrated a history of not only refraining to take action until his personal interests were threatened (which he admitted), but of seeking to implement arrangements to avoid personal liability at the expense of creditors.

[37] He was cross-examined, for example, on the circumstances described by Butler SC DCJ in *Deputy Commissioner of Taxation v Purdie*.[16] His Honour, in that case, refused an application by the Applicant to set aside a default judgment for some $220,000 which had been entered against him by the ATO. In the course of the reasons for judgment, His Honour referred to an argument that the Applicant did not have personal liability for the tax debt. Butler SC DCJ described the following:

> [27] The applicant's affidavit exhibits an undated deed purporting to have effect from 1 December 2010. The deed provides for the resignation of the applicant as trustee in favour of Harris Sushames Pty Ltd. The deed is signed by the applicant in his personal capacity and also by him on behalf of Harris Sushames Pty Ltd as incoming trustee of the Trust. The difficulty with this is that Harris Sushames Pty Ltd was not incorporated until 1 August 2014, after the date of judgment. While the date this deed was executed is not known, it could not have effect to appoint Harris Sushames Pty Ltd as a trustee until that entity came into existence with legal personality on 1 August 2014.

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15 LPA, s 68.

16 [2014] QDC 222.

> [28] A further undated deed executed by Harris Sushames Pty Ltd claiming to have effect from 1 August 2014 purports to retrospectively ratify the earlier deed appointing the company as trustee as at 1 December 2010.
>
> [29] Counsel for the applicant declined to rely upon these documents in support of his submissions. That approach was well advised. As trustee of the Trust the applicant was personally liable for trust liabilities. The first deed could not have had the effect of appointing as trustee an entity which did not, at that time, exist in law. The second deed could not retrospectively change the legal person liable as against a third party for the debts of the Trust when the applicant had already been found by prior judgement of the Court to be the person so liable. In my view, these deeds could not found a basis for relieving the applicant of his personal liability for the tax debts incurred by the Trust.

[38] The Applicant was cross-examined on the matters set out in that passage of the judgment, and gave the following evidence:

> The Judgment describes the existence of two deeds?--- Yes.
>
> One which tried to have the company's appointment as trustee take effect from the 1st of December 2010?---Yes.
>
> But that couldn't have been right because the company was not incorporated until August 2014, after default judgment had been entered. That's right, isn't it?---That's right, yeah.
>
> There was a second deed that tried to retrospectively ratify the earlier deed?--- Mmm.
>
> And those are documents that you created?---They were created, yes.
>
> When were they created?---Morgan Conley created them, but yes, I signed them, yes. I have to take responsibility.
>
> Well, when were – sorry, Mr Purdie, when were they created?---I couldn't tell you. It would be around that time.
>
> And the documents attempted to have the company replace you as trustee, effectively from when you purchased the firm and commenced to incur tax liabilities?---Yes. Yes.
>
> And thereby avoid your personal liability for the debts of the firm?---Yes. Well, yes.
>
> That was the intention behind the creation of the deeds?---Yes.
>
> It was an attempt, but not a successful one?---Yes."

[39] The Applicant was also cross-examined on the circumstances under which he had transferred the ILP's assets into the new entity, Paterberg Legal, in 2018. On 19 August 2018, the Applicant caused a liquidator to be appointed to the ILP. On 20 August 2018, the business of the Firm was "sold" to Paterberg Pty Ltd. In fact, there was no valuable consideration paid for the transfer of the assets of the business. The gist of the true arrangement emerged sufficiently from the cross-examination of the Applicant. He described taking advice from a firm of insolvency accountants, but denied asking for advice on how to avoid personal liability. His evidence continued:

You incorporated Paterberg on the 17th of August 2018?---Yes.

You intended for that company to take over the business of the firm?---Yes.

The firm ended, winding up just two days later on the 19th of August?---Yes.

You reached some agreement with Mr David Hambleton, who was the liquidator, about the sale of assets?---Yes.

And that occurred on 20 August 2018, just the day after his appointment?---Yes.

What was the agreement?---That if I took on the leave liabilities and some of the debt of Harris Sushames, that they would give me the files. They were approximately the same value as the debt.

Can I ask you to go to page 348?---Three hundred and - - -

Excuse me. Three-four-eight of the bundle to Ms Fitzpatrick's affidavit?---Three-four-eight, yes.

Does subparagraph (b), if you read it to yourself, accurately set out the essential terms of your agreement with the liquidator?---Yes.

Aside from intangible assets and the work-in-progress, the other major assets were the Kriedeman debt?---Yes.

And the loan to you?---Yes.

And that loan was not formally documented?---No.

It was repayable on demand, then?---Sorry?

It was repayable on demand, then?---Yes.

If it was repaid to the company those funds could have been used to pay the tax debt?---Yes, but I had no money.

Well, it wasn't one of the assets that was transferred to Paterberg, was it?---No.

And that's because you only wanted to transfer the assets of the firm, which you could continue to use to run your legal practice?---Yes.

Paterberg didn't actually pay any money to the firm for the assets?---No. No.

So Paterberg's acquisition of the firm's assets didn't result in any unsecured creditors being paid. It would have all had to have come out of the Kriedeman debt?---That was not my intention, but that's – yes, I can understand why you say that, yes.

Well, you say it wasn't your intention. That was the natural effect of the - - -?---Yes, it was. It was the natural effect, yeah.

One of the other natural effects is that Paterberg and yourself didn't become liable to pay any of the unsecured creditors, including the ATO?---I was – yes, but that – but I was – I wanted to pay the ATO.

Well, you wanted to, but you didn't take any steps to transfer that liability either to yourself or to Paterberg, did you?---No, I didn't, but I should have.

Well, the transaction was deliberately structured to achieve that outcome, wasn't it?---Yes, but – yes. On advice from Rodgers Reidy.

> And, in fact, at the time you made no effort to conceal what you were doing?---No.
>
> Do you recall the conversation on the 22nd of August 2018 with Ms Lauren Fitzgerald of the Law Society?---Yes. Yes.
>
> And you told Ms Fitzgerald that you intended to phoenix straightaway?---I told Ms Fitzgerald I intended to do a restructure rollover. And she said, "Well, is that a phoenix thing?" This is the recollection of my conversation. She then said, "No, it's – it's a phoenix." And I said, "Well, I've been advised it's a legitimate restructure rollover." And then in the end I said yes – the conversation was becoming circular. I said, "Yes, it's a phoenix", but, yes, in hindsight it is. I shouldn't have done it. I should have sought advice both from the Law Society and from other accountants.
>
> Well, you know what a phoenix is, don't you, Mr Purdie?---Yes.
>
> It's a company created to take over the business of an insolvent company?---Yes.
>
> And its purpose is to avoid paying creditors of the old company?---Yes.
>
> And that was what you were trying to do when you incorporated Paterberg?---No.
>
> What were you trying to do?---What I was trying to do was have a law firm that had a financial footing that would allow me to pay all the debtors. Whether Paterberg had taken the debts on or not, it was my intention to reduce the overheads so I either had an income to pay everything. And I mean from the ATO, to the superannuation guarantee, to everything else that was there.
>
> But you didn't take any steps to make yourself or Paterberg liable for those amounts?---No. I should have. And I should have. In hindsight, you know, that's – that's what I – I should have done.
>
> Well, it's still the case, isn't it, that there's no arrangement with the ATO for you or Paterberg - - -?---Because I have no income.
>
> - - - to become liable for those debts?---I have no income.
>
> Have you ever written to the ATO to say that you would like to pay the debt, but you don't have income?---I've had – I've spoken to the ATO, but I haven't written to them, no. I haven't spoken to the ATO in over 12 months, so – about that.

[40] The Applicant's treating psychiatrist, Dr Mukharjee, was called to give evidence about three reports he had provided. In his first report dated 27 March 2019, the doctor had set out some detail of the Applicant's personal and professional history, as recounted by the Applicant. He expressed the view that, at that time, the Applicant had symptoms consistent with major depression with moderate severity and generalised anxiety disorder.

[41] Dr Mukharjee provided a further report dated 25 July 2019 which expanded on a number of matters described in his first report. He said:

> In my opinion Mr Purdie describes a pattern of generalised anxiety triggered by psycho-social stresses which progressively gets worse and leads to episodes of depression throughout his life. Mr Purdie describes symptoms consistent with generalised anxiety which started after 2014 and got progressively worse by him engaging in his usual maladaptive coping style

> and avoidance leading to further worsening of his social situation and leading on to his moderate depressive symptoms when I first saw him.

[42] This view was repeated in a further report dated 3 September 2019, in which Dr Mukharjee confirmed that the Applicant had been taking his medication and seeing a psychologist for stress management and behaviour therapy.

[43] Under cross-examination, the doctor identified a particular stressor in the Applicant's personal life in 2014 from which his symptoms progressively commenced, and also referred to the stress concerning the state of the Applicant's business at the end of 2017, and concerning the tax debt in August 2018. Dr Mukharjee was unable to suggest any other contributing stressors, and could not point to a period between the stressor of 2014 and the end of 2017 when the Applicant's decision making ability was any better or worse than usual for him.

[44] The Applicant sought the employee level practising certificate to enable him to work for Mr Sara as an employed solicitor. It was Mr Sara, it will be recalled, who had ultimately taken over the files of Paterberg Legal. Mr Sara was called to give evidence before the Tribunal. He described his professional background. He was first admitted as a solicitor in New South Wales in 2003 and worked as a solicitor for some three years before practising as a barrister in Queensland for about five years. In about 2015 he went back to being a solicitor. He was employed in a number of capacities by regional law firms, and also worked for a time in Singapore. It transpired, however, that Mr Sara only commenced actually practising as a principal on his own account at the beginning of 2019, when he took over the Paterberg Legal files from the Applicant.

[45] Mr Sara said that he would employ the Applicant to work particularly in the fields of criminal and family law. He said that he would sign all of the Applicant's correspondence and have weekly file meetings with him. To that extent, the Applicant's work would be supervised. The Applicant would have no financial responsibility within the firm.

[46] Under cross-examination, Mr Sara confirmed his limited experience in supervision as a principal. His firm at that time had several paralegals and other employees, such as a conveyancing clerk, but no employed solicitors.

Consideration

[47] The Applicant's fundamental submission was to the effect that, whilst his history in practice demonstrated a lack of commercial sense and business acumen, the Tribunal ought not conclude from that admitted history that the Applicant is not currently a fit and proper person to hold an employee level practising certificate such as would permit him to practice under the mentorship of Mr Sara.

[48] Although he accepted that his business dealings were deserving of criticism, the Applicant nevertheless argued that one needs to examine why he did not meet his tax and superannuation obligations, what he did, and what could have been done. It was submitted:

(a) He should have taken advice and acted earlier, rather than merely hoping that the fees recoverable from Mr Kriedemann would discharge his obligations.

(b) He sought to take some steps, for example, by borrowing from a private lender in 2014 and using the proceeds of sale of a property to pay down debt.

(c) There is no evidence that the Applicant obtained a personal advantage. It was said that the decision to liquidate the ILP and establish Paterberg was on accounting advice and to reduce overheads and running costs to allow the outstanding debt to be paid.

(d) This was not a case of the Applicant enjoying disposable income which could have been applied to the tax and superannuation liabilities.

(e) It was reasonable for the Applicant to continue trading, having regard to the fees he anticipated receiving from Mr Kriedemann.

(f) There is no evidence of a disciplinary history, or of dishonesty, on the part of the Applicant, although counsel for the Applicant properly conceded that the Applicant could have been more questioning of the advice he received to liquidate the ILP and establish Paterberg.

[49] The Applicant relied particularly on the decision of the New South Wales Court of Appeal in *New South Wales Bar Association v Murphy* ("*Murphy*")[17] to submit that, in this case, the Applicant's failings did not so reflect on the Applicant's ability to act in the affairs of his clients, that protection of the public warranted cancellation of his practising certificate.[18] That case is, however, quite distinguishable from the present, both in terms of the legislative regime under consideration, and in respect of the factual circumstances.

[50] In *Murphy*, a barrister had been declared bankrupt upon presentation of his own debtor's petition. He notified the relevant regulatory body, gave reasons for his bankruptcy, and submitted that he remained a fit and proper person to retain a practising certificate. The regulatory body, however, cancelled his practising certificate. Under the relevant New South Wales legislation at the time, there were specific provisions relating to the bankruptcy of practitioners. In particular, the legislation prescribed an inquiry into whether the act of bankruptcy was committed in circumstances that showed that the person was not a fit and proper person to hold a practising certificate. It was under that legislative scheme that the Court of Appeal held that the test to be applied when determining fitness to hold a practising certificate in the context of an act of bankruptcy is not whether the indebtedness which led to the bankruptcy was brought about or associated with dishonest conduct, but whether the circumstances in which the act of bankruptcy was committed was such as to persuade the regulatory body that, at the time of its determination, the practitioner was not a fit and proper person to hold a practising certificate.[19]

[51] In that case, the New South Wales Court of Appeal examined closely the circumstances of the barrister's act of bankruptcy. It is sufficient to note that it was nothing like the present case. The barrister accrued a significant tax liability, principally because of fees paid under an unusually large number of third party matters which had settled, and receipt by him of unexpected income from a government scheme related to a business in which he had an interest, and which was unconnected to his practice. Despite selling assets and continuing to practice

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17 (2002) 55 NSWLR 23.
18 Ibid, invoking observations by Giles JA at [171].
19 Ibid, [107] (Giles JA).

remuneratively, the barrister was unable to meet the accruing tax impost. It was in that context that the Court stated that the barrister:[20]

> … did not meet his taxation obligations. But it is necessary to ask why he did not meet them, and what was done and could have been done about addressing them.

[52] As to this, it was then noted that the barrister honestly intended to try and trade his way out of difficulties and meet his liabilities by the sale of his remaining assets and that, in circumstances where his situation could only get worse because of penalties and interest, trading until the sale of the business was all he could hope for.[21]

[53] In short, the Court of Appeal held that the circumstances of the particular barrister's act of bankruptcy did not bespeak a lack of fitness to practise.

[54] I would, however, respectfully adopt the following general observations by Giles JA:[22]

> 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 in those engaged in the administration of justice that legal practitioners will properly perform those functions.

[55] In the present case, the question is not merely whether the Applicant's admitted financial ineptitude is indicative of a lack of fitness to practice. Rather, it is necessary to look at all of the circumstances, and the manner in which the Applicant conducted himself, to make an assessment of his current fitness to practice.

[56] Of course, the Applicant's dereliction in relation to the statutory taxation and superannuation obligations, whilst not determinative, is clearly relevant. As noted above, the legal and civic obligation which lies in meeting these statutory fiscal responsibilities is a professional obligation which exists independently of the liability itself. In the present case, these were not minor oversights or temporary embarrassments. On the contrary, there was a longstanding persistence about these failures. The failure to pay superannuation guarantee liabilities, for example, dated back to 2012. The Applicant gave no proper or sensible explanation for these longstanding failures. The commencement of these failures pre-dated the Applicant acting on what was, in effect, a protracted speculative basis for the client Kriedemann. The most he says is that he took out a private loan and sold some property to pay debts he owed, but again this does not provide any explanation for his failure to have proper regard to his statutory fiscal obligations for such an extended period.

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20 Ibid, [162] (Giles JA).
21 Ibid, [168]-[169] (Giles JA).
22 Ibid, [113].

[57] Of deeper concern to this Tribunal, however, and more telling in terms of an assessment of the Applicant's fitness to practice, is not just the fact that he traded in parlous and perilous circumstances for years, but that it was not until he was exposed to a risk of personal liability that he took steps to liquidate the ILP. It is clear, on all the evidence, that his response to the Director Penalty Notices had nothing to do with the wellbeing and interests of the Firm and its creditors, but everything to do with personal preservation and protection of his own liability position. His reference to the QLS officer of entering into a "phoenix" arrangement was telling in that regard.

[58] It is, moreover, quite clear even on the Applicant's evidence that he was acting on advice – that he was quite prepared to be a party to an arrangement under which he retained the parts of the Firm's business which were necessary to keep trading, only on the basis of assuming the bare minimum of liabilities necessary to keep the business operating. The other liabilities of the Firm, which the Applicant effectively walked away from, included:

(a) secured debts of some $350,000, including an ATO debt of some $170,000;

(b) priority creditors, including the Deputy Commissioner of Taxation and employees, of some $261,000; and

(c) unsecured creditors (mainly the Deputy Commissioner of Taxation) of more than $330,000.

[59] Similarly concerning in respect of an assessment of the Applicant's fitness to practice was his preparedness, as recorded by Butler SC DCJ, to sign up to documents which purported to record a retrospective appointment of Harris Sushames Pty Ltd as a trustee at a time before that company even existed. It is not to the point that, as with other unfortunate circumstances, the Applicant says he did this on advice. The point is that the Applicant either lacked the insight to know that what he was doing was wrong, or he was prepared to sign the documents regardless in order to protect his personal position. Either way, the conduct bespeaks a character which falls short of fitness to practice.

[60] The Tribunal also notes the Applicant's lack of candour in his dealings with the QLS. Instances of that conduct included:

(a) his contention that there had never been any significant issues raised by the external auditor or the trust account auditors when this was simply untrue;

(b) his insistence that the Firm's financial difficulties were caused by Mr Kriedemann's bankruptcy when, in fact, the Firm had been defaulting on its superannuation guarantee obligations for some years; and

(c) his failure to disclose to the QLS that he had been served with a creditor's petition in 2014 (another matter which he attributed to external advice).

[61] Again, this conduct does not merely point to a lack of proper appreciation of the need for legal practitioners to be scrupulously honest and candid in their dealings with their regulatory body. It is indicative of an absence of an innate appreciation that these standards of conduct are fundamental for legal practitioners.

[62] Even in the context of the present application, it is not at all clear that the Applicant has insight into these essential shortcomings. He repeatedly, and appropriately,

accepts that he was not a good business manager. But what is lacking is any real insight into what was fundamentally professionally wrong in the way he conducted himself.

[63] It is to the Applicant's credit that he has sought psychiatric and psychological assistance. Whilst informative about the Applicant's more recent state of presentation, however, Dr Mukherjee's evidence provides no rationale or explanation for the Applicant's longstanding derelict conduct. Nor, with respect, does the doctor's reports assist in an assessment of the Applicant's current character as a legal professional.

[64] Similarly, it is to the Applicant's credit that he has undertaken some self-education to improve his business skills. As noted above, however, a determination of the Applicant's current fitness to practice is not made by reference to an assessment of his business acumen, but rather involves an assessment of his appreciation of the fundamental obligations and duties which must be observed by all legal practitioners in practice.

[65] Ultimately, the Applicant's position is that all he wants is an employee level practising certificate to enable him to work as an employed solicitor under the supervision of Mr Sara. There are, however, two difficulties with that position. First, it is not at all clear how Mr Sara's supervision would address the professional character traits which need to be developed, and for which the Applicant requires insight. Secondly, and more fundamentally, the standard of fitness and propriety to practice expected of an employed solicitor is not in any way less than that expected of a principal. Either someone is a fit and proper person to engage in practice as a lawyer or they are not.

[66] Having regard to all of the circumstances, the Tribunal has concluded that the Applicant has not demonstrated that he is presently a fit and proper person to hold a practising certificate.

Conclusion

[67] Accordingly, the Tribunal has concluded that the decision to refuse to issue the Applicant with a practising certificate was the correct and preferrable decision.

[68] The application to review a decision filed on 18 December 2019 is dismissed.