Ethics, Professional Responsibility and Legal Practice

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ETHICS, PROFESSIONAL RESPONSIBILITY AND LEGAL PRACTICE

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LexisNexis Butterworths
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2017

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SOUTH AFRICA	LexisNexis Butterworths, Durban
SWITZERLAND	Staempfli Verlag AG, Berne

TAIWAN	LexisNexis, Taiwan
UNITED KINGDOM	LexisNexis UK, London, Edinburgh
USA	LexisNexis Group, New York, New York
	LexisNexis, Miamisburg, Ohio

National Library of Australia Cataloguing-in-Publication entry

Author:	MacFarlane, Peter.
Title:	Ethics, professional responsibility and legal practice.
ISBN:	9780409344073 (pbk). 9780409344080 (ebk).
Notes:	Includes index.
Subjects:	Legal ethics — Australia. Practice of law — Australia. Professional ethics — Australia.
Other Authors/Contributors:	Ross, Ysaiah.

Typeset in Myriad Pro and Minion Pro.

Printed in Australia.

Visit LexisNexis Butterworths at www.lexisnexis.com.au

PREFACE

This book replaces *Lawyers' Responsibility and Accountability: Cases, Problems and Commentary*. The text, which still includes concise extracts from the relevant case law, is more studentfriendly, being shorter in length than the previous work. The text also includes details of the statutory and ethical obligations of lawyers in all Australian jurisdictions, making it a valuable resource for those in the legal profession.

It should be noted that Peter MacFarlane was responsible for chapters 7–10, the first half of chapter 6 and editorial work on chapter 5. Ysaiah Ross was responsible for chapters 1–5 and the second half of chapter 6.

We would like to acknowledge permission from *Bar News* and the NSW Bar Association for the extract by David Robertson, 'An Overview of the Legal Profession Uniform Law' (2015) (Summer) *Bar News* 36.

We further acknowledge the help, support and editorial advice provided by Jocelyn Holmes from LexisNexis Butterworths and our book editor, Jeanette Maree, as well as the assistance and co-operation given by numerous members of the legal profession.

Finally, we wish to include the following dedications: from Ysaiah Ross to Wendy MacDonell, a wonderful friend for life; and from Peter MacFarlane to his children Jenny, Wendy, Anthony and Alexander for their love and support.

Peter MacFarlane
Ysaiah Ross
November 2016

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LEGAL ETHICS AND PROFESSIONAL PRACTICE

INTRODUCTION

1.1 The purpose of this book is to provide the cases, statutes and regulations, professional rules, and problems and questions to enable students and practitioners to explore important ethical issues that occur in legal practice. These issues involve ethical situations and the need for lawyers to balance their obligations to clients, other lawyers, the legal system, the courts, and to the Australian community in general. This book is intended to meet a gap in the teaching of courses in this area, as well as provide guidance to those in the profession.

THE STUDY OF LAWYERS' PROFESSIONAL RESPONSIBILITY

1.2 There has been strong anecdotal evidence that students do not take courses in professional responsibility seriously. One reason may be that the courses focus on what you cannot do in the

practice of law, and not on what you can, which may imply that the subject matter is impractical. Luban and Millemann[1] state that the material 'seems not just impractical but downright anti-practical'. They cite as another reason that both teachers and students find it 'hard to avoid alternating between pollyannish moralism and grating cynicism'. The authors recommend the necessity of teaching legal ethics not only in the classroom, but in combination with real-life practical cases.

1.3 Courses in the area of legal ethics are as difficult as any other law course, and at times more difficult, because there are many more unanswerable problems. Indeed, perhaps the courses are also disliked because the questions asked and examined are personally confronting, requiring us to look closely at ourselves. The material also requires the development of good moral judgment in order to obtain satisfactory results. This is discussed further in **Chapter 2**.

1.4 The approach we take is that students can become 'good lawyers', while maintaining an ethical approach to the law. This idea was first formulated by David Luban.[2] In Australia, several books have also adopted the 'virtuous approach' to teaching legal ethics.[3]

DEFINITIONS

1.5 Lawyers and law students must decide not only how they will deal with an ethical problem in their personal everyday life, but also how they will deal with one in the professional context. Ethics is about making personal choices. It is not about doing anything

wrong. In order to start dealing with these issues, it is necessary to adopt a few definitions:

- *Ethics* — derives from the Greek *ethos* and *ethikos*; the former means 'character' and the latter means 'practice or custom of the community'; Aristotle[4] defined 'ethos' as being the trustworthiness (or credibility) of the speaker; the modern definition is the science of morals or rules of conduct, or values and rules of individual conduct;
- *Professional ethics* — the values and rules of conduct of an occupational group;
- *Morals* — derives from the Latin word *mores*, meaning 'custom or conventions of a social group'; the modern meaning includes distinguishing between right and wrong;
- *Values* — principles or qualities which we consider worthy or desirable;
- *Beliefs* — acceptance of an idea or statement of fact as being true; and
- *Conventions* — unwritten rules and practices governing the behaviour of a social or professional group; conventions within the legal profession are usually considered to be the ethical rules of etiquette.

1.6 Morals and ethics are often interchanged because they have, at times, been defined in similar terms. Beliefs and values can be weak or strong. As we have more practical experience of applying these beliefs and values, the more we either reinforce them or replace them. There is no doubt that our decisions will flow from the application of especially strong values and beliefs. It is only when we have a revelation or a conflict between our values and beliefs that we break the circle that reinforces that belief.

1.7 According to Armstrong,[5] the ancient Greeks believed that

there were two ways to arrive at the 'truth' — *logos* and *mythos* — with neither way being superior to the other, and with them not being in conflict, but complementing each other. She said:

> *Logos* (reason) was the pragmatic mode of thought that enabled us to function effectively in the world. … But it could not assuage human grief or find ultimate meaning in life's struggle. For that people turned to *mythos*, stories that made no pretensions to historical accuracy but should rather be seen as an early form of psychology; if translated into ritual or ethical action, a good myth showed you how to cope with mortality, discover an inner source of strength, and endure pain and sorrow with serenity.

1.8 According to numerous sources, the religious approach to ethics differs from that of the Greeks. There is no abstract definition of the term 'ethics' in the Bible. Instead we find many statements of the demands that God places on us. For example, God commands us to refrain from doing harm to others and to avoid doing evil. Even this command is open to interpretation.

PROFESSIONAL RULES OF CONDUCT

1.9 The Law Council's Australian Solicitors' Conduct Rules 2011 (ASCR) have been adopted in most jurisdictions — South Australia, Queensland, Victoria, New South Wales, and the Australian Capital Territory.[6] A breach of the Rules can give rise to disciplinary action. The Rules set out the ethical and professional obligations of solicitors when dealing with their clients, the courts, their fellow legal practitioners, and other persons, and are referred to throughout this text. In Western Australia, Tasmania, and the

Northern Territory separate Rules of Conduct apply.[7]

1.10 Apart from the states of Queensland, Victoria, and New South Wales, there is no statutory distinction between barristers and solicitors. Thus, for example, in South Australia, a legal practitioner is admitted as a 'barrister and solicitor of the Supreme Court'.[8] In respect of those who practise as barristers, Queensland, New South Wales, Victoria, South Australia, Western Australia, the Northern Territory, and the Australian Capital Territory apply the principles expressed under the Legal Profession Uniform Conduct (Barristers) Rules 2015, while Tasmania proposes to adopt these Rules in 2016.[9] The principles under these Rules are as follows:

- Barristers owe their paramount duty to the administration of justice.
- Barristers must maintain high standards of professional conduct.
- Barristers, as specialist advocates in the administration of justice, must act honestly, fairly, skilfully, bravely, and with competence and diligence.
- Barristers owe duties to the courts, to their clients, and to their barrister and solicitor colleagues.
- Barristers should exercise their forensic judgments and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients.
- The provision of advocates for those who need legal representation is better secured if there is a Bar whose members:
  - must accept briefs to appear, regardless of their personal beliefs;
  - must not refuse briefs to appear, except on proper professional grounds; and

- compete as specialist advocates with each other and with other legal practitioners as widely and as often as practicable.

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LYING

1.11 The Australian Solicitors' Conduct Rules 2015[10] state that a solicitor 'must … be honest and courteous in all dealings in the course of legal practice'.[11] Even with the requirement of honesty in the rules, lawyers have a reputation for lying. Is this reputation justified or are there reasons lawyers will or can lie? Is it ever appropriate for a lawyer to lie?[12] Is there is a difference between lying and 'not telling'? For example, where, in a criminal law matter, the defence counsel does not reveal relevant information to the prosecutor, such as information concerning a client's confession of guilt. The famous philosopher Gerald Dworkin[13] has given the following examples of when he believes it is acceptable to lie:

1. A man lies to his wife about where they are going in order to get her to a place where a surprise birthday party has been organized.
2. A young child is rescued from a plane crash in a very weakened state. His parents have been killed in the crash but he is unaware of this. He asks about his parents and the attending physician says they are OK. He intends to tell the truth once the child is stronger.
3. Your father suffers from severe dementia and is in a nursing home. When it is time for you to leave he

becomes extremely agitated and often has to be restrained. On the occasions when you have said you would be back tomorrow he was quite peaceful about your leaving. You tell him now every time you leave that you will be back tomorrow knowing that in a very short time after you leave he will have forgotten what you said.

4. A woman's husband drowned in a car accident when the car plunged off a bridge into a body of water. It was clear from the physical evidence that he desperately tried to get out of the car and died a dreadful death. At the hospital where his body was brought his wife asked the physician in attendance what kind of death her husband suffered. He replied, 'He died immediately from the impact of the crash. He did not suffer.'
5. In an effort to enforce rules against racial discrimination 'testers' were sent out to rent a house. First, an African-American couple claiming to be married with two children and an income that was sufficient to pay the rent would try to rent a house. If they were told that the house was not available, a white tester couple with the same family and economic profile would be sent. If they were offered the rental there would be persuasive evidence of racial discrimination.
6. In November of 1962, during the Cuban Missile crisis, President Kennedy gave a conference. When asked whether he had discussed any matters other than Cuban missiles with the Soviets he absolutely denied it. In fact, he had promised that the United States would remove missiles from Turkey.

7. A woman interviewing for a job in a small philosophy department is asked if she intends to have children. Believing that if she says (politely) it's none of their business she will not get the job, she lies and says she does not intend to have a family.
8. In order to test whether arthroscopic surgery improved the conditions of patients' knees a study was done in which half the patients were told the procedure was being done but it was not. Little cuts were made in the knees, the doctors talked as if it were being done, sounds were produced as if the operation were being done. The patients were under light anesthesia. It turned out that the same percentage of patients reported pain relief and increased mobility in the real and sham operations. The patients were informed in advance that they either would receive a real or a sham operation.
9. I am negotiating for a car with a salesperson. He asks me what the maximum I am prepared to pay is. I say $15,000. It is actually $20,000.
10. We heap exaggerated praise on our children all the time about their earliest attempts to sing or dance or paint or write poems. For some children this encouragement leads to future practice, which in turn promotes the development — in some — of genuine achievement.

SOME ETHICAL PROBLEMS FOR CONSIDERATION

1.12 While considering the following ethical or moral problems, think about what important values and beliefs you have applied in trying to 'solve' the problems. For example, did conventions play a

role in your decision? Did peer pressure influence your action?

- You are undercharged for a purchase:
  - You realise the mistake immediately. What do you do?
  - You realise the mistake when you have just left the store or after you get home. What do you do?
  - Does it make a difference to your behaviour if you are a frequent customer?
  - Does it make a difference if the store is owned by a large company? What if the company has good environmental policies and/or makes large donations to worthy causes?
- You have electrical work done in your house. Three months have passed but you have not received a bill. Do you call the electrician?
- You are in practice in a large law firm located in a foreign country where it is normal for the firm to give bribes to government officials in order to obtain government contracts for its clients. You are told this is normal practice in the foreign country, but against the law in Australia. What would you do? What if this practice is also against the law in the foreign country, but it is still normal practice because the officials are corrupt?
- You receive a refund cheque from the Australian Taxation Office (ATO) that is $2000 more than you expected according to your calculations. You do your calculations again and it is still $2000 too much:
  - Do you inform the ATO?
  - If you used an accountant who said to expect an amount that is $2000 less than you received, do you inform your accountant?

  - Does it make a difference if the mistake is $20,000?
  - What if you were in legal practice and the ATO made a similar mistake in favour of one of your clients during an audit hearing? What would you do?
- You are working in a summer job at a law firm. Your boss, a senior partner, asks you to send flowers to an elderly client in the hospital. A few weeks later, you notice in this client's file that the client was charged for the flowers. What do you do? What if you were working as a first-year lawyer with the firm and the same problem took place?
- What would you do if you found a large brown paper bag with $45,000?[14] This actually happened a number of years ago on George Street, Sydney. The money was turned in to the police.
  - In another example, a bank employee found $263,000 in a lane near his Chippendale, Sydney, home. He placed some of the money in a safety deposit box and kept $110,000 in a backpack under his desk at work. He had to travel to Melbourne and asked a colleague to place the backpack money into a safety deposit box in her name. She refused and reported him to the police.[15] What would you have done? Has he broken the law?[16]
  - The citizens of Tokyo have a long tradition of returning found items. In 1733 two officials who kept found items were executed. The modern law dates from 1958 and requires items found to be turned in within seven days. Failure to do so results in loss of a reward or ownership. If the owner is found, the finder usually receives 10 per cent of the cash or the value of the item found. If no

owner is found within six months, the finder can claim the object or money. Most finders do not bother to make any claims.[17]

HOW ARE LAWYERS PERCEIVED?

1.13 Besides enjoying a monopoly over the legal system, lawyers are, and throughout history have been, among our leading politicians and business people. According to O'Dwyer,[18] the Howard Government was the most lawyer-dominated government since Federation. He later stated that,[19] before the 2004 election, 19 of the 30-member ministry were lawyers, and that, since Federation, John Howard was the 11th lawyer out of 25 prime ministers. In 2015, Malcolm Turnbull became the 14th lawyer to become Prime Minster out of 29 Australian prime

ministers. Furthermore, lawyers are in the majority in the Turnbull cabinet. Do you think that having lawyers in dominant political positions results in fairer legislation? Does it make the political system work more efficiently?

1.14 Lawyers are frequently disliked. It is perplexing for the legal profession to find that various opinion polls hold lawyers in low esteem. For example, in the 28 April 2015 Roy Morgan Poll,[20] only 31 per cent of respondents found lawyers to have a very high or high standard of ethics and honesty. Nurses were the highest at 92 per cent, while car salesmen had the lowest at 4 per cent. In the previous Roy Morgan Poll taken in April 2014,[21] lawyers were at 38

per cent, nurses were still the highest at 91 per cent, while car salesmen maintain the lowest ranking at 5 per cent. Why do you think the percentage for lawyers fell from 38 to 31 in one year? What do you think are the reasons for lawyers being distrusted and disliked? What suggestions do you have for bettering the image of the legal profession? How are lawyers depicted on television and in movies? For example, the ABC program, *Rake*, has contributed to the bad reputation of lawyers found in numerous books and articles.[22]

1.15 One of the problems facing lawyers is the high percentage suffering from depression. This has been found in several studies by the University of Sydney's Brain and Mind Institute entitled BeyondBlue.[23] Furthermore, lawyers may hide depression and mental illness, as being treated for mental illness and depression can lead to other problems. Olivia Collings[24] states:

> Despite greater awareness of mental illness and depression in the profession, many lawyers face financial uncertainty following a diagnosis. Legal professionals seeking to insure themselves against loss of income may find it either difficult, or very expensive, to have insurance following diagnosis or treatment. … 'If an individual has a history of mental illness or depression the insurer will view that as being a higher risk', said Moray & Agnew partner and national head of life insurance, Gerry Davies.

1.16 Besides the opinion polls, an example of lawyers being disliked is the number of disparaging remarks that have become the foundation of a lawyer joke industry. An Australian book by Ross[25] is based on the notion that lawyers have become one of our main targets for

humour. In fact, the authors believe that a joke about a lawyer will usually be well received because, unlike jokes about many other groups (for example, women or Aborigines), lawyer jokes are 'politically correct'. Many jokes used for other groups are now turned into lawyer jokes. An extensive investigation into the history and origin of lawyer jokes was published in the United States.[26] What appear to be the main criticisms of the legal profession underlying these jokes?

1.17 The authors have found many positive statements about lawyers by lawyers or former lawyers. What do you consider are the positive attributes that lawyers have to offer our society? What can you and/or the profession do to change the public's attitude to lawyers?

APPLYING LAWYERING TECHNIQUES TO ETHICAL PROBLEMS

1.18 In the context of ethics, the following terms that are applied in this text are important:

- *Amoral* — an indifference to moral responsibility;
- *Immoral* — a failure to conform to what is generally accepted by a culture as correct behaviour;
- *Positivism* — the separation of law from personal and cultural norms and its connection to the use of force;
- *Deontology* — the science of duty or moral obligation; it assumes that there are certain absolute truths arising out of natural law;
- *Teleology* — the doctrine of final causes, which states that reality is determined by final goals and purposes, rather than mechanical causes; and

- *Utilitarianism* — the ethical view that the right conduct is achieved when an action or result leads to the greatest good for the greatest number of people.

1.19 How do you think lawyers should approach ethical rules governing their behaviour?

- By being legal technicians?
- As spiritual human beings?
- As moral activists?
- According to the behaviour of other lawyers?
- According to standards of their community?
- According to their own beliefs?
- By having fidelity to the law — upholding the relevant law and legal system?
- By complete loyalty to their clients?

ETHICAL OBLIGATIONS OF LAWYERS IN TERMS OF THE PROFESSIONAL RULES OF CONDUCT

1.20 The lawyer's paramount duty is to the court and the administration of justice, and this duty prevails to the extent of inconsistency with any other duty.[27] In relation to the ethical obligations of lawyers concerning their duty to act fairly, honestly, and with competence and

diligence in the service of a client, and their duties of confidentiality, frankness in Court, and the giving of undertakings, see the rules extracted at **6.5**–**6.8**, **10.16**–**10.19**, **10.29**–**10.32**, and

10.36–10.39.

THE AMORAL LAWYER

1.21 Wasserstrom[28] notes that his first criticism of lawyers is 'that the lawyer-client relationship renders the lawyer at best systematically amoral and at worst more than occasionally immoral in his or her dealings with the rest of mankind'. Wasserstrom's second criticism is that the behaviour of lawyers towards their clients is morally objectionable, because lawyers dominate the relationship and typically treat their clients in both an 'impersonal and a paternalistic' manner. He continues by stating that the relationship requires lawyers to be indifferent:

> … to a wide variety of ends and consequences that in other contexts would be of undeniable moral significance. Once a lawyer represents a client, the lawyer has a duty to make his or her expertise fully available in the realization of the end sought by the client, irrespective, for the most part, of the moral worth to which the end will be put or the character of the client who seeks to utilize it. Provided that the end sought is not illegal, the lawyer is, in essence, an amoral technician whose particular skills and knowledge in respect to the law are available to those with whom the relationship of client is established. …

1.22 Wasserstrom[29] believes that defence counsel may act amorally in criminal cases. He argues that there are different factors involved in this area than there are in civil cases, where he believes lawyers should act morally. The different factors include the fact that the result of a criminal case can lead to a prison sentence, prosecutors have the vast resources of the state at their disposal, the proceedings are adversarial, and there is scepticism about whether punishing a wrongdoing is the correct approach to curing the

problem. The above leads to the conclusion that defence counsel should be responsible for making out the best possible case for the accused, regardless of the merits of the case.

1.23 Would clients be better off leaving the expert lawyer they have chosen to apply their own moral universe? Should lawyers in these situations completely inform their clients of all facts and then have the clients apply their moral universe? Postema[30] highlights the problem of reconciling our general moral principles and their application in everyday life situations. Postema's solution is treating people not as objects, but in a human way, and applying our wisdom based on our world experience and knowledge to any confusing ethical situation. Do you think you can create a distinction between 'role ethics' (identifying with your role as a lawyer) and your own personal ethics?

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1.24 Curriden[31] points out the problems of reconciling religious beliefs and practising law. The following are some of his examples:

- On Wall Street, a lawyer at a major law firm refused to cover up a client's mistakes, despite insistence to do so by the client and her firm's partners. To do so, the lawyer contended, violated her Muslim beliefs.
- In New York, a Jewish lawyer, citing his religious beliefs, gave a client money out of his own wallet to keep her from being evicted from her apartment, even though State Bar ethics rules prohibited lawyers from giving money to their clients.
- In February 2002, Pope John Paul II repeated earlier calls to Catholic lawyers to combat divorce and encourage estranged

couples to reconcile.

1.25 Can you think of an ethical rule in your faith that may conflict with your role as a lawyer? What would you do if faced with the above problems?

THE MORAL LAWYER

1.26 Shaffer[32] has adopted the 'care' model as one of his models for the lawyer-client relationship. This model involves a 'moral universe', where any discussion between the two parties has a moral dimension, and moral issues have to be confronted.

1.27 What do you consider are the benefits of working as a lawyer within a moral framework? What do you consider are the negative aspects of rejecting the amoral model? What problems do you see if you become too 'friendly' with your clients? Be aware of the problem that, if lawyers are permitted to incorporate a moral viewpoint into their legal services, this moral perspective may not be acceptable to the client or acceptable in our society. Do we want lawyers to decide according to their moral views which legal problems are to be given priority and which clients they deem to be unacceptable?

1.28 In relation to law students, Professor Schiltz[33] has given the following advice, which can also be applied to those in practice:

> Right now, while you are still in law school, make the commitment — not just in your head, but in your heart — that, although you are willing to work hard and you would like to make a comfortable living, you are not going to let money dominate your life to the exclusion of all else. And don't just structure your life around this negative; embrace a positive. *Believe* in something — *care* about something — so that when the culture of greed presses in on you from all sides,

there will be something inside of you pushing back. Make the decision now that *you* will be the one who defines success for you — not your classmates, not big law firms, not clients of big law firms, not the *National Law Journal*. You will be a happier, healthier, and more ethical attorney as a result.

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ATTRIBUTES OF A PROFESSION

1.29 According to Millerson,[34] the main attributes found by sociologists in determining a profession are:

- skill based on theoretical knowledge;
- the provision of training and education;
- testing the competence of members;
- organisation;
- an ethical code of conduct; and
- altruistic service.

It is obvious from the listed attributes that law comes within the definition of a profession.

1.30 When taking the oath for admission to the legal profession, a bible is used. There is already a provision allowing non-believers to make an affirmation. Also, there are now many Australian lawyers from non-Christian-Judaeo backgrounds. Should provision be made for them to take a different oath when being admitted to practice? Should new members be allowed to create their own oath, as we already allow people to do when they get married?

1.31 In contrast to all the traditional definitions of a profession, sociologists such as Johnson[35] have defined a profession as an

occupation that is only interested in amassing power or resources. Larson[36] modifies Johnson's definition within her historical class analysis of the traditional professions, stating that, historically, professionalism was a collective assertion by producers of special services to achieve upward mobility — that is, special social status. They did this by control over a scarce resource — special knowledge and skills. This control was then translated into social and economic rewards.

1.32 Morgan[37] takes the view that the current American lawyers are not part of a profession. He suggests that the old values of the 19th and the 20th century no longer exist (they 'should be seen as — dead'), and that the present values are not those of the professional organisations, such as the American Bar Association, but those of the large firms.

WHAT IS NOT ACTING AS A PROFESSIONAL?

1.33 Courtesy, honesty, integrity, diligence, and candour are all characteristics or attitudes consistent with being a professional. For example, the Professional Conduct Rules require that a solicitor must be honest and courteous in all dealings in the course of legal practice.[38]

1.34 In the Court of Appeal case of *Garrard (t/a Arthur Andersen and Co) v Email Furniture Pty Ltd* (1993) 32 NSWLR 662, lawyers sought an advantage when the opposition lawyer failed to reply within the required 21 days. The lawyers were awarded a

judgment because of this technical failure on the part of their opponents. On appeal, the judgment was reversed. Kirby ACJ at 663 said:

> Discourtesy is not limited to the tone of correspondence or the vigour of its language. Those members of the legal profession who seek to win a momentary advantage for their clients without observing the usual and proper courtesies invite correction by the court and disapprobation of their colleagues.
>
> To the extent that solicitors act in this way, they run the risk of destroying the confidence and mutual respect which generally distinguishes dealings between members of the legal profession from other dealings in the community. Jumping the gun and securing a certificate for want of objection, when it is very well-known that an objection is fully intended, may win a momentary battle. But in the end, those who engage in such tactics, at least without complete candour to the court, run the risk of running up needless costs and causing delay and inconvenience. They become known for their rigid adherence to the rules. Those who act in this way also generally attract retaliation. The victim lies in abeyance, sometimes for years, waiting an opportunity to strike back. …

Kirby ACJ at 263 states that members of the legal profession must have 'confidence and mutual respect' in their dealings with each other, which is different from dealings in the general community.

1.35 In Victoria, the Solicitors' Board in Victoria in *Re Victor Horoch* (No 880, 1992, unreported), reprimanded a solicitor for continuous offensive and discourteous correspondence with other practitioners and the Law Institute, and threatening to physically assault another practitioner. In *Baker v Legal Services Commissioner* [2006] QCA 145, a solicitor used offensive language to and in the presence of a client as well as members of his staff. Stating that the client was an 'absolute moron', he continued:

> I can't deal with *** morons. Get out of my office. … What the *** are you doing here? You don't have the right to waste our ***ing time. I have spent enough ***ing time on the ***ing file. You are a ***ing moron. If you had signed the ***ing contract properly in the first place we wouldn't be in the ***ing mess. *** off out of my reception area.

1.36 The Legal Practice Tribunal stated that '[i]t is inconceivable that the behaviour the subject of [the charges] could ever be regarded as acceptable behaviour by a solicitor towards a client or an employee. It is bound to bring the profession into disrepute.' There are a number of other disciplinary cases where solicitors were found to have breached the 'civility and courtesy' that is required by the profession.[39] The penalties in these procedures are usually a reprimand, or more seriously, an order for costs against the solicitor.

1.37 Karpman,[40] in writing about Californian lawyers, stated:

> To eradicate uncivilized behavior, we need to enlist the participation of the bench, the bar and each other. Peer pressure is one of the most effective means to block uncivil conduct. That is why the State Bar has created a special task force on civility and professionalism to deal with these issues.

1.38 A survey conducted in 2006 of 800 lawyers in the United States found that 69 per cent thought that civility in the profession had been declining.[41] Levit and Linder,[42] commenting on legal practice in the United States, state that:

> One of the largest dissatisfactions with lawyers' professional lives is other lawyers. Incivility is rampant. In any gathering of lawyers, you will hear complaints about lawyer incivilities. … [I]ncivility is

> escalating, particularly in larger cities. In smaller towns, everybody still knows everybody else; in more sprawling metropolitan areas, lawyers practice against opposing counsel they may see once and then never again. What is lost is not just a sense of a professional community but civility.

1.39 A lawyer's professional image and reputation is valuable property. For instance, where a jury found that a Sydney barrister, Allan John Goldsworthy, had been defamed,[43] he was awarded more than $80,000 because a well-known radio broadcaster, Ray Hadley, implied Goldsworthy was a heartless person because he had sought to cross-examine a young man who had seen his mother shot dead. The jury rejected Goldsworthy's claim that the comments implied he was unfit to be a lawyer, but awarded him damages because of the comments.

CODES OF ETHICS

1.40 There are different kinds of codes of ethics adopted by different occupations in Australia. Sometimes within the same code there are both aspirational sections and those that are more specific and binding. Some occupations have different codes — one to deal with their aspirations or ideals, and another concerning concrete rules of behaviour. The Law Society of New South Wales has adopted this approach.[44]

1.41 The following is the Law Society of New South Wales' Statement of Ethics:[45]

> **We acknowledge** the role of our profession in serving our community in the administration of justice. We recognise that the law should protect the rights and freedoms of members of society. We understand that we are responsible to our community to observe high standards

of conduct and behaviour when we perform our duties to the courts, our clients and our fellow practitioners.

Our conduct and behaviour should reflect the character we aspire to have as a profession.

This means that as individuals engaged in the profession and as a profession:

- We primarily serve the interest of justice.
- We act competently and diligently in the service of our clients.
- We advance our clients' interests above our own.
- We act confidentially and in the protection of all client information.
- We act together for the mutual benefit of our profession.
- We avoid any conflict of interest and duties.
- We observe strictly our duty to the Court of which we are officers to ensure the proper and efficient administration of justice.
- We seek to maintain the highest standards of integrity, honesty and fairness in all our dealings.
- We charge fairly for our work.

1.42 Shirvington[46] made the following comment about the earlier 1994 and 2003 Statements of Ethics, which is still relevant for the 2009 Statement:

> The Society believes that lawyers should proudly display the Statement of Ethics to their clients. This would be of great benefit not only to the profession, to the clients and to new members of the profession. It should also inspire confidence in the general community about the ethical standards by which lawyers practise. …
>
> The Statement is essentially a positive, not proscriptive document. It is not in the nature of a code of conduct the breach of which would lead to any disciplinary action against a lawyer. It is important in

explaining in succinct form the role of lawyers in the community, the duties they owe and how those duties interact. …

1.43 By contrast to this aspirational code, the Santa Cruz County Bar Association's Civility Code[47] appears to be more than aspirational. It states:

> In order to raise the standards of civility and professionalism among counsel and between the Bench and the Bar, I hereby pledge the following:
>
> 1. To at all times comply with the California Rules of Professional Conduct;
> 2. To honor all commitments;
> 3. To be candid in all dealings with the court and counsel;
> 4. To uphold the integrity of our system of justice and not compromise personal integrity for the sake of a client, case or cause;
> 5. To seek to accomplish the client's legitimate goals by the most efficient and economical methods possible;
> 6. To act in a professional manner at all times, to be guided by a fundamental sense of fair play in all dealings with counsel and the court, and to be courteous and respectful to the court;

> 7. To be on time;
> 8. To be prepared for all court appearances — to be familiar with all applicable court rules;
> 9. To adhere to the time deadlines set by statute, rule, or order;
> 10. To avoid visual displays of pique in response to rulings by the court;
> 11. To discourage and decline to participate in litigation or tactics that are without merit or are designed primarily to harass or drain the financial resources of the opposing party;

12. To avoid any communications with the judge concerning a pending case unless the opposing party or lawyer is present, or unless permitted by court rules or otherwise authorized by law;
13. To refrain from impugning the integrity of the judicial system, its proceedings, or its members;
14. To treat all court personnel with the utmost civility and professionalism;
15. To remember that conflicts with opposing counsel are professional and not personal — vigorous advocacy is not inconsistent with professional courtesy;
16. To refrain from derogatory statements or discriminatory conduct on the basis of race, religion, gender, sexual orientation or other personal characteristic;
17. To treat adverse witnesses and litigants with fairness and due consideration;
18. To conduct discovery proceedings as if a judicial officer were present;
19. To meet and confer with opposing counsel in a genuine attempt to resolve procedural and discovery matters;
20. To not use discovery to harass the opposition or for any other improper purpose;
21. To not arbitrarily or unreasonably withhold consent to a just and reasonable request for cooperation or accommodation;
22. To not attribute to an opponent a position not clearly taken by that opponent;
23. To avoid unnecessary 'confirming' letters and to be scrupulously accurate when making any written confirmation of conversations or events;
24. To not propose any stipulation in the presence of the trier of fact unless previously agreed to by the opponent;
25. To not interrupt an opponent's legal argument;
26. To address opposing counsel, when in court, only through the court;
27. To not seek sanctions against or disqualification of another lawyer to attain a tactical advantage or for any other improper

purpose;

28. To not schedule the service of papers to deliberately inconvenience opposing counsel;
29. To refrain, except in extraordinary circumstances, from using the fax machine to demand immediate responses from opposing counsel.

1.44 Compare the NSW and Santa Cruz codes. Which one you would prefer and why? There are similar codes in other American jurisdictions. Should we adopt a civility code in Australia? Would it have any effect?

1.45 Lawyers who practise as migration agents must abide by a separate code of conduct for migration agents.[48] The High Court in *Cunliffe v Commonwealth* (1994) 182 CLR 272, held that the constitution was not violated by requiring lawyers who practised migration law to abide

by this Code. The Code of Conduct for Migration Agents[49] requires agents, when requested by the Migration Agents Registration Authority, to disclose clients' communications.[50] What if the lawyer or migration agent refuses because they believe that their ethical code requires non-disclosure under legal professional privilege? Which ethical code should prevail? In *Joel v Migration Agents Registration Authority* [2000] FCA 1919, the Law Council of Australia intervened as an *amicus curae* due to the importance of the case. The Court upheld the legal privilege on one aspect of the case, but was able to sever the rest of the case from the legal privilege rule, and ordered the disclosure of the rest of the communications under the Code of Conduct for Migrant Agents.

1.46 In the context of ethical codes, Ross[51] notes:

3.19 Lichtenberg has summed up what she calls the 'puzzling' idea of an ethical code. She says:

> 'What is it, exactly, and how can it bind us? Or can it? Its status, normative if not ontological seems mysterious. Either its pronouncements are obvious (read 'platitudinous'), in which case it invites simply filling out an application showing they have an Australian law degree or that they are admitted to practice. ridicule, or they are not obvious (read 'controversial') in which case it arouses suspicion. A third possibility is that its pronouncements are vague. In that case they are useless unless interpreted. When interpreted, they are either obvious, thus platitudinous; or not obvious, thus controversial.'

[J Lichtenberg, 'What are Codes of Ethics for', in M Coady and S Bloch (eds), *Codes of Ethics and the Professions*, Melbourne University Press, 1996, p 15.]

Why the great need for an ethical code? Who benefits when an occupation adopts an ethical code? It has been argued that codes can be used to control lawyers from shady practices and also give the lawyers a weapon against clients who want them to do something that the lawyers consider too extreme. The mere existence of a code can raise the standard of ethical behaviour simply by clarifying what is deemed to be ethical conduct and expressing an occupation's commitment to a moral standard. This idea is the basis of voluntary codes of conduct. It can lead to morally acceptable or required behaviour by making people conscious of their actions and by threatening them with sanctions. A code can also have aspirational aspects by providing a statement of ideals that can act as a framework for a more ethically oriented profession. …

3.20 Ethical codes can be criticised for their inability at times to resolve ethical conflicts and for their limited ability to change human

> conduct. Codes can also be used to the detriment of the community and be used mainly for the interests of the profession. A code can enhance status, control the market for legal services and be used to defend the profession

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> against attack. For example, if lawyers are accused of some kind of unsavoury behaviour the profession can say it will amend the code and that will cure the problem. Codes can only be effective if they are clearly stated and enforced against members. They must be able to 'permit the coercion of ethical delivery of professional services and … offer a prospect of deterrence of professional misconduct'. [footnotes omitted]

1.47 The 19th century Code of Medical Ethics of the American Medical Association,[52] an aspirational code, supports the view that such a code can bring group cohesion. It states the purposes of the professional association to be, stating its aim to be '[f]or cultivating and advancing … for elevating … for promoting, for enlightening and directing … for exciting … and for facilitating, and fostering friendly intercourse between those engaged in it'.

1.48 There is nothing wrong with adopting aspirational codes. According to MacKenzie,[53] they help 'to remind the profession and inform the public of the public service dimension of the practice of law'. He notes:

> Codes that seek to regulate the profession cause more problems because they 'cannot help' but at least dilute the public service orientation'. Detailed codes to control ethical behaviour are doomed to fail. They will foment endless litigation because it is impossible to achieve any kind of certainty in the principles and rules to be applied.

There is a need for flexibility which is destroyed when ethical codes become too specific.

1.49 MacKenzie at 817 adds two further criticisms:

> [A]n exhaustive code of black-letter rules is unlikely to attract the support of a professional consensus' which 'is important in any system of self-government, partly because voluntary compliance is preferable to disciplinary sanctions. …
>
> [And, specifying] minimum prohibitions for disciplinary purposes entails regulating to the lowest common denominator. If the standards that are established are calibrated too high, neither widespread compliance nor rigorous enforcement is likely. … Rules that embody minimal standards … deemphasize ethical aspirations and are certain to discourage lawyers from reaching beyond those minimums.

MONOPOLY OVER LEGAL SERVICES

1.50 The government, under legislation, and the courts, by use of their discretion, have granted the legal profession a virtual monopoly over the delivery of legal services. This is an important aspect of being considered a profession. Not all occupations that are sometimes called 'professions' have this right — for example, architects. The legal profession, like the medical profession, considers that its work is so skilful and important that only

qualified lawyers should be able to practise. This attitude is aptly described by the English Law Society:[54]

> So far as the professional man is concerned, he [or she] does not sell a

> commodity but offers only his personal expertise and the member of the public obtains the benefit of that expertise by consulting a practitioner who has obtained the necessary professional qualification. It is not for a professional man to create a demand for that expertise — indeed it is just because the demand is always there and the public have needed protection against the charlatan and the incompetent that his profession exists at all.

1.51 In the 1990s and the 2000s, governments called into question the need for monopolistic practices that discourage competition.[55] Having said this, the various Legal Profession and Legal Practitioners Acts protect the public and the monopoly by stopping anyone from 'acting or practising' or 'pretending' to be a legal practitioner.

1.52 In the area of conveyancing, there has never been a monopoly in Western Australia or South Australia. New South Wales abolished the monopoly by adopting the Conveyancers' Licensing Act 1992 (NSW),[56] which allows qualified licensed non-lawyers to carry out conveyancing. Similar legislation was also adopted in Victoria.[57] By March 2016, all jurisdictions except for Queensland and the Australian Capital Territory have, by law or practice, removed the monopoly as regards the area of conveyancing.

1.53 In *Legal Practice Board v Said* (SC(WA), Scott J, No 940608, 31 October 1994, unreported), it was alleged that Said was in contempt by virtue of the fact that he purported to act as a legal practitioner. The problem concerned certain clauses in a building contract entered into by Jardim, his *de facto* wife (Da Silva), and Homestyle Pty Ltd. Said examined the contract and decided to invoke its arbitration clause. A preliminary meeting of the parties, attended by Said, ended acrimoniously, particularly because Homestead regarded Said's approach to be irrational. Homestyle

then issued a writ of summons to take the dispute to the District Court. In the interim, Said proceeded to have an arbitrator appointed. In addition, Said was advised that, under the provisions of the Commercial Arbitration Act 1985 (WA),[58] it was possible for a non-legal practitioner to represent Jardim and Da Silva at the arbitration. It was alleged that, up to this point, only Said's action of giving advice as to the legal effect of the contract was in breach of the Legal Practitioners Act 1893 (WA).[59]

1.54 Said sought to obtain legal assistance to defend the writ and failed, probably because he had such a bad reputation that few, if any, legal practitioners were prepared to act for him, or through him for his 'clients'. There was evidence that Said repeatedly stated that all lawyers in Western Australia were 'crooks and cheats'. Before seeking help for his 'clients', Said had reached

agreement that he would be paid $200 per hour. Said, unable to obtain legal assistance, lodged documents in the District Court himself. He prepared a conditional appearance, a chamber summons directed at striking out the writ of summons, and an affidavit of Jardim in support of the application. The chamber summons was listed for hearing in the District Court on 8 January 1991. On 7 January 1991, Said employed a solicitor, who declined to act at the last minute after finding out about Said's reputation. As a result, Said decided to act for Jardim. Registrar Harding did not allow Said to speak for Jardim, nor was he permitted to sit alongside him. The application failed and the defendants were ordered to pay costs. Said still sought a solicitor who would be

willing to deal only with him and not to have any direct contact with Jardim. Understandably, legal practitioners were reluctant to become involved and were also concerned that Said was breaching the Legal Practitioners Act. Said believed that, under his contract with Jardim, he was to run the action and instruct solicitors. The application to strike out the writ of summons was brought on for hearing on a number of occasions, but always failed.

1.55 Scott J held:

> … This motion for contempt of court arises out of the fact that Said is said to have given legal advice to Jardim and Da Silva. … In addition it is alleged that in preparing the District Court documents including the notice of conditional appearance, the chamber summons to strike out the writ and the accompanying affidavit, Said was acting in breach of the Legal Practitioners Act ('the Act'). …
>
> … Apart from the allegation that the defendant prepared documents for Jardim and Da Silva in relation to the District Court action, the plaintiff also alleges that the defendant effectively acted as the solicitor for those two defendants during the relevant period.
>
> [The court then detailed a number of legal documents that Said admitted that he had prepared.]
>
> Mr McCardell was appointed arbitrator and in a discussion with Said, Mr McCardell, an architect, told Said that he could if he wished appear for Jardim and Da Silva at the hearing of the arbitration. … Said maintains the view that it was therefore proper for him to do all things necessary to bring the dispute to resolution in that way and in his eyes, that included taking whatever steps were necessary in the District Court action to force the matter back to arbitration. That being the case, Said says that despite being warned by Mr Hotchkins, solicitor for Homestyle, of the possible breach of the Legal Practitioners Act, Said decided that it was within his lawful authority to take those steps in the District Court action.
>
> In his defence to the motion Said called many witnesses. Some were

discharged from answering subpoenas and in some cases they were discharged from the witness box by me because there was obviously no relevant evidence to be given. In this respect it is to be noted that Said repeatedly told me that he wanted to call some 350 witnesses, all of whom he said were in conspiracy with the Legal Practice Board and causing him ongoing difficulties in his life. A perusal of the witnesses whom the defendant did call reveals that Said had no idea of relevance, persistently refused to obey directions given to him, and passionately believed that everything he said was correct. He maintained that all of his witnesses were telling lies to the extent that they did not agree with what he said in evidence. Said, for that reason, repeatedly

purported to cross examine his own witnesses and would not accept my directions as to the impropriety of taking that approach.

It is significant that the plaintiff 's case was conducted on the basis that the admissions said to have been made by Said in his affidavit in reply to the motion admitted the allegations made against him.

Said has raised only two matters which in my view can relevantly be said to warrant consideration as a defence to the motion. Firstly he says that the charges which he agrees he made for his services to Jardim and Da Silva were not for legal work, but only for the assistance he was giving them in finding help and in giving instructions to the lawyers concerned. Secondly, Said says that the steps that he took in preparing the documents for use and presentation to the District Court were caused by the necessity of having to take steps to protect his clients during the Christmas break and to prevent judgment being entered by default. The many other arguments raised by Said and the many irrelevant witnesses he called can only be properly dealt with by an appropriate order for costs. Said was made well aware, in the course of these proceedings, which should

have taken only one day, but which in fact took 12 days that he was at risk as to costs. The proceedings would have continued for many months but for the fact that I was forced to compel Said to present summaries of the evidence that each witness was to be called to give so that I could rule on the question of relevance.

Said's refusal to accept my rulings and to limit the case to relevant material was such that I seriously considered taking contempt action against him during the proceedings and had police brought to the court for that purpose. In the end it was the evidence of a psychiatrist called by Said (who testified that an earlier diagnosis of paranoia made in relation to Said was wrong but that Said suffered from a narcissistic personality disorder) which persuaded me to treat Said as a person who deserved sympathy for his plight rather than criticism. That evidence dissuaded me from taking that drastic step.

I turn now to the law to be applied to this application. The starting point is the case of *The Barristers Board v Palm Management Pty Ltd* [1984] WAR 101 in which his Honour Brinsden J dealt with the history of the relevant provision of the Legal Practitioners Act in a very thorough and detailed analysis of the provision and its history.

The relevant sections of the Legal Practitioners Act are s 76 to s 81 although the central focus of this application is ss 76, 77 and 78 of the Act:

> '76(1) No person other than a certificated practitioner shall, whether in their own name or that of any other person, directly or indirectly sue out any writ or process, nor commence, carry on, solicit, defend, or appear in any action, suit, or other proceedings in any court whatever of civil or criminal jurisdiction in Western Australia, nor act as a barrister, solicitor, attorney, or proctor of the Supreme Court of Western Australia in any cause, matter or suit, information or complaint, civil or criminal, wheresoever and before whomsoever the same is to be heard, tried, or determined, or under any commission for the examination

within the State of witnesses, or others issued by any court in or out of Western Australia'.

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(2) Nothing in subs (1) shall be construed as preventing a party from appearing or defending in person as heretofore, nor to prevent any person from addressing the court if permitted to do so pursuant to s 29 of the Local Courts Act 1904. …

77(1) No person other than a certificated practitioner shall directly or indirectly perform or carry out or be engaged in any work in connection with the administration of law, or draw or prepare any deed, instrument, or writing relating to or in any manner dealing with or affecting real or personal estate or any interest therein or any proceedings at law, civil or criminal, or in equity.

(2) Nothing in subs (1) shall be construed to affect public officers acting in discharge of their official duty, or the paid or articled clerks, office certificated practitioners, or any person drawing or preparing any transfer under the Transfer of Land Act 1893.

78(1) Nothing in the last preceding section contained shall extend to make any person liable to any penalty if such person satisfies the Court or a Judge thereof, as the case may be, that the person has not directly or indirectly been paid or remunerated or promised or expected pay or remuneration for the work or services so done.

(2) Where such person directly or indirectly receives, expects, or is promised pay or remuneration for or in respect of other work or services relating to, connected with or arising out of the same transaction or subject-matter as

> that to which the said first-mentioned work or services shall relate, the provisions of this section shall not apply.'

The case of *Palm Management Pty Ltd* (supra) dealt with the actions of the company in preparing conveyancing documents rather than documents for use in court proceedings, but the principles are the same.

His Honour, in considering the relevant provisions, referred to the American case of *Florida Bar v Town* (1965) 174 So (2d) 395 and the quotation therein referred to from the case of *State ex rel Florida Bar v Sperry* (1962) 140 So (2d) 587 at 591:

> 'It is generally understood that the performance of services in representing another before the courts is the practice of law. But the practice of law also includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments including contracts by which legal rights are either obtained, secured or given away, although such matters may not then or ever be the subject of proceedings in a court.
>
> 'We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the person giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitutes the practice of the law.'

The *Palm Management* case was considered in *Cornall v Nagle* (unreported, No 9799/91 S Ct Vic; delivered 25 March 1994 (Phillips J)) [now reported at [1995] 2 VR 188]:

> '… which considered a number of complaints against one Sylvester Finbar Nagle for disobedience of an order made by McGarvie J which in summary restrained him from acting or practising as a solicitor. That case in some of its particulars is remarkably similar to this. Nagle's case involved a large number of complaints alleging breaches by Nagle of the injunction … '. It is of course to be noted that the corresponding section of the Legal Profession Practice Act of Victoria is in different terms to the Legal Practitioners Act of Western Australia [s 77], particularly as that Act [Victorian] proscribes 'acting or practising as a solicitor'. …

In *Nagle's* case, Phillips J adopted the distinction drawn in *Oake v Moorecroft* (1869) LR 5 QB 76 and in *Associated Securities Ltd v Aziz* [1974] VR 699 at 709 between what is a 'purely ministerial' act not required to be done by a legally qualified person and other acts which require a legally qualified person to perform them. Within the latter category as set out in *Nagle's* case is 'the formal entry of an appearance' (see page 23).

Nagle's case goes on to refer to 'taking an unqualified person to court to take notes and assist' (at 25) and says that such assistance may be allowed in the exercise of discretion.

Nagle's case then considers the bringing into existence of documents for the purpose of the proceedings as the plaintiff says happened here. In that respect Phillips J said at 32:

> 'there can be no doubt that in bringing documents into

> existence Mr Nagle did exercise his mind as to what was the appropriate form of words to accommodate the particular case …' and the Court considered that in taking such a step Mr Nagle could be said to have 'drawn or prepared the documents' and thereby to have contravened the relevant Act.'

His Honour Phillips J then referred to the authorities of *Green v Hoyle* [1976] 1 WLR 575; [1976] 2 All ER 633; *Law Society of NSW v Ramalca Pty Ltd* (1988) 12 NSWLR 34 and *AG Ex rel Law Society (WA) v Quill Wills Ltd* (1990) 3 WAR 500 and said: 'But in that last two of these, the Court regarded as answerable the one who took responsibility for the fi nished product … that is a sufficient test for present purposes.'

Applying those principles to this case, both in relation to the advice which Said admits that he gave to Jardim and Da Silva and by his actions in preparing and filling the documents in the District Court, I have concluded that the defendant, Said, was acting in breach of the Legal Practitioners Act and I have little difficulty in reaching the conclusion that he was responsible for all of the documents which he admitted preparing as set out above so that in this case the test set out in *Nagle's* case is met.

I would finally point out in dealing with *Nagle's* case that Phillips J said at 67:

> 'Had he (Nagle) confined himself to running to and fro and to the performance of the mechanical and clerical tasks involved in the litigation, it would have been altogether a different matter. He did not do that; rather he carried on the defence of the litigation

> for his principals and in doing so, he did work specifically required by law to be done only by a solicitor … '.

In addition having reviewed the evidence I have also reached the conclusion that the defendant in giving advice to Jardim and Da Silva, particularly in relation to the arbitration clause in the building contract, was giving legal advice to those parties.

The next issue for consideration is whether the accounts admittedly sent by Said to Jardim and Da Silva constituted a payment or a promise of payment for legal work as required by s 78 of the Act.

Said accepts that he sent accounts to Jardim for his services [and submitted an account for $9700.30. He offered a discount of $3000 if the account was paid promptly]. …

The account and the letter just reproduced is a clear indication that included in the charges being raised by Said were his fees for the preparation of the document referred to earlier in these reasons and filed in the District Court.

I have therefore concluded that the evidence establishes that Said did charge Jardim for his time and services in preparing the District Court documents.

As to the second matter referred to, namely that Said acted as he did because there was no practitioner available to him over the Christmas period to protect Jardim's position, I am not persuaded that this was so. Said did try to engage a number of solicitors during that period but in my opinion once he could not secure the services of the solicitors he wanted, he decided to act for Jardim himself and so prepared the conditional appearances, the chamber summonses, and the supporting affidavits for use in the District Court. In doing that I accept that Said may have misunderstood discussions he had with the various solicitors to whom he had spoken. I accept that he had been told that Jardim could prepare and file the documents on his own behalf, but I do not accept that any of the practitioners called as witnesses told Said that he could prepare and file the documents for

Jardim as part of his contractual services to Jardim and Da Silva.

As Phillips J said in Nagle's case (supra) at 78:

> 'To assume responsibility for another's litigation may perhaps be permissible, if the agent were to observe carefully the line between acting as an agent and acting as a legal practitioner though not qualified to do so.'

I agree that in some cases the 'line' of which Phillips J spoke is not always easy to draw depending on the facts of the particular case, but as the reasons in this case indicate, in my opinion, this is not a marginal case, nor one that is close to the dividing line.

In acting as he did Said realised that he was in breach of the Legal Practitioners Act having been warned by Mr Hotchkin of Corrs Australia (the solicitor acting for Homestyle) that his actions were in breach of that Act. In my opinion Said chose to act as he did because he thought he was entitled to do so in the circumstances, particularly because he thought that the defence to the writ of summons had to be filed within 10 days of service on 22 December 1990.

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In my opinion the applicant has made out its case and I find Said guilty of the contempt set out in the application. I will hear the parties on the question of the appropriate penalty, but on the question of costs, it is my opinion that Said should bear the costs of these needlessly lengthy and expensive proceedings. I warned Said that his failure to accept my directions as to relevance could reflect in the order for costs and as the matter turns out he will be ordered to pay the plaintiff 's costs to be taxed. …

1.56 Said was allowed to aid in the arbitration. Why do we have legislation to stop people from giving help in the court system?

1.57 In *Cornall v Nagle* [1995] 2 VR 188 at [23], the court said that 'purely ministerial' acts are not required to be done by a legally qualified person, while other acts require a legally qualified person to perform them. The court at [23] also said that first, '[h]ad he [Nagle] confined himself to running to and fro and to the performance of the mechanical and clerical tasks involved in the litigation, it would have been altogether a different matter … ', and second, ' … if the agent were to observe carefully the line between acting as an agent and acting as a legal practitioner though not qualified to do so', he would not violate the Act. In another Victorian case, *Felman v Law Institute of Victoria* [1998] 4 VR 324 at 352, the court stated that 'engaging in legal practice' means 'to carry on or exercise the profession of law' — that is, 'engaging in legal practice as a legal practitioner'. Does this definition clarify the problem?

1.58 The various Legal Profession Acts protect the public and the monopoly by stopping anyone from 'acting or practising' or 'pretending' to be a legal practitioner.

1.59 Part 2.1 of the Legal Profession Uniform Law 2015 (NSW) states as follows with regard to 'unqualified legal practice':

…

9 Objectives

The objectives of this Part are—

(a) to ensure, in the interests of the administration of justice, that legal work is carried out only by those who are properly qualified to do so; and

(b) to protect clients of law practices by ensuring that persons carrying out legal work are entitled to do so.

10 Prohibition on engaging in legal practice by unqualified entities

(1) An entity must not engage in legal practice in this jurisdiction, unless it is a qualified entity.
Penalty: 250 penalty units or imprisonment for 2 years, or both.

(2) An entity is not entitled to recover any amount, and must repay any amount received, in respect of anything the entity did in contravention of subsection (1). Any amount so received may be recovered as a debt by the person who paid it.

(3) Subsection (1) does not apply to an entity or class of entities declared by the Uniform Rules to be exempt from the operation of subsection (1), but only to the extent (if any) specified in the declaration.

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11 Prohibition on advertisements or representations by or about unqualified entities

(1) An entity must not advertise or represent, or do anything that states or implies, that it is entitled to engage in legal practice, unless it is a qualified entity [penalty only].

(2) A director, partner, officer, employee or agent of an entity must not advertise or represent, or do anything that states or implies, that the entity is entitled to engage in legal practice, unless the entity is a qualified entity [penalty only]. …

12 Entitlement of certain persons to use certain titles, and presumptions with respect to other persons

(1) *Titles* This section applies to the following titles—

(a) lawyer, legal practitioner, barrister, solicitor, attorney, counsel or proctor;

(b) Senior Counsel, Queen's Counsel, King's Counsel, Her Majesty's Counsel or His Majesty's Counsel;

(c) any other title specified in the Uniform Rules for the purposes of this section.

(2) *Entitlement to take or use title* A person is entitled by force of this section to take or use a title to which this section applies if—

(a) the person is of a class authorised by the Uniform Rules for the purposes of this section to take or use that title; and

(b) where the Uniform Rules so provide — the person does so in circumstances, or in accordance with restrictions, specified in the Uniform Rules for the purposes of this section.

(3) *Presumption of representation of entitlement of person* The taking or use of a title to which this section applies by a person gives rise to a rebuttable presumption (for the purposes of section 11(1)) that the person represented that he or she is entitled to engage in legal practice.

(4) *Presumption of representation of entitlement of entity* The taking or use of a title to which this section applies by a person in connection with an entity, of which the person is a partner, director, officer, employee or agent, gives rise to a rebuttable presumption (for the purposes of section 11(2)) that the person represented that the entity is entitled to engage in legal practice.

13 Protection of lay associates

A lay associate of a law practice does not contravene a provision of this Law or the Uniform Rules merely because of any of the following—

(a) he or she receives any fee, gain or reward for business of the law practice that is the business

of an Australian legal practitioner;

(b) he or she holds out, advertises or represents himself or herself as a lay associate of the law practice where its business includes the provision of legal services;

(c) he or she shares with any other person the receipts, revenue or other income of the law practice where its business is the business of an Australian legal practitioner—

unless the provision expressly applies to lay associates of law practices.

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14 Functions of local regulatory authority with respect to offence

The designated local regulatory authority may—

(a) take any steps that in its opinion may be necessary or proper for or with respect to the investigation of any question as to conduct by any entity (whether or not an Australian lawyer) that is, or may be, a contravention of a provision of this Part; and

(b) institute prosecutions and other proceedings for the contravention of a provision of this Part by any entity (whether or not an Australian lawyer).

…

1.60 One of the methods the profession has of maintaining its monopoly and control over lawyers already admitted is the requirement in all jurisdictions that a person, in order to practise as

a legal practitioner, must hold a current practising certificate.[60]

1.61 In *Orrong Strategies Pty Ltd v Village Roadshow Ltd* [2007] VSC 1, Ziegler had an LLB and had been admitted to legal practice in Queensland in 1984 and Victoria in 1990. He worked for Orrong, which was Ziegler's private family company. He took out a corporate practising certificate in Victoria in 1990 and held that certificate at the time of the case. The corporate practising certificate allowed a lawyer to give legal advice as an employee to their corporate employer. Ziegler was also a tax expert, a Fellow of the Taxation Institute of Australia, and a Chartered Accountant. Under an agreement entered into with Village Roadshow Ltd (VRL) in 1993 and modified in 1995, Orrong agreed to provide consultancy services to VRL for five years from 1 July 1996 to 30 June 2001. VRL asserted that all of the work carried out or services provided by Orrong pursuant to the agreements constituted 'engaging in legal practice' within the meaning of the Legal Practice Act 1996 (Vic). As Orrong was not 'at any time an incorporated practitioner or the holder of a practising certificate', VRL pleaded that Orrong contravened s 314(1) of the Legal Practice Act (prohibition on unqualified practice), and claimed relief under subs (6) and (7), namely:

> (6) A person who contravenes subsection (1) or (3) is not entitled to recover any amount in respect of anything done during the course of that contravention and must repay any amount so received to the person from whom it was received.
>
> (7) If a person does not repay an amount required by subsection (6) to be repaid, the person entitled to be repaid may recover the amount from the practitioner or firm as a debt in a court of competent jurisdiction.

1.62 In the course of his judgment, Habersberger J noted as follows:

[822] VRL submitted that many of the services provided by Orrong through Mr Ziegler constituted engaging in legal practice. It argued that services by Mr Ziegler such as briefing counsel to advise, interpreting and advising on the effect of legislation including the Income Tax Assessment Act 1936 (Cth), particularly with respect to tax returns; preparing or advising on documents which created, transferred or modified the rights and/or liabilities

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of VRL or VRP; and providing advice, opinions or 'sign off on the legal effect of particular documents or arrangements all constituted engaging in legal practice.

…

[834] … Orrong submitted that it was incumbent on VRL to establish by convincing proof to the appropriate level of satisfaction, that Orrong had in the circumstances of this case 'carried on or exercised the profession of law'. It submitted that the mere fact that Orrong, or Mr Ziegler on its behalf, had given legal advice or drawn a document in the course of an otherwise lawful profession or business did not, in itself, constitute 'engaging in legal practice'. These otherwise lawful activities would have to be performed in such a way as to lead to the reasonable inference that Orrong, or Mr Ziegler on its behalf, was acting as a solicitor and 'engaging in legal practice'.

[835] Orrong further submitted that a common thread running through each of the decisions [referred to above] was the question of whether the person said to have contravened the relevant legislation in fact represented himself to be a legal practitioner or at least conveyed that impression to persons with whom he dealt. Orrong contended that none of the witnesses called by VRL gave any evidence that they ever believed Orrong to be an incorporated legal practitioner or that they were ever led to believe that Orrong was qualified to

engage in legal practice or was in fact engaging in legal practice. As will be discussed below, this was not quite correct given that Mr Foo had signed a letter dated 29 August 2002 to Mr Ziegler to be sent to the ATO asserting a claim for legal professional privilege in respect of communications between the Village Roadshow Group and Mr Ziegler of Peter Ziegler & Co Pty Ltd (as Orrong was then called). Further, in his witness statement, in speaking of the 1993 Agreement, Mr Foo said:

> 'Ziegler was the first person to come to VRL as Specialist Tax Counsel. Prior to this these services had been provided by E&Y [Ernest & Young], primarily by Ziegler and Leigh Devine. Tony Pane now occupies that role. I cannot recall if Ziegler was ever specifically entitled 'Legal Counsel' however he provided general legal advice within the VRL Group. For example he prepared legal documentation for the Village Roadshow Creative Trust, various share option based contracts with executives, VRL share option contracts and other various tax effective financing transactions. He also instructed external solicitors such as Herbert Geer & Rundle and a range of US firms, including Skadden Arps, and Counsel.'

The facts were that Mr Ziegler was initially referred to by VRL as 'Chief Tax Counsel' and then as 'Group Counsel' and that he later sought and obtained the title of 'Director, Fiscal, Legal & Strategic Objectives'.

[836] Orrong also contended that, similarly, VRL called no such evidence from any third parties with whom Orrong dealt in the course of its activities on behalf of VRL. Orrong therefore submitted that in accordance with the comments of Fitzgerald JA in *Seymour*, the absence of such evidence made it difficult, if not impossible, for the Court to be satisfied that the only reasonable inference open was that Orrong, or Mr Ziegler on its behalf, engaged in legal practice.

[837] However, VRL submitted that the discussion in *Seymour* was limited to 'when activities may lawfully be carried out by a person who is not a solicitor', and that for the reasons discussed below, this was not such a case.

[838] VRL emphasised that in his witness statement Mr Ziegler referred to his legal qualifications, his holding of a Victorian Corporate Practising Certificate and then made the following assertion:

> 'My company has never provided legal services to VRL (or, for that matter, to any other party), and my company has accordingly never been remunerated for providing legal services. My company has provided commercial and taxation services to VRL; and, on the limited occasions when legal services have been required to be provided (almost exclusively with respect to briefing counsel), I personally performed that role as a licensed practitioner, rather than that role having been performed by my company. I have received no separate remuneration from VRL for my performance of that role.'

VRL submitted that this paragraph contained both a false denial and an unintended admission of performing legal work. It would appear that Mr Ziegler was acting under a misapprehension because, as previously stated, by the time of final submissions it was common ground that the holder of a corporate practising certificate could only provide legal advice and services to the corporation that employed him, and not otherwise. Thus, VRL submitted that for Mr Ziegler to perform the role of briefing counsel on behalf of VRL went beyond that which was permitted, was something that Orrong could not have done anyway, and amounted to an admission of the performance of legal services.

[839] VRL further submitted that the supposed 30 June 1993 Agreement between Orrong and Mr Ziegler clearly showed that Orrong contemplated providing legal services. It recited that the employer 'undertakes the business of providing commercial, *legal*, fund raising, structured finance, taxation and other advice and services … ' and that the employee has 'commercial, *legal*, fund raising … skills' (emphasis added). VRL submitted that this showed that both Orrong and Mr Ziegler were contemplating providing legal services and that Mr Ziegler was qualified to do so or, if the agreement was prepared at a later date, it showed that Mr Ziegler believed these services had already been provided. Mr Ziegler said that originally when the agreement was drafted it was intended that Peter Ziegler & Co Pty Ltd would undertake the business of providing legal advice, but that he then spoke to the Law Institute and was told that he could not have a company providing both legal and non-legal services, so the company did not provide any legal services. It would appear that Mr Ziegler did not ask the Law Institute about what he was entitled to do as the holder of a corporate practising certificate. …

[842] In order to resolve this dispute it is necessary, in my opinion, to examine closely just what legal work Mr Ziegler is alleged to have done when 'engaging in legal practice' in contravention of the LPA.

[843] I propose to begin by looking at Mr Ziegler's role in the giving of taxation advice to the Village Roadshow Group. VRL maintained that this was a clear example of legal services being provided by Mr Ziegler or where he was otherwise engaged in legal practice whilst at VRL. First, reference was made to three memoranda from Mr Ziegler to Mr Foo which all related to matters of taxation advice. …

[844] Secondly, VRL referred to Mr Ziegler's evidence that he gave advice about issues relating to the tax returns of Village Roadshow Group companies by, for example, answering specific questions and

sometimes 'vetting' the tax returns.

[845] Thirdly, VRL referred to the fact that the words 'taxation advice' were very frequently used in the description of the work for which 'professional fees' were being charged in the invoices rendered by Orrong or Remut. …

[846] In the period from July 1997 to June 2000, all of the monthly retainer invoices rendered by Orrong contained the words 'taxation advice' in the description of the work for which the 'professional fees' were being charged. …

[847] The invoice for the retrospective increase in the annual retainer was also rendered in this period. The description of the work on this invoice was as follows:

> 'To: Professional Fees for taxation advice.
>
> Re: Adjustment for period July 1 1997 through to June 30 2000.'

[848] All of the other invoices, in respect of which VRL was seeking repayment of the fees paid by it, contained some reference to 'tax issues' in the description of the work. …

[849] VRL placed great emphasis on the references to the giving of taxation advice because in the period of the above invoices, s 251L of the ITAA provided that:

> '(1) A person, other than a person exempted under this section, shall not demand or receive any fee for or in relation to the preparation of any income tax return or objection, or for or in relation to the transaction of any business on behalf of a taxpayer in income tax matters, unless he is a registered tax agent. Penalty: $2000.'

Neither Mr Ziegler nor Orrong was a registered tax agent. There was, however, an exception in favour of solicitor or counsel acting in the course of his or her profession because subs (4) provided:

> 'Subsection (1) shall not apply to any solicitor or counsel acting in the course of his profession in the preparation of any objection or in any litigation or proceedings before a board, the Tribunal or a court, or so acting in an advisory capacity either in connection with the preparation of any income tax return or with any income tax matter.'

[850] With effect from 1 July 2000, the wording of s 251L changed to requiring a broader range of matters, including specifically 'giving advice about a taxation law', to be performed by a registered tax agent if a fee was charged. The only other significant change was that the provision of 'a BAS service' was not required to be done by a registered tax agent. The exception for lawyers was now to be found in subs (8). Perhaps not coincidentally, it was after the date of the change in the wording of s 251L that the description of the work set out in Orrong's invoices changed to expressions such as: 'Advice pertaining to the affairs of the company, its subsidiaries, affiliates and related entities.'

[851] VRL submitted that for Mr Ziegler, or Orrong, to lawfully charge for work such as providing taxation advice, he must have been acting either as a lawyer or a registered tax agent and that as neither of them was a registered tax agent, neither could charge for the taxation advice and work, unless it was done in the capacity of solicitor or counsel acting in the course of his profession. In the result, VRL submitted, Mr Ziegler the accountant could not have charged for the tax work because of the prohibition in the income tax legislation. Mr Ziegler could only legally have done the work as a solicitor, but as he did not hold an appropriate practising certificate at the time a fee should not have been demanded for it. VRL therefore submitted that Mr Ziegler, on behalf of Orrong, had both given taxation advice and charged for it as a solicitor engaged in legal practice.

…

[853] … Although I find that Mr Ziegler did give taxation advice from time to time during this period, it cannot be correct that this was the only work performed by him pursuant to the retainer.

[854] Moreover, although Mr Ziegler undoubtedly gave taxation advice from time to time I am not satisfied that it has been established that he did so as a solicitor engaged in legal practice in contravention of s 314 of the LPA. …

[855] There was no reason why, in my opinion, the taxation advice given by Mr Ziegler, at least prior to 1 July 2000, could not have been given by him as an accountant, albeit not one registered as a tax agent. At that time he would not, in my opinion, have breached s 251L by giving taxation advice when he was not registered as a tax agent. …

[856] That situation changed after the amendment of s 251L of the ITAA. It seems to me that it is difficult to resist the conclusion that, after the amendment, an accountant, who is not a registered tax agent, cannot charge a fee for giving taxation advice, however extraordinary that outcome might seem to be.

[857] But even if I assume that, in giving taxation advice either before or after 1 July 2000, Mr Ziegler would have been contravening s 251L of the ITAA, I am not persuaded of the logic of VRL's submission that in order not to breach that section, Mr Ziegler must have been acting as a solicitor. It seems to me that equally it could be said that in order not to breach s 314 of the LPA, he must have been acting as an accountant. It could well be said that, apart from any other reason, this was more likely because of the much heavier civil and criminal penalties able to be imposed under the LPA. The position is therefore far from clear and I am not satisfied, on the appropriate standard of proof, that the giving of taxation advice meant that this work was done by Mr Ziegler in such a way as to lead to the reasonable inference that he was acting as a solicitor and engaging in legal practice.

[858] I turn next to examine Mr Ziegler's role in the briefing of

counsel. VRL submitted that it could hardly be denied that the briefing of counsel constituted the provision of legal services. It also relied, of course, on Mr Ziegler's admission that when counsel were briefed he did that 'personally … as a licensed practitioner'. …

[867] In the light of Mr Ziegler's admission that he briefed counsel 'personally … as a licensed practitioner', together with his description of himself on the back sheet as 'Peter

Ziegler LL.B (Hons)', without any reference to his accounting qualifications, and the contents of the briefs themselves, I am satisfied that the reasonable inference is that this work was done by Mr Ziegler as a solicitor.

…

[889] The fact that Mr Ziegler participated in this way in the making of a claim for legal professional privilege on behalf of some 16 different persons, companies or firms, including VRL, in respect of their retainer of 'Peter Ziegler of Peter Ziegler & Co Pty Ltd' and the giving of legal advice to them by 'Mr Peter Ziegler' and privileged confidential communications involving 'Mr Peter Ziegler' (as it was finally expressed), seems to me to make it impossible for Orrong to deny that at least on occasions during this period Mr Ziegler did 'engage in legal practice' on behalf of VRL. Otherwise, how could the claim be made? The giving of taxation advice, for example, which could lawfully be done by either a lawyer or an accountant, could not give rise to a claim to legal professional privilege if the advice was given by someone in his or her capacity as an accountant. It is only if the lawyer is acting as lawyer in giving that advice that such a claim could arise. This indicates to me, therefore, that the person giving the advice in respect of which privilege was claimed was 'engaging in legal practice'. On the face of the letter dated 29 August 2002 signed by Mr

Foo, Mr Ziegler of Peter Ziegler & Co Pty Ltd had performed some legal work for VRL. That is, Mr Ziegler was acting in this respect on behalf of Orrong in contravention of s 314 of the LPA. …

…

[913] … The only legal work which I consider was done by Mr Ziegler whilst 'engaging in legal practice' was briefing counsel and advising VRL 'from time to time' on unspecified matters in circumstances giving rise to the claim for legal professional privilege. …

…

[916] Orrong's claim for the two unpaid 'taxes saved' performance bonuses raises other issues. Although no invoices were rendered for the performance bonus in the 2001 and 2002 financial years, the wording of the invoices for the earlier years referred to 'advice on tax issues'. As previously discussed, I am not satisfied that this was a sufficiently clear indication that Mr Ziegler was 'engaging in legal practice'. He could well have been acting in his capacity as an accountant, without contravening s 251L of the ITAA. However, the scope of that section was considerably broadened by the amendment to its wording, with effect from 1 July 2000. Nevertheless, I still do not consider that the giving of advice about a range of tax matters contravened the current form of s 251L. In any event, even if I am wrong, there is still the point that there is no logical reason why it must be concluded that Mr Ziegler would breach the LPA in order not to breach the ITAA. The inference cannot be drawn. Moreover, as no cause of action for breach of the ITAA has been pleaded, if indeed Mr Ziegler was acting as an accountant in breach of the ITAA, then this does not assist VRL either to resist Orrong's claim or pursue its own counterclaim.

[917] The same reasoning applies, in my opinion, to all of the other work done in raising finance, even though it might have been described on the relevant invoices as 'advice on tax issues' associated with the particular type of finance raised. This is important when it comes

> to considering whether Orrong would be prevented by s 314 of the LPA from recovering the termination bonus, if it were otherwise found to be payable. I do not consider that it would be, because the reason it would be payable and the means of quantifying it would not be associated with 'anything done during the course of ' the occasional contravention.
>
> [918] What I have said so far deals with the question of VRL's recovery of the 'taxes saved' performance bonuses and the 'finance raised' performance bonuses. There remains the question of the retainer payments. Although it might be arguable that the legal work done by Mr Ziegler could have been charged for in these invoices, I do not reach this conclusion. In my opinion, the retainer amounts were payable by VRL whether or not Mr Ziegler briefed counsel or gave legal advice on some particular topic. It cannot therefore be said that there has been any charge by Orrong for anything constituting the occasional 'engaging in legal practice' by Mr Ziegler. VRL was not correct, in my opinion, when it submitted that there was material showing charges were made for legal work. …
>
> [920] For all of the above reasons I have, therefore, concluded that VRL's argument based on s 314 of the LPA fails. That section does not prevent Orrong from recovering amounts to which it is otherwise entitled, nor does it require that any of the amounts totalling $5,979,511 be repaid to VRL as sought in its counterclaim.

1.63 In *ASIC v Axis International Management Pty Ltd (No 4)* [2010] FCA 685, Gilmour J of the Federal Court granted the application of a solicitor, without a practising certificate, the right to appear for the defendant company and its present sole director. Gilmour J found that the Federal Court had the power to exercise its discretion to waive the requirement that a corporation must have qualified legal representation. The solicitor, Hill, had been a

former sole director for the company. Hill had a Bachelor of Laws degree, had been admitted as a barrister and solicitor in Western Australia in December 1999, and had practised for some time, but did not renew his practising certificate after 30 June 2007. There was evidence presented that the corporation and its current sole director did not have the financial capacity to pay the legal fees. In supporting his decision, Gilmour J pointed out that this situation was 'different to the ordinary case where a proposed representative has no legal qualifications'. Furthermore, the defendants did not have the financial capacity to employ a qualified legal practitioner.

1.64 In the *Said* case,[61] the court referred to *Barristers' Board v Palm Management Pty Ltd* [1984] WAR 101 at 105, where the respondent company was held to be in contempt in relation to its conduct in preparing various documents for a family business. The court quoted from *Florida Bar v Town* (1965) 174 So (2d) 395, which in turn quoted from *State ex rel Florida Bar v Sperry* (1962) 140 So (2d) 587, which said at 591 that:

> … the preparation of charters, by-laws and other documents necessary to the establishment of a corporation, being the basis of important contractual and legal obligations, comes within the definition of the practice of law. … The reasonable protection of the rights and property of those involved requires that the persons preparing such documents and advising others as to what they should and should not contain possess legal skill and knowledge far in excess of that possessed by the best informed non-lawyer citizen.

The court concluded at 591 that '[w]hat is complained of amounts to the company being engaged, directly or indirectly, in the

administration of law'.

1.65 In *The Barristers Board v Palm Management Pty Ltd* [1984] WAR 101, the company's employee was found not to have violated the Legal Practitioners Act 1893 (WA) because the work he did was of a clerical nature. He had inserted the company's name in the memorandum and articles of association and caused the common seals of the two subscribers to be affixed to the memorandum and articles. With the deed of settlement, he caused the names of the parties, the amount settled, the name of the family trust, and the particulars to be inserted in the schedule. The court referred to *Green v Hoyle* [1976] 1 WLR 575; [1976] 2 All ER 633 at 638, where Widgery LCJ said that the common conception of 'draw or prepare' to him meant the use of the intellect to compose the document, the use of the brain to select the correct words, and to put them in the correct sequence so that the document expresses the intention of the parties.

1.66 In *Legal Practice Board v Giraudo* [2010] WASC 4, the Supreme Court in applying *Palm Management, Cornall*, and other cases, found that Giraudo had breached the Legal Practitioners Act 1893 (WA). Giraudo, who was a lay person, had represented to his 'client', Domney, that he was in 'the legal business' and that he was a patent attorney and an international patent consultant. Domney paid Giraudo to help him recover outstanding debts. Giraudo represented Domney in these matters by preparing and filing legal documents, attending meetings, and making offers of settlement.

1.67 Section 90 of the Supreme Court of Queensland Act 1991 (Qld) states:

> (1) In a proceeding, a party may appear in person or by—
>
> (a) a lawyer; or
>
> (b) with the leave of the court, another person.

(2) In this section—
party includes a person served with notice of or attending a proceeding although not named in the record.

1.68 Section 48 of the Aboriginal Affairs Planning Authority Act 1972 (WA) states:

> Any person generally or specifically authorised in writing by the Minister for that purpose may in any legal proceedings in any court to which a person of Aboriginal descent is a party, or in which a person of Aboriginal descent is indicted for or charged with any crime or offence, address the court or the jury on behalf of that person and examine and cross-examine witnesses.

Does this provision negate the power of the court?

1.69 In the *Said* case,[62] the defendant represented himself in the contempt action. His desire to call many irrelevant witnesses and his presentation of irrelevant material caused a simple case to last 12 days. There are obviously some problems for judges when one of the exceptions to the legal profession's monopoly, the right to self-representation, is exercised. Do you think there are times when a litigant should be required to have a lawyer?

1.70 In *Ley v Kennedy (Finance) Pty Ltd* (SC(NSW), 21 May 1975, unreported),[63] Mahoney J controlled the conduct of the case by Ley, finding:

> The question … is whether Mr Ley, or a person in his position, should be allowed an unrestricted right to conduct litigation in the courts.
>
> Mr Ley has conducted this appeal himself and during the period during which he has been addressing the court (significantly more

than one day) I have had the opportunity of considering and of observing what he has said and his manner of saying it. I do not think it necessary that I express any conclusion as to Mr Ley's mental attitude generally in relation to the proceedings. However, from what he has said and done before this court, it is in my opinion, clear that he is emotionally deeply involved in the issues which have been raised and that he is unable to understand what these issues are or, at times, to follow a connected line of thought in his presentation of an argument in respect of them. During the course of his argument, members of the court sought to elicit from him the point which he was seeking to make, or to direct him to the issues with which the appeal was concerned. These efforts were generally unsuccessful … [and] … did not result in Mr Ley presenting an argument which, in the relation to the issues before the court, at any stage was of significant assistance. Ultimately, it became apparent that what Mr Ley was saying was unlikely to further his appeal, and the President indicated the view of the court that Mr Ley should conclude his argument within the period of a further 75 minutes. This … was, in my opinion, the appropriate course to take.

The right to a litigant to present his case is, of course, clear. It has been the fashion, recently, for persons not trained in the law to be encouraged, by some groups, to present their own cases before the courts. Laymen who do so almost invariably, in my experience, achieve less than with the normal professional assistance they would have achieved. …

But [such a right] … must not be seen as giving … an absolute right to conduct a case, or to conduct the case in the manner and for the time that such a person chooses, whatever that choice may be. That right must be balanced against the rights of the other parties who are involved in the litigation, including the right, as I have put it, not to be involved in pointless litigation and to have the litigation conducted properly and with reasonable promptitude; and it must be balanced against the right of the public generally not to have the court's time wasted.

> In the present case, Mr Ley, for example, spent some time reading to the court disconnected statements as to the law from a series of cards, some of which statements it was impossible to understand and most of which had no significant relationship to the issues in the proceedings. Indications from individual members of the court that these readings were of no assistance in determining the appeal appeared to have no effect upon the manner of his conducting the proceedings. Mr Ley filed in court, before the commencement of the hearing of the appeal, 22 pages of manuscript submissions and voluminous references to decided cases, textbooks and the Holy Bible. Many of the written submissions were difficult to understand or lacking in coherence, and most of them gave little or no help in the determination of the appeal.
>
> What steps will be appropriate, in a particular case, to prevent injustice being done to parties who find themselves involved in litigation conducted in this way, must, of course, be

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> determined in the light of the facts of that case; but it should be clear that it is proper that steps be taken to that end.
>
> If, for example, it appears to the tribunal that a party is, because of emotional involvement in the case or for any other reason, not capable of conducting the case adequately or properly, or refuses so to do, it will be within the power of the court to make appropriate orders to protect the interests of that party and those who are involved in the litigation by or with him and to prevent the improper waste of public time and money.

1.71 The courts have the inherent power to discipline practitioners appearing before them, but do not have this power over laypersons. Does this make a difference in judges preferring to hear from qualified practitioners, rather than from laypersons? It

should be noted that the contempt power of the courts can be exercised over anyone, not only practitioners.

1.72 In *Damjanovic v Maley* (2002) 55 NSWLR 149, a plaintiff sought to have a psychologist and family friend act as his advocate in an action against his previous solicitor. The psychologist applied to represent him on the basis that the plaintiff distrusted lawyers and had poor English. The legal issues in the case were complicated. The Court of Appeal at [79]–[80], in rejecting special leave to appeal the rejection of her application, stated:

> Lay advocates are unqualified, unaccredited and uninsured. This places a client at considerable risk. … A lay advocate does not owe the same duty to his client as does a lawyer. … One should also not lose sight of a lawyer's duty to his/her opponent. … None of these protections for the system of justice exist with an unqualified lay advocate. Mr Damjanovic has none of the protections although he can afford a lawyer. … [I]t is difficult to accept that he cannot find a competent and trustworthy Croatian or non-Croatian lawyer.

1.73 The Full Family Court of Australia in *Re F: Litigants in Person Guidelines* (2001) 27 Fam LR 517, adopted the following revised guidelines for litigants representing themselves:

(1) A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial;
(2) A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses;
(3) A judge should explain to the litigant in person any procedures relevant to the litigation;
(4) A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation;
(5) If a change in the normal procedure is requested by the other

parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course;

(6) A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise;

(7) If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege to inform the litigant of his or her rights;

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(8) A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated (*Neil v Nott* (1994) 121 ALR 148 at 150);

(9) Where the interests of justice and the circumstances of the case require it, a judge may:

- draw attention to the law applied by the Court in determining issues before it;
- question witnesses;
- identify applications or submissions which ought to be put to the Court;
- suggest procedural steps that may be taken by a party;
- clarify the particulars of the orders sought by a litigant in person or the bases for such orders.

1.74 The above list is not intended to be exhaustive and there

may well be other interventions that a judge may properly make without giving rise to an apprehension of bias. The Family Court of Australia was one of the first courts to recognise self-represented litigants as a permanent and significant client group using its services. Research undertaken in 2003[64] indicated that 30–40 per cent of Family Court cases involved a party who was self-represented at some point. In 2007–08, this figure was 20–30 per cent. The Court has gone to considerable lengths to streamline the process for self-represented litigants at court, providing them with increased support by simplifying its procedures to encourage the early resolution of disputes and to make the court more user-friendly. Self-represented litigants are a recognised client group and are included in all strategic developments at national and local registry level through registry business plans.

1.75 The New South Wales Bar Association has issued *Guidelines for Barristers on Dealing with Self-Represented Litigants*.[65] The Law Society of New South Wales also issued *Guidelines for Solicitors on Dealing with Self-Represented Parties*.[66] The Queensland Law Society issued the *Self-Represented Litigants: Guidelines for Solicitors*.[67]

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1. D Luban & M Millemann, 'Good Judgment: Ethics Teaching in Dark Times' (1995) 9 *Georgetown Journal of Legal Ethics* 31 at 38.
2. D Luban (ed), *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics*, Rowman & Allanheld, Totowa NJ, 1983.
3. These include, A Evans, *The Good Lawyer*, Cambridge University Press, Melbourne, 2014; C Parker & A Evans, *Inside Lawyers' Ethics*, 2nd ed, Cambridge University Press, Melbourne, 2014; and P Baron & L Corbin, *Ethics and Legal Professionalism in Australia*, Oxford University Press, Sydney, 2014.
4. Aristotle, *On Rhetoric*, 2nd revised ed, Oxford University Press, New

York, 2006.

5. K Armstrong, 'Nothing Beyond Belief ', *The Weekend Australian* (reprinted from *The Wall Street Journal)*, 19–20 September 2009.

6. Queensland Law Society, Australian Solicitors Conduct Rules 2012; New South Wales, Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015; Victoria, Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015; the Law Society of South Australia, Australian Solicitors' Conduct Rules 2015; The Australian Capital Territory, Legal Profession (Solicitors) Conduct Rules 2015.

7. In Western Australia, see the Legal Profession Conduct Rules 2010. In Tasmania, see the Rules of Practice 1994, as amended. In the Northern Territory, see the Law Society of the Northern Territory, Rules of Professional Conduct and Practice 2005.

8. Section 15 of the Legal Practitioners Act 1981 (SA). See also s 5 of the Act, which defines a legal practitioner as '(a) a person duly admitted and enrolled as a barrister and solicitor of the Supreme Court; or (b) an interstate legal practitioner who practises the profession of the law in this State'.

9. Bar Association of Queensland, Barristers' Conduct Rules 2011 r 5; New South Wales, Legal Profession Uniform Conduct (Barristers) Rules 2015 r 5; Victoria, Legal Profession Uniform Conduct (Barristers) Rules 2015 r 4; South Australian Bar Association Inc, Barristers' Conduct Rules 2013 r 5; Western Australian Bar Association, Western Australian Barristers' Rules 2012 r 5; Northern Territory, Barristers' Conduct Rules 2015 Preamble; the Australian Capital Territory, Legal Profession (Barristers) Rules 2015 Preamble.

10. Rule 4.1.

11. Refer to **Chapter 6** at **6.5**–**6.6**.

12. See W Simon, 'Virtuous Lying: A Critique of Quasi-Categorical Moralism' (1999) 12 *Georgetown J of Legal Ethics* 433.

13. G Dworkin, 'Are these 10 Lies Justified?', *The New York Times — Opinions*, 14 December 2015.

14. A survey conducted in 2004 in Australia found that, if they found a bag of cash, 57 per cent of those surveyed would keep it, 17 per cent would hand it in to the police, 9 per cent would keep some and hand the rest in,

13 per cent would try to find the owner in hope of a reward, and 4 per cent would leave it: see 'Numbercrunch', *Sydney Morning Herald — Good Weekend*, 10 July 2004, p 9.

15. See *Sydney Morning Herald*, 12 October 2005, p 11.
16. According to the article in the *Sydney Morning Herald*, he pleaded guilty to larceny by finding and was given an 18-month good behaviour bond; he also lost his job and any rights to the money that had not been claimed. For further information on larceny by finding, see s 124 of the Crimes Act 1900 (NSW); R Hayes & M Eburn, *Criminal Law and Procedure in New South Wales*, 3rd ed, LexisNexis Butterworths, 2009, [7.32]–[7.37]; *R v MacDonald* [1983] 1 NSWLR 729 (extracted in Hayes & Eburn, at [7.31]); and *Mingail v McCammon* [1970] SASR 82.
17. See *International Herald Tribune*, 9 January 2004, pp 1 and 4.
18. T O'Dwyer, 'The Rule of Lawyers' (July 1996) 31 *Australian Lawyer* 11.
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24. O Collings, *ALB Legal News*, 9 July 2010, at <www.legaljobscentre.com>.
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39. See P Baron & L Corbin, *Ethics and Legal Profession in Australia*, Oxford University Press, Sydney, 2014, ch 8 (Civility and Courtesy), Rule 3.2.
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Trivial Pursuit: The California Attorney Guidelines of Civility and Professionalism' (2008) 48 *Santa Clara L Rev* 1127.

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55. These are discussed in **Chapter 2 — The Structure and Regulation of the Legal Profession in Australia**.
56. Repealed and vastly expanded by the Conveyancers' Licensing Act 1995 (NSW), and modified in 2003.
57. Victoria Conveyancers Act 2006 (Vic).
58. Repealed and replaced by the Commercial Arbitration Act 2010 (WA).
59. Repealed and replaced by the Legal Practice Act 2003 (WA).
60. See *Kekatos v Council of the Law Society of NSW* [1999] NSWCA 288.
61. See **1.53–1.56**.
62. See **1.53–1.56**.

53. See also *Stip Mag Bull* (NSW, July–August 1975, unreported) at 1.
54. See <www.familycourt.gov.au>. Specific details of the projects that have been adopted are found on this website and <www.familylawcourts.gov.au>.
55. New South Wales Bar Association, *Guidelines for Barristers on Dealing with Self-Represented Litigants*, July 2001; and New South Wales Bar Association, *Guidelines for Barristers on Dealing with Self-Represented Litigants*, 2011.
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2

THE STRUCTURE AND REGULATION OF THE LEGAL PROFESSION IN AUSTRALIA

INTRODUCTION

2.1 In this chapter, we first look at the debate over the best structural arrangement for lawyers to deliver their services. The restrictions on what work different segments of the profession are permitted to perform are an essential part of the historical development of the legal profession. The importance of understanding these developments is that present professional structures have a profound influence on the ethical behaviour of lawyers. These structures also determine how the profession exercises power and control over its members.

2.2 The present divided structure of solicitors and barristers cannot be taught in isolation and any discussion of reform of that structure will necessarily include a discussion of the impact such

changes will have on the ethical behaviour.[1] We will consider the various arguments for and against the present divided structure and the development of new structures, such as multi-disciplinary practice (MDP) and the incorporation and listing on the stock exchange of legal practices.

2.3 In the second part of this chapter, we look at the present regulatory arrangements for lawyers, especially under the Uniform Law adopted in Victoria and New South Wales. In **Chapter 3**, we examine the regulation of admission to the profession, and in **Chapter 4**, the disciplinary system for lawyers.

ARGUMENTS FOR AND AGAINST THE PRESENT STRUCTURE

2.4 Below is an extract from a report by the New South Wales Law Reform Commission compiled in 1982,[2] when the legal profession in that state was more rigidly divided than it is now. It should also be noted that since 1982, stronger and larger independent bar associations have developed in the fused profession states (ie those with no separation for solicitors and barristers) of South Australia and Western Australia, and the smaller states of the Australian Capital Territory, Northern Territory, and South Australia.

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2.5 The arguments presented in this report, although written around 35 years ago, are still relevant in clarifying the debate over what kind of structure is proper for the legal profession. For

example, although there is now direct access to barristers by clients in New South Wales, Queensland, and Victoria, the practice of directly approaching a barrister is still rare, except perhaps in criminal law. The vast majority of barristers' work comes from their being briefed by solicitors, and few barristers are willing to accept clients directly. Further, in certain circumstances, barristers are expressly permitted under the cab-rank rules to reject these clients. Criticisms of practices which have since been changed and are no longer relevant have been omitted from the extract.

2.6 The following extract is from the New South Wales Law Reform Commission's *First Report on the Legal Profession: General Regulation and Structure*:[3]

> …
>
> **3.34** It is important to emphasise at the outset that we do not give serious consideration to the introduction of a structure in which practising in the style in which barristers now practise would be prohibited or discriminated against. … The important question, in our view, is whether the present divided structure gives practitioners sufficient freedom to practise in the style which best suits them and their clients, whether that be the style in which barristers now practise or some other style. We do not consider that the continued existence of a strong and vigorous Bar depends upon the maintenance of a divided structure. The experience of the legal professions in South Australia, Western Australia, New Zealand and elsewhere demonstrates the correctness of that view. We give other reasons for it in the course of this section.
>
> …
>
> **The Importance of Flexibility and Freedom of Choice**
>
> **3.36** There is a wide diversity of needs for legal services amongst clients and would-be clients. This arises not only from differing types of legal problem, but also from factors such as a client's financial

situation, geographical location, and familiarity with the legal system. There is also a wide diversity of needs and preferences amongst lawyers in relation to the manner in which they practise. This arises from factors such as their aptitudes, experience, personality and geographical location. Moreover, the needs of particular lawyers and clients can be changed substantially by variations in the economic situation, changes in substantive or procedural law, or technological developments.

3.37 In the light of these diverse needs and changing circumstances, it is important, both for lawyers and for their clients or would-be clients, that the structure of the profession should give lawyers substantial freedom of choice concerning the manner in which they organise their practices. Freedom of choice encourages flexibility, diversity, competition and innovation. It enables lawyers to respond to the needs of their particular clients or potential clients, to their own capabilities and preferences, and to the circumstances of particular

cases. If the structure of the profession unduly restricts this freedom, it may adversely affect the quality, accessibility, speed or cost of legal services. This does not mean that the structure should provide absolute freedom of choice, but rather that freedom should not be restricted to a greater degree than is clearly required in the public interest.

The Combined Effect of Distinctions and Restrictive Practice

3.38 The present divided structure substantially restricts practitioners' freedom of choice as to the style in which they practise and the manner in which they handle particular matters. This arises principally from the combined effect of, on the one hand, legal and official distinctions between barristers and solicitors, and on the other

hand, restrictive practices amongst barristers. …

3.39 The combined effect of the restrictive practices and the distinctions may be summarised as follows. The restrictive practices require a barrister to practise in a particular style, the principal elements of which are being a sole practitioner and not acting without the intervention of an instructing solicitor. [The latter requirement has now been changed.] If a barrister wishes to practise in a slightly different style (for example, by going into partnership with another practitioner who does not act without the intervention of an instructing solicitor) he or she must become a solicitor. Upon doing so, the legal and official distinctions between barristers and solicitors mean that for example, he or she has to … contribute to the Fidelity Fund, and cease to wear a wig and gown when appearing as an advocate. … These and many other consequences arise even though the practitioner is practising in the same style as a barrister save that he or she is now in partnership with another practitioner who practises in the same style, and may be doing exactly the same kind of work as a barrister. We do not see why, for example, the wearing of a wig and gown … should turn upon whether a practitioner is in sole practice or in partnership. Consequences similar to those described above will arise if, for example, a barrister wishes to continue as a sole practitioner and is generally willing to observe the Bar Association's rule against acting without the intervention of an instructing practitioner, but wishes to make an exception in relation to work from, say, a particular institutional client which has its own legal department that is willing and competent to do the work of an instructing solicitor. Indeed, the legal and official distinctions to which we have referred apply even where a solicitor practises in precisely the same style as a barrister. They depend on whether one is admitted as a barrister, not on whether one practises in the style of a barrister.

Justifiable and Unjustifiable Distinctions

3.40 There are, of course, many circumstances in which legal or official distinctions between practitioners may be appropriate, and

may be compatible with, or even enhance, freedom of choice and flexibility within the profession. But it is unfair, and inimical to freedom of choice and flexibility, for a distinction to be based on a criterion which differs from the justification for the distinction. For example, if the justification for a distinction lies in the difference between the style of practice of a barrister and all other styles, the criterion used for the distinction should be whether or not a practitioner practises in that style, rather than whether or not he or she is admitted as a barrister. After all, solicitors may practise in the style of a barrister. If the justification for a distinction lies in one aspect of the style of a barrister,

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such as not acting without the intervention of an instructing solicitor [for a corporate client], the criterion used should be whether a practitioner practises in that way, not whether he or she is a barrister or practises in all respects in the style of a barrister. If the justification lies in the type of work, say, advocacy, which a practitioner performs in a particular instance, the criterion should be whether the practitioner is undertaking that work. The fact that a large proportion of the advocacy in this State is performed by barristers does not justify the criterion being whether or not the practitioner is a barrister. A similar point may be made in relation to a distinction for which the justification lies in whether the practitioner was instructed by another practitioner in the particular case in question. The fact that in most instances instructed practitioners are barristers does not justify the distinction being drawn between barristers and solicitors.

…

The Effect of Distinctions in the Present Divided Structure

3.42 The principal effect of the present [divided structure in New South Wales] has been to put undue pressure on practitioners who

wish to specialise in advocacy (especially in the higher courts) and in advisory work, to practise in the style of a barrister irrespective of whether that style is best-suited to them or is in the best interests of their … clients … If they were to diverge even slightly from the barrister's style, they would incur a substantial number of disadvantages, and only a few minor advantages. … The result of this pressure to conform to one particular style can be seen by comparing the style of practice of specialist advocates in the higher courts in New South Wales with those in places where few, if any, legal or official distinctions are drawn between barristers and solicitors. In New South Wales all such advocates, with perhaps one or two exceptions, [this number has increased but the number is still low] are barristers and practise in the style of barristers. By contrast, in those Australasian jurisdictions which have a flexible structure, some of these advocates practise at the Bar [this number has substantially increased], but many others practise in partnerships, sometimes taking work directly from clients and sometimes having an instructing practitioner, whether from their own firm or from elsewhere. In these places there is a wider range of choice for practitioners, unencumbered by unfair distinctions, and as a result there is a greater scope for diversity and competition, and a greater range of choice for clients in relation to the way in which they may have their matter handled.

…

Advantages of a Division of Labour

3.46 The New South Wales Bar Association has submitted to us that:

> 'The separation of the profession provides a convenient division of labour, not a multiplication of labour. Law is, today, infinitely complex and no one person could possibly cope with all aspects of all branches of the law. In particular, there is an obvious practical difference between the process of interviewing clients, and assessing what their cases are really about, on the one hand, and presenting those cases in

court, on the other hand. The distinction between barrister and solicitor reflects this difference. If the one person is placed in the position where he does both

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jobs, he will do each of them less thoroughly than if he is able to confine his attention to one of them.'

3.47 There can be no doubt that in many circumstances the use of two lawyers on a matter has substantial advantages. The sheer volume of work may require it. Even in a less onerous matter, the overall quality and efficiency of service provided may benefit, from different lawyers concentrating on separate aspects of it, and from the ready availability of an informed second opinion. This specialisation can enable work to be more skilled and efficient. It is possible that any consequential saving of time may be reflected in lower fees for clients.

Disadvantages of a Division of Labour

3.48 There are circumstances, however, in which the advantages of division of labour are outweighed by its disadvantages. For example, in many relatively simple cases it would be quicker, and equally adequate, for one lawyer to handle the whole matter. In these cases the involvement of two lawyers, one instructing the other, is a waste of time and money.

3.49 Moreover, a division of labour can lead to a confusion or abdication of responsibility on the part of some, or all, of the lawyers involved. The solicitor may rely on the barrister, the barrister may rely on the solicitor, and the client may find that the practical effect is that no-one is accepting a proper degree of responsibility. Additional cost and delay may arise from the need to transfer information between the lawyers involved, and from duplication of work, such as the reading of documents. The possibility of inefficiency arising out of the

involvement of both a barrister and solicitor is increased by certain Bar rules and practices. For example, generally speaking, barristers are required to be accompanied by solicitors at conferences and in court, not to attend conferences at their instructing solicitors' offices, and to go through their instructing solicitor if they wish to obtain further information from their client or from potential witnesses.

3.50 Another important consideration is whether a particular client can afford to pay for both a barrister and a solicitor. In some cases it may be essential to have two lawyers, and if the client cannot afford them then he or she must hope to obtain legal aid. In many other cases, however, while it may be preferable to have two lawyers, one would be sufficient and is all that the client can afford.

The Rigidity of the Present Structure

3.51 In short, division of labour in a case is sometimes desirable and sometimes undesirable. A principal weakness of the present structure is that it inhibits flexibility in this respect. The structure contributes to a situation in which, for cases in the higher courts, it is in practice almost inevitable that a barrister will have to be used. It also increases the likelihood of advisory work having to be sent to a barrister, rather than being dealt with by the original solicitor or by another solicitor on referral. It involves rules and practices which require that wherever a barrister is used a solicitor must also be used, and that there must be a division of labour between the barrister and the solicitor along specified lines. The overall effect, then,

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is that the present structure of the profession tends to impose for a wide range of cases a standardised method of handling them. …

…

Development and Identification of Specialisation

…

3.53 … The existence of the Bar nurtures to some extent the development of specialisation within the profession. By becoming barristers, practitioners announce, in effect, that they are prepared to take court work and advisory work on referral from solicitors and that, since work will be taken on referral only, solicitors can refer matters to them without fear that the clients will be taken over. Such an announcement greatly increases barristers' prospects of obtaining sufficient work to develop a specialist practice.

3.54 There are, however, some aspects of life at the Bar which do not encourage specialisation. Barristers [in the vast majority of cases] … practise on referral only and therefore cannot build up a specialist practice with the assistance of clients who come directly to them. Nor, generally speaking, can they take any other type of work directly from clients in order to keep themselves going while they build up their specialist work. Since they must practise as sole practitioners rather than as partners or employees, they cannot obtain the support of partners or employers to 'carry' them during difficult times and to share the capital costs of acquiring expensive library and technological resources which may be necessary for advanced work in their chosen field. Solicitors, especially those who work in medium-sized or large firms, do not face these difficulties to the same extent.

…

… Consequences of Specialisation

Advantages and Disadvantages

3.56 There is no doubt that specialisation in a particular field of practice can have many important advantages. It can enable a practitioner to substantially improve the quality, speed and efficiency of his or her service. As society and the legal system become increasingly complex, there is a growing number of fields in which a measure of specialisation is essential for the provision of satisfactory service.

3.57 The advantages of a measure of specialisation can be substantial and in some cases essential. But two qualifications need to be expressed. First, specialists can tend to become unwilling or unable to handle work outside their specialist field. This applies, for example, to solicitors specialising in the preparation of a case and barristers specialising in its presentation, thus reducing the number of practitioners who are willing and competent to handle both preparation and presentation in appropriate cases. Secondly, intensive specialisation can lead to inbreeding and tunnel vision within those working in the field, raising the danger of problems being handled automatically — in accordance with the prevailing views of specialists in the field, rather than being examined to see whether a particular problem might better be dealt with by a new method or by a specialist in another field.

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3.58 … By specialising in advocacy and opinion work on referral from instructing solicitors, barristers can avoid the high overheads, and the frequent interruptions, that may be involved in establishing and working in a solicitor's office which may be frequented by many clients and may require extensive staff, premises and other resources for the handling of clients' affairs.

3.59 There is strength in these points, but several qualifications must be taken into account. First, … the Bar Association has submitted to us that interruptions in chambers can be frequent, making sustained concentration very difficult. Secondly, while there can be no doubt that, on average, barristers' overheads are substantially lower than those of solicitors, much of this difference arises from the mere fact that solicitors tend to handle those parts of a case which involve high overheads, such as the collection of evidence and the preparation of documents. To this extent, there is no overall saving for the client, nor for the profession as a whole. Thirdly, some

of the difference in average overheads is misleading, because solicitors often include within their overheads the salaries of fee-earning solicitors on their staff. Fourthly, there is reason to expect that some solicitors can keep their overheads as low as barristers, or even lower. A likely possibility would be a solicitor specialising in advocacy who gets most of his work from an institutional client (such as an insurer) which has the resources and willingness to undertake most of the preparation of the case. And if a specialist advocate joins a medium or large firm of solicitors, the consequential addition to the firm's overheads may not be substantial and may be less than the overheads of the barristers whom the firm would otherwise have briefed.

The Effect on Non-Specialists

3.60 … Excessive encouragement of intensive specialisation within the profession can deplete unduly the supply of non-specialists to whom clients can resort for a preliminary diagnosis followed by a referral to an appropriate specialist, or for the handling of a problem which is simple or which, although difficult, arises in a country area remote from specialists. The development of a high degree of specialisation can result in various types of work coming to be regarded widely as requiring the services of a specialist, even though non-specialists with a modicum of experience in the relevant fields would be competent to handle them. In consequence, non-specialists can be deprived of the experience needed to develop or maintain their competence in performing these tasks, and thus the attitude that they are not competent to handle the work becomes self-fulfilling. As the more stimulating, prestigious and remunerative work is taken over by specialists, so there is a tendency for the status, morale and eventually the calibre of non-specialists to decline, not only in relation to their remaining work in specialist fields but also in non-specialist fields and in the general diagnostic and referral role. [This] process … can be seen in the history of the medical profession [and] has led to great concern about the number and standards of general medical practitioners. …

3.62 The relevance of these considerations to the present divided

structure of the legal profession is that, while that structure leads to experience in advocacy and opinion work being concentrated in the relatively small group of lawyers at the Bar, and thus tends to promote a special excellence in that group, the structure may so affect the calibre of services

provided by the remainder of the profession that its overall effect is adverse. For example, if solicitors refer almost all advocacy or legal advice of any substance to the Bar, rather than undertaking it themselves, they reduce their competence to handle such work. It may appear on the surface that this does not matter because the work will be done by barristers. But it does matter. It reduces solicitors' ability to prevent legal problems arising for their clients, to diagnose promptly and accurately those problems which do arise, and, where the assistance of a barrister is necessary, to seek it at the right time and to gather evidence and present issues to the barrister in an effective and efficient manner. Moreover, it increases the likelihood of clients incurring additional expense and delay through having to resort to two lawyers rather than one. For a significant number of clients the financial or geographical difficulties of briefing a barrister may be prohibitive, forcing them to rely solely on their solicitor, whose lack of opportunity to develop experience in the field in question may lead to inadequate service.

3.63 Consequences of this kind have been adverted to in many submissions to us. For example, the Chief Solicitor of the Commonwealth Bank submitted to us:

> 'The present form of the division seems to produce two undesirable tendencies:
>
> (a) Many solicitors seem to be reluctant to express an opinion or follow a course of action in a contentious

matter without obtaining an opinion or advice from a barrister.

(b) Although some solicitors competently carry out advocacy, there appears to be a predominant practice of briefing a barrister for the sole purpose of advocacy in even the most elementary of matters.'

Independence and Objectivity

Freedom from Conflicting Interests

3.64 Barristers may be less prone than many solicitors to certain conflicts of interests. The division of labour means that barristers often do not have close or continuing contact with clients, and thus may be able to give more objective advice, unclouded by a long association with the client and with the conduct of his or her legal affairs. The fact that barristers practise as sole practitioners rather than as partners or employees of other practitioners leaves them free of possible conflicts between, on the one hand, their clients' interests, and on the other hand, interests of their partners or employers, or of clients of their partners or employers. Solicitors, on the other hand, may have ties with partners or … employers, and with a wider range of business interests than most barristers. …

3.65 On the other hand, the extent and significance of these differences between barristers and solicitors should not be exaggerated. The practice of many barristers rests heavily on a flow of work from a particular client, type of client (such as trade unions), or firm of solicitors. Some have general retainers binding them to accept such work as may be offered by a particular client. These ties can reduce availability and independence. Also, barristers' independence and distance from clients can sometimes lead them to have an inadequate understanding of their clients' needs and an insufficient commitment to provide the best possible service.

…

… Accessibility to Clients and Other Practitioners

…

Client Poaching

3.69 An important advantage said to be inherent in the divided structure is that, because a barrister may not deal with clients except through a solicitor, any solicitor may obtain the assistance of a barrister without running the risk of permanently losing the client to that barrister. This, it is said, improves clients' access to lawyers of appropriate skills. The protection against client-poaching is said to be of special importance in relation to sole practitioners and small firms, which are more likely to lack specialist skill in a particular field and therefore to need to refer a client to another lawyer. They may also be more vulnerable than large firms to having unfavourable comparisons made by a client between their resources and those of the firm to which the client is referred. The Bar Association has submitted to us:

> 'Without the Bar, individual or small group practice amongst solicitors may well become impossible or dangerous.'

3.70 In our view, the risk of client-poaching is not great. First, our inquiries indicate that referrals between solicitors, including referrals from small outlying practices to large Sydney firms, are by no means uncommon and are increasing in frequency. Secondly, a practitioner who gained a reputation as a client-poacher would be unlikely to continue to get work on referral, and his or her practice would thereby suffer. Thirdly, experience in professions with flexible structures shows that practitioners, including country practitioners, frequently brief amalgam practitioners (that is, those who are not at the separate Bar) despite the alleged risk of client-poaching. Our survey of the profession in South Australia found that small and country practices were at least as willing to brief amalgams as to brief practitioners at the Bar. Fourthly, if there is a widespread fear, whether justified or

otherwise, that client-poaching will occur, practitioners who are willing to undertake not to poach clients referred to them or at least not to do so within a specified period of the referral, could be permitted to advertise that fact. Indeed if a choice has to be made between, on the one hand, the Bar's present restrictive practice against accepting work directly from clients, and on the other hand, a rule prohibiting client-poaching in certain circumstances, the latter alternative may well be preferable in the public interest.

Access to Practitioners in Firms

3.71 Another matter concerning accessibility arises from the fact that barristers have to be in sole practice. If they were in a firm, it is said, they might be largely occupied with work for clients of that firm and they might be more likely to have to decline a brief due to a conflict between the interests of the potential client and those of an existing client of the firm. This is a valuable attribute of barristers, but its significance by comparison with solicitors should not be exaggerated. First, solicitors can be, and many are, sole practitioners. Secondly, by contrast with a barrister, a partner in a firm is more likely to be able to transfer to other partners, or to employees, work which does not require his or her skills. In this way, the partner can

make time to handle a greater number of clients. These arrangements are especially likely to be made if the partner is so busy that he or she is having to decline work referred to him or her by other practitioners, whether inside or outside the firm. Thirdly, most firms, and especially those members of them who receive work from outside practitioners, are unlikely to want to turn down this outside work any more than inside work. Experience in New South Wales shows that some leading advisers working in firms, including medium-sized and large firms, receive and accept much outside work. Our survey in South Australia showed that when leading amalgams received instructions from other

practitioners, about half were from practitioners in their own practice and about half from outside practitioners. Those instructions which were declined were as likely to come from inside the practice as from outside it. In relation to instructions which were accepted, those sent to amalgams were more likely to come from small practices than were those sent to members of the Bar.

Country and Suburban Areas

3.72 Both the Law Society and the Bar Association have stressed in their submissions to us the special value of the Bar for country and suburban solicitors, and for their clients. There is strength in this view as an argument for retention of a strong Bar. But for reasons which we have given above, we consider that there is considerable, and growing, scope for country and suburban solicitors to refer matters to other solicitors as an alternative to using the Bar.

3.73 It is important, too, to bear in mind the problems which arise from the present centralisation of the Bar. The Law Society has pointed out some of the problems which this causes for country solicitors:

> 'There is difficulty in briefing counsel as a matter of urgency and, even in non-urgent matters, once counsel is briefed it is more difficult for a country solicitor not having the close personal contact with counsel or the volume of work to extract favours from counsel or even to have counsel deal "with his matters in turn"'.

The problems can be especially marked in relation to advocacy. Country solicitors have frequently told us of the difficulties and expense of obtaining barristers to take briefs at country sittings. Country solicitors often have very little choice as to whom they brief and may find themselves left without a barrister, or with a strange barrister, at the last minute. Even when barristers are available, bringing them from Sydney is expensive.

… Support and Assistance from Other Practitioners

3.75 A feature of the Bar is its corporate life. It embraces the communities of barristers sharing floors of buildings, and the Bar Association itself. Through close proximity, and the traditions of the Bar, many barristers have ready access to the advice and assistance of other barristers. They can benefit from an overflow of work amongst other barristers on their floor and elsewhere. These characteristics can be of special value to newly-fledged barristers. However, many of the virtues of corporate life seen in the Bar by its older or former members have become less substantial in recent years as the Bar has grown rapidly in size.

3.75 It must not be forgotten that practice outside the Bar often provides support and assistance of at least equal value to that which is available at the Bar. A firm may provide

an environment which is both intellectually and socially rewarding, and may provide ready access to the experience and expertise of colleagues. …

…

Solicitors often maintain extensive contacts with solicitors outside their own firm. By comparison with barristers, they have greater opportunities for extensive contact with clients, which can give them a wide range of knowledge and experience outside a purely professional milieu.

… The Operation of the Courts

A Flood of Inexperienced Advocates?

3.76 An argument commonly advanced in favour of the present structure is that because it, in effect, confines advocacy in the higher courts to the Bar, it thereby prevents the courts from being flooded with inexperienced or incompetent advocates who are unfamiliar to

the judges and to other advocates. It is argued that the advent of these advocates would greatly prolong the hearing of many cases and would erode the mutual understanding and trust between advocates and judges which, at present, substantially improves the speed and fairness with which cases are resolved.

3.77 The strength of this argument in modern times must be assessed in the light of the substantial increase in the size of the Bar and the Bench, and the high proportion of inexperienced barristers. … Moreover, even if higher court advocacy were no longer confined, in practice, to the Bar, the overwhelming majority of it would continue to be undertaken by skilled specialists in advocacy, whether at the Bar or otherwise, rather than by neophytes. Even if a sense of responsibility or pride did not deter the incompetent advocate, the fear of judicial criticism or disciplinary action would be highly likely to do so. Perhaps more importantly, many inexperienced advocates would prefer to spend their time working on matters in which they were experienced, rather than working less efficiently and less remuneratively on the unfamiliar task of advocacy. The experience in flexibly-structured professions in Australasia and Canada supports these views. Concern has been expressed at the standard of advocacy in the United States. But that country differs from Australasian and Canadian jurisdictions in many relevant respects, including methods of legal education, the widespread use of contingent fee arrangements, emphasis on written procedure, the appellate system, and methods of judicial selection. [Former United States Supreme Court] Chief Justice Burger has been a prominent critic of standards of advocacy in his country and has proposed that advocates should be required to undergo special training. But he has said that: 'we cannot have, and most emphatically do not want, a small elite, barrister-like class of lawyers.'

Selection of Judges

3.78 Another argument advanced in favour of the present structure is that the Bar provides a pool of specialist advocates from which judges can be chosen. Because the pool is relatively small and its

senior members are well-known to each other and to the judiciary, identification of the professional skills and personal qualities desirable in judges is facilitated.

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3.79 Several reservations must be expressed about this view. As we have mentioned, both the Bar and the Bench are now large. Moreover, both the Bar and the Bench in England are very much larger than in New South Wales, yet the process of judicial selection … appears to work at least as well as in this State. We have expressed earlier the view that, whether or not the present divided structure is retained, higher court advocacy would remain, in practice, largely the preserve of a group of specialist advocates which would not be much greater in size than is the case at present. The skills and personalities of these advocates would be well known among themselves, the judges, and others whose opinion would be likely to play a direct or indirect role in judicial selection.

…

The Need for Reform

3.80 As we see it, the present divided structure has the following disadvantages, amongst others:

(i) In many cases, two lawyers (a barrister and a solicitor) are used where one lawyer would be sufficient and more economical.
(ii) Where a barrister and a solicitor are used, the division of labour between them is often determined by rules or practices which are not appropriate to the particular circumstances, with the result that duplication, omission, or confusion may occur.
(iii) Many solicitors are unduly deterred from handling matters on their own without reference to a barrister, and therefore they do not develop their ability to undertake advocacy and to advise on difficult questions of law.

(iv) Especially in relation to litigation, firms of solicitors are deterred from providing a complete service to their clients, yet in many circumstances such a service might be more efficient than one which involves a barrister.

[This has dramatically changed, as many more solicitors are willing to appear in lower courts.]

(v) The number and calibre of specialist solicitors tends to be underestimated, especially by members of the public, thus inhibiting the supply and accessibility of such specialists.

[The Law Society's specialist certification programs have made it easy to identify specialist solicitors.]

(vi) In practice, the ranks of leading advocates and advisers (including Queen's Counsel [now Senior Counsel]) and the judiciary are deprived of much valuable talent to be found amongst solicitors.

(vii) Specialist advocates and advisers are less readily accessible to clients in country and outer suburban areas.

(viii) There are undue restrictions on the freedom and incentive for lawyers to introduce new methods of providing legal services, or to extend existing methods into new areas.

…

2.7 Since this report was published, there have been a number of appointments to the bench from the ranks of solicitors and academics. Furthermore, country solicitors in several provincial cities in New South Wales, such as Newcastle, Lismore, and Wollongong, now have

access to expanding local bar associations. Local bars have also

developed in smaller cities in Queensland and Victoria.

2.8 Many barristers share library expenses by having a common library on their floor. The bar associations also maintain extensive libraries, which are used by members. Today, libraries are no longer that important, as most barristers have on-line services that meet their research requirements. It should be noted that barristers from the same floor or chambers frequently help out colleagues who double brief or are ill.

2.9 The New South Wales Law Reform Commission has supported the idea of a separate Bar. If the commission wants to maintain a divided profession, are its criticisms of the present system that important? The Legal Profession Uniform Law 2015 (New South Wales and Victoria) maintains the division of the profession. Under s 6, the definition for admission allows for the admission of a legal practitioner, a barrister, a solicitor, a barrister and solicitor, or a solicitor and barrister.

2.10 Jurisdictions aside from Queensland, Victoria, and New South Wales, do not have the statutory distinction between barristers and solicitors. This has led to some practitioners — known as 'amalgams' — acting as both barrister and solicitor. In its submission to the Legal Profession Advisory Council, the New South Wales Bar Association[4] stated:

> Neither the lack of the statutory distinction nor the existence of amalgams has prevented the maintenance in Victoria and the development in South Australia, Western Australia, the Australian Capital Territory and the Northern Territory of voluntary, independent, sole-practitioner Bars — some, in fact, still insisting on an instructing solicitor in all cases.

2.11 Tasmania has also established an independent Bar. One of the main factors supporting the maintenance of a separate Bar is its

various restrictive work practice rules.

2.12 An important change to the structure of the legal profession has been the incorporation of legal practices. For example, in New South Wales, s 6 of the Legal Profession Uniform Law (NSW) defines a 'law practice' as including an incorporated legal practice (ILP) or an unincorporated legal practice. In Victoria, s 9A of the Legal Profession Uniform Law Application Act 2014 (Vic) includes in the definition of a 'law firm': incorporated legal practices; or one or more incorporated legal practices and one or more Australian legal practitioners; or one or more incorporated legal practices and one or more Australian-registered foreign lawyers; or one or more incorporated legal practices, one or more Australian legal practitioners, and one or more Australian-registered foreign lawyers. Incorporation is also provided for under the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, which defines a 'law practice' to include an incorporated (and in some cases an unincorporated) practice, and a multi-disciplinary partnership (MDP).[5]

2.13 Incorporation of legal practices has made it easier to raise capital, and some incorporated firms have listed on the stock exchange. It has not only benefited the large incorporated firms. Small and medium-sized incorporated firms in Australia and New Zealand have established a unified management team which will be listed on the Australian Securities Exchange as Integrated Legal Holdings.[6]

2.14 According to Mark and Gordon,[7] there are many benefits

for lawyers by incorporating:

> By contrast to partnerships, incorporation is seen to protect directors of a firm through the benefit of limited liability. Incorporation can also provide taxation benefits, grant the drafters of the company constitution flexibility regarding ownership, control and distribution of profits and constitute a profitable investment for shareholders. Share transferability gives owners and other shareholders, who may be non-lawyers, greater flexibility by comparison with partnerships in their financial relationship to the firm. Non-lawyer directors may make valuable contributions to the operations of a company, providing speciality expertise. Incorporated legal practices avoid the requirement of partnerships to reconstitute themselves on the death, retirement or withdrawal of a partner. In addition, whereas non-performing partners may have only been exorcised from a practice through litigation, in an ILP they need only be voted off the board. Incorporation provides for greater flexibility in how employees are rewarded for productivity and may contribute to a greater corporate camaraderie.

2.15 Mark and Gordon[8] also point out that the disadvantages to incorporation include the rigorous reporting requirements under the Corporations Act 2001 (Cth) and obligations to shareholders. The latter may lead to the law firms ceding authority for the ownership and management of the practice.

2.16 On 21 May 2007, Slater and Gordon, an incorporated firm noted for its class action suits, was the first firm listed on the Australian Stock Exchange. In the first two days of trading, the share price went up $1.60 from its offer price of $1.00. The share price continued to increase substantially, peaking at $7.85 in April 2015, but by 2 March 2016 it had declined to only $0.26. On 29 February 2016, Slater and Gordon posed a loss of over $900 million, most of which consisted of a write down of the goodwill of its United Kingdom business. It also faces two class actions from its

shareholders for lack of proper disclosure to shareholders concerning its profit estimates and not providing accurate accounts. Other firms have also listed on the Australia Stock Exchange, including Shine Lawyers, which also had a big fall in its share price of 70 per cent after a profit warning in January 2016.

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2.17 Xenith IP Group has distanced itself from troubled plaintiff firms, Slater and Gordon and Shine Lawyers, with chief executive Stuart Smith arguing that 'there is no one listed law firm model'. Xenith IP, which listed in November 2015, does not appear to have the problems under its business model of other listed firms, such as Slater and Gordon and Shine. Xenith IP's chief executive, Stuart Smith, said:[9]

> The nature of our intellectual property practice is fundamentally different to other listed legal services businesses. … Whereas plaintiff firms have encountered cash flow and accounting problems due to high volumes of work in progress (WIP), the IP industry is much more predictable. … WIP never builds up to an appreciable degree. … At the end of last financial year our WIP was the equivalent of only a few days' billings, and averaged only a few weeks' throughout the year. … These 'relatively immaterial levels' of WIP mean that the firm has a high degree of certainty around cash conversion. … By comparison, commercial law firms operating on a contingency basis might have to wait several years to invoice each client and even then, only if they win. …

2.18 Another example of a successful specialised firm dealing with trademarks, is Intellectual Property Holding, which posted a 60 per cent profit in February 2016.[10]

2.19 In relation to MDPs, firms have, in a number of cases, separated their divisions for legal practice and for non-legal services. This type of structure overcomes many of the ethical considerations identified in the extract in **2.20**.

2.20 The following extract from the Law Council of Australia's *MDP Issues Paper*[11] illustrates some of the ethical problems with MDPs and contains the Law Council's policy statement on MDPs.

…

4.2 Recommendations

> Threats to the independence of legal advice come from a variety of sources, both within law firms and from multidisciplinary alliances that are either controlled or not controlled by lawyers. The personal integrity of each lawyer is the only ultimate guarantee that the independence of legal advice will not be affected by the lawyer's own financial interest. …

… [T]his paper has been prepared on the assumption that the restrictions on the type of business structure in which a legal practitioner may practice have been removed. It therefore examines whether current laws and rules governing the *conduct* of individual solicitors need to be amended to deal with the issues of legal professional privilege and conflict of interest in this context.

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Overall, there is a case to be made that there is little need for substantial additional regulatory intervention. The courts have already adapted conflict of interest and legal professional privilege rules to reflect changes to the profession and to business, and there is no reason to believe that this will not continue. The key is ensuring that

legal practitioners operating within MDPs remain subject to existing ethical and professional obligations, and that the legal profession's standards for conflict of interest are applied to all professionals within the MDP, not just those within the legal practice.

[The paper then endorses the existing policies of the Law Council and outlines some of these policies.]

…

4.2.2 Should the other services offered by an MDP be controlled?

Recommendation

> *An MDP that provides legal services should not also provide other services to an individual client where the provision of both services would result in conflicting duties of disclosure and confidentiality.*

Options

1. Allow MDPs only with specific professions that meet identified criteria and/or ban MDPs providing certain services in combination with legal services (eg, auditing).
2. Allow MDPs with any occupation that is subject to professional rules.
3. Place no control over what type of business can be run in conjunction with a legal practice as part of an MDP.

4.2.3 Legal Professional Privilege

Recommendations

> *Clients should be able to claim privilege if the dominant purpose of the communication in question is legal advice/litigation*
>
> *Clients must be fully aware of any limitation on their right to claim privilege*
>
> *Information subject to a claim for privilege must be handled*

with appropriate confidentiality

Options

1. Develop detailed rules prescribing such matters as:
   (a) the nature and content of any disclosure to clients about legal professional privilege;
   (b) the situations in which legal professional privilege will be lost;
   (c) requiring lawyers to control the information flow in the MDP to avoid inadvertent loss of legal professional privilege;
   (d) requiring structural separation of the legal practice from other parts of the MDP.

2. Regulate only key principles where necessary. Consider a general rule to prevent clients being misled about the nature of service offered.
3. No specific regulatory response. Regulatory bodies to instead conduct an education campaign to ensure that legal practitioners are aware of the circumstances in which legal professional privilege can and cannot be claimed.

4.2.4 Conflict of Interest

Recommendations

The principle of imputed knowledge and the prohibition on conflicts of interest must apply to all aspects of the MDP's business

Clients must be fully aware of all profit from referrals within the MDP

Options

1. Develop prescriptive rules regulating such issues as:
   (a) what occupations may be part of an MDP;
   (b) how profits from referrals will be disclosed to clients;
   (c) how specific potential conflicts should be handled;
   (d) an approved structure for 'Chinese Walls'.
2. Ensure that the definition of a 'firm' in relevant Solicitors' Rules includes an MDP to ensure that existing conflict of interest rules apply. Place no other specific controls.
3. No specific regulatory response. Rely on existing common law rules.

Appendix A: Law Council of Australia Policy Statement on MDPs

1. The foundation of the Law Council's policy on MDPs rests on three fundamental objectives:
   (a) paramountcy [sic] must be placed on the maintenance of lawyers' ethical obligations and professional responsibilities;
   (b) there should not be any restrictions on the manner in which lawyers choose to practise unless that restriction is in the public interest; and
   (c) the interests of consumers are properly protected.
2. These objectives are consistent with national competition principles, protect the interest of consumers and will remove existing restraints on the capacity of the legal profession to compete with other service providers.
3. A fundamental tenet of the Law Council's approach is that the regulation of MDPs should focus on compliance by individual lawyers with their ethical standards and professional duties rather than on the regulation of the business entity.
4. The Law Council's policy is enshrined in the following simple principles:
   (a) that the regulatory regime should be directed to the individual lawyer who is bound by ethical obligations and professional responsibilities;
   (b) that regulation of business structures should no longer be

regarded as critical or necessary to the maintenance of professional standards; and

(c) that individual lawyers should be free to choose the manner and style in which they wish to practise law including the right to choose to practise at an independent Bar, which requires practice as a sole practitioner and adherence to the cab-rank rule, recognising the importance of the sole practice rule in the administration of justice.

5. To reinforce the paramountcy [sic] of a lawyer's ethical obligations and professional responsibilities and in recognition of the unique role that lawyers' fulfil in relation to the administration of justice, the Law Council recommends that the following measures be adopted:

(a) **Model Rules of Professional Conduct and Practice**

The Model Rules should contain the following explicit statements:

(i) a lawyer practising within an MDP, whether as a partner, director, employee or in any other capacity, shall ensure that any legal services provided by the lawyer are delivered in accordance with his or her obligations under the applicable Legal Practice legislation and professional conduct rules; and

(ii) no commercial or other dealing relating to the sharing of profits shall diminish in any respect the ethical and professional responsibilities of a lawyer.

(b) **Legal Practice Legislation**

The Legal Practice legislation in each State and Territory should prohibit an MDP, by way of partnership deed, employment contract or in any other manner, from requiring a lawyer practising within the MDP to act in breach of the lawyer's obligations under the legal practice

legislation or the professional conduct rules.

6. The Law Council's policy has been adopted on the basis that:
   the concept of legal professional privilege be further enshrined by legislation;
   there be disclosure to the client of what services are offered by MDPs; and the Law Council consider what limits there should be to those who practise in association with lawyers in MDPs.
7. The Law Council's policy requires the removal of existing restrictions on lawyers' business structures in the various statutes governing the legal profession. This is a relatively simple exercise involving, in the main, repeal of regulation rather than replacement.

…

2.21 According to Mark and Hutcherson:[12]

> A large number of MDPs have not incorporated. Complete service firms which are MDPs operate almost exclusively in the area of real estate and conveyancing and the provision of financial services. … There are [also] a number of smaller MDPs that provide a range of non-legal services to clients. These include partnerships between lawyers and accountants, debt collectors, architects, tax agents, management consultants, corporate trainers, town planners, human resources consultants, financial planners and advisors, and, in one case, an entertainment agent.

2.22 Mark and Hutcherson[13] provide an excellent discussion of the development of ILPs and MDPs in New South Wales. They discuss the process and philosophy of regulating the new MDP structures and seek to have them adopt appropriate management

systems based on ethical behaviour. The authors point out that a significant number of the firms that originally incorporated no longer operate as corporate entities, but are 'nevertheless prepared to cautiously label the grand experiment of incorporation … a success. … [I]ncorporation [so far] … has not resulted in the sacrifice of professional ethics on the altar of profitability. …'

2.23 According to Mark and Gordon,[14] there is another form of ILP that is being developed — that of franchising. One such ILP law firm already operates a group of offices in New South Wales, the Australian Capital Territory, and Queensland. The branch offices are independent ILPs, not related to each other, but only to the franchising firm. The main ILP has already entered into 20 franchise agreements. Under the agreements, the main office receives a percentage of the branch offices' monthly turnover. The branch offices may use the firm's name, branding, signage, letterhead, etc, and must accept the main firm's management systems and practices. There is also another firm that has franchised in three states under the limited partnership model.[15]

2.24 MDPs are permitted in France and to a limited extent in Germany, with accountants, patent lawyers, auditors, and tax advisers. They are prohibited in Holland, New Zealand, Canada (except Ontario), and the United States (except the District of Columbia, but later rejected by the DC, Court of Appeal).[16] In Canada, British Columbia adopted MDPs as of 1 July 2010.

2.25 By contrast, the United States has been the main jurisdiction that is opposed to the MDP structure, and according to the American Bar Association, only four states — California, Colorado, Georgia, and Main — are in favour of establishing MDPs.[17]

2.26 The structure of the Law Council of Australia a few years ago was also significantly different to today. The nine largest law firms joined forces and formed the Large Law Firm Group (LLFG) to seek a greater say in the affairs of the Council. The LLFG threatened to withdraw funding from the state law societies unless they were given representation on the council. There are 15 seats on the Law Council's Executive, which deals with everyday matters and policy. The Law Society of New South Wales, the Law Institute of Victoria, and the Queensland Law Society each had four votes. A compromise was reached whereby each of these bodies conceded one vote to the LLFG.

In return, the LLFG undertook to continue to have its legal practitioners pay for membership in the state bodies. If the LLFG were to breach the agreement, it would forfeit the allocated seats.[18]

RESTRICTIVE RULES OF THE BAR

2.27 Section 2 of the Competition and Consumer Act 2010 (Cth) states that:

> The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

2.28 To meet criticism that their Barristers Rules were anti-competitive, the New South Wales Bar Association changed its rules as to what constitutes barristers' work in 1995, again in 1997, and again in 2016. The following extract constitutes the present

rules in New South Wales,[19] which are mirrored in other jurisdictions:[20]

> …
>
> **ADVOCACY RULES**
>
> …
>
> **Another vocation**
>
> 9. A barrister must not engage in another vocation which:
>
> (a) is liable to adversely affect the reputation of the legal profession or the barrister's own reputation;
> (b) is likely to impair or conflict with the barrister's duties to clients; or
> (c) prejudices a barrister's ability to attend properly to the interests of the barrister's clients.
>
> **Use of professional qualification**
>
> 10. A barrister may not use or permit the use of the professional qualification as a barrister for the advancement of any other occupation or activity in which he or she is directly or indirectly engaged, or for private advantage, save where that use is usual or reasonable in the circumstances.
>
> The Work of a Barrister
>
> 11. Barristers' work consists of:
>
> (a) appearing as an advocate;
> (b) preparing to appear as an advocate;

> (c) negotiating for a client with an opponent to compromise a case;
> (d) representing a client in or conducting a mediation or

arbitration or other method of alternative dispute resolution;

(e) giving legal advice;

(f) preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs;

(g) carrying out work properly incidental to the kinds of work referred to in (a)–(f); and

(h) such other work as is from time to time commonly carried out by barristers.

12. A barrister must be a sole practitioner, and must not:

(a) practise in partnership with any person;

(b) practise as the employer of any legal practitioner who acts as a legal practitioner in the course of that employment;

(c) practise as the employee of any person;

(d) be a director of an incorporated legal practice; or

(e) practice by or through a unincorporated legal practice.

13. A barrister must not, subject to rules 14 and 15:

(a) act as a person's general agent or attorney in that person's business or dealings with others;

(b) conduct correspondence in the barrister's name on behalf of any person otherwise than with the opponent;

(c) place herself or himself at risk of becoming a witness, by investigating facts for the purposes of appearing as an advocate or giving legal advice, otherwise than by:

(i) conferring with the client, the instructing solicitor, prospective witnesses or experts;

(ii) examining documents provided by the instructing solicitor or the client, as the case may be, or produced to the court;

(iii) viewing a place or things by arrangement with the instructing solicitor or the client; or

(iv) library research;

(d) act as a person's only representative in dealings with any court, otherwise than when actually appearing as an

advocate;

(e) be the address for service of any document or accept service of any document;

(f) commence proceedings or file (other than file in court) or serve any process of any court;

(g) conduct the conveyance of any property for any other person;

(h) administer any trust estate or fund for any other person;

(i) obtain probate or letters of administration for any other person;

(j) incorporate companies or provide shelf companies for any other person;

(k) prepare or lodge returns for any other person, unless the barrister is registered or accredited to do so under the applicable taxation legislation; or

(l) hold, invest or disburse any fund for any other person.

14. A barrister will not have breached rule 13 by doing any of the matters referred to in that rule, without fee and as a private person not as a barrister or legal practitioner.

15. A barrister does not breach rule 13(a), (h) or (l) if the barrister becomes such an agent, is appointed so to act or becomes responsible for such funds as a private person and not as a barrister or legal practitioner.

16. A barrister who is asked by any person to do work or engage in conduct which is not barrister's work, or which appears likely to require work to be done which is not barristers' work, must promptly inform that person:

(a) of the effect of rules 11, 12 and 13 as they relevantly apply in the circumstances; and

(b) that, if it be the case, solicitors are capable of providing

those services to that person.

…

2.29 An important new structural development is practising law in a virtual world. These virtual law practices operate by use of an online client portal, which allows a legal practitioner and their client to interact with one another. E-lawyering is a new method of structuring legal practice, which provides cost benefits for legal practitioners as well as their clients.[21] For example, a legal practitioner may create a Facebook profile that is accessible at the same time to family, friends, and prospective clients. The legal practitioner may then post professional announcements that are shared with all of those people. A number of top-tier Australian law firms — including Clayton Utz, Mallesons, Freehills, Allens, Blake Dawson, Norton Rose, and Corrs — are regular users of social networking sites like Twitter. In addition to the generic sites like Facebook, MySpace, and Linkedin, there are also social networking sites specifically directed at legal practitioners. For example, Lawyersnet enables legal practitioners from all over the world to set up profiles, make connections, and join groups. Lawlink.com is a similar site, yet is more developed, offering four interconnected websites to members — the Attorney Network, the Expert Witness Network, the Law Student Network, and the Law Professional Network. Lawlink.com's services for members include networking, a Twitter Law Forum, moderated forums, document sharing, and a news alerts.[22]

REGULATION OF LAWYERS BY LAWYERS

2.30 The most important aspect of lawyers being a profession is the right to self-regulation. The follow quote from the Law Society

of New South Wales outlines the main reasons for its position on self-regulation:[23]

> The legal profession is one of those professions, designated '*consultant professions*', that are distinguished by a tradition of honourable service and are of particular value and importance to the community. Professional self-regulation is logical and efficient. The legal profession in New South Wales has demonstrated throughout its history that it is capable of setting, and enforcing compliance with, high standards of professional practice. The courts have constantly relied upon the professional practitioner of good repute and competency as the best arbiter of proper professional conduct. An informed understanding of a professional

> discipline is required to assess the standards of practice which should be observed by practitioners who profess competence in that discipline. … The independence of the legal profession from the influence or control of the executive arm of government is essential not only to its effective self-regulation but also to the very maintenance of the rule of law. One of the reasons for the perceived unpopularity of lawyers is their need from time to time to defend persons' rights under the law and to uphold the law. If the executive should wish to take action to circumvent the law, or diminish individual rights, the lawyers who may stand between the executive government and the achievement of its objectives should not be subject to the control of a government instrumentality.

2.31 Below we look at the different regulatory models proposed in relation to the 1996 Legal Profession Act in Victoria.[24] We then look at the model adopted under the Legal Profession Uniform Acts for Victoria and New South Wales.[25]

2.32 The multiple-structured regulatory system established by the 1996 Act in Victoria came under considerable criticism. In June 2000, the Attorney-General of Victoria announced a review of the Legal Practice Act and appointed Sallmann and Wright to this end. They published a discussion paper in March 2001,[26] and a final report in November 2001,[27] which makes recommendations for significant change.

2.33 The following is an extract of Sallman and Wright's March 2001 discussion paper titled *Discussion Paper: Legal Practice Act Review*.[28] The discussion paper does not endorse a particular model. It summarises the submissions and the criticisms of the present system, looks at systems in other jurisdictions, and outlines possible regulatory models.

> … [I]t was frequently asserted that the complaints system is insufficiently protective of consumer interests, lacks independence, is unduly complex, involves excessive duplication of activities and is too expensive. These criticisms were often made across the board and sometimes regardless of the overall view of the authors of the submissions as to what the ideal regulatory arrangement should look like.
>
> Many submissions noted that the system of multiple entry points for complaints is a significant cause of confusion and inefficiency; that the process does not adequately serve the interests of consumers; that it is unclear and confused in its aims; that it is too bureaucratic; that to maintain the present regime would be to retain the high cost of regulation; and that the legislation needs shortening and simplification in order to make it more easily understandable and accessible to the legal and general communities. Apart from confusion, duplication and inefficiency, submissions frequently made the point that, while the overall aim of the 1996 legislation, in introducing new, independent elements into the regulatory process, was a worthy one, this particular system of coregulation (or, as one

put it, a hybrid of self-regulatory and independent elements) has not worked satisfactorily. As one commentator noted, this model of co-regulation has brought increased criticism and cost and few advantages. The same commentator said that the post-1996 regime has in fact brought a number of unhealthy tensions into the regulatory arena. Another submission referred to these tensions and observed that they were a cause of the current system losing public confidence. Another aspect of this lack of confidence is the fact that, according to the Law Institute, the cost of legal profession regulation in Victoria has risen by some $4.5 million a year as a result of the changes brought by the 1996 Act. (This was probably inevitable with the introduction of a number of new organisations into the system.) Among submissions which reached fundamentally different views about what the overall regulatory structure should be there was strong agreement on some aspects of the system. For example, there is virtually unanimous agreement that there should be a single entry point for the complaints system rather than the current confusing array of options. Also, many submissions made the point that the concept of Recognised Professional Associations (RPAs), established as a special feature of the 1996 legislation, has not been a success and should be abandoned. (It can be observed in passing that the creation of RPAs was responsible for a good deal of the complexity and length of the Act.)

… Beyond these matters, and some observations about a number of administrative and procedural initiatives which could be taken, there are few other areas of agreement. In fact, as mentioned earlier, when the discussion turns to the best models or structures for the regulation of the legal profession, including of course the complaints system, ideas differ greatly. Views are strongly divided on the key questions of

principle and operational effectiveness which inevitably arise. All seem to agree that any system should be fair, open, independent, effective, efficient and so on but whether these things can best be achieved by an arrangement that is self-regulatory, coregulatory or independent of the legal profession associations is an issue of considerable contention and complexity. Many submissions suggested that the present system does not measure up well against the kinds of benchmarks increasingly associated with industry-based complaints systems.

At one level, one would think that there should be a reasonably straightforward means of resolving difficulties of this kind. It would seem logical to work out what the aims of the regulatory arrangements should be and then to organise the structures and procedures which are best calculated to achieve those purposes. Unfortunately, it is not as simple as that. While there might be general agreement on what the system should be seeking to achieve, the legal profession associations argue that they should continue to be directly involved in the process whereas others, including various consumer groups and law bodies, say that the associations have a deeply embedded conflict of interest which presents problems of both principle and practice. They argue that the regulatory system should be truly independent of the associations and that it will continue to be heavily flawed until it does operate entirely independently of them.

It is interesting to note, however, that there does seem to be strong agreement, even among those with very different views about the ideal model, that the existing form of 'co-regulation' introduced under the 1996 Act has not worked effectively and efficiently. One submission

even suggested that it has produced so much difficulty and tension that it could not appropriately be described as 'co-regulatory' but rather as a dysfunctional hybrid.

One additional matter to mention before some of the key models are outlined is the difficulty of assessing the strengths and weaknesses of the different approaches and thereby arriving at a preferred position. Different positions of principle are often strongly held and defended, while the practical outcomes of different models can be difficult to compare and assess. As William Hurlburt, author of a recent book on self-regulation of the legal profession in Canada and in England and Wales, put it:

> Any assessment of the effectiveness of self-regulation will depend on impressionistic arguments and views and upon inference and deduction. It is difficult to organise the consideration of the various factors in any intelligible way. So perhaps the best that can be done is to consider the positive benefits and the positive detriments that appear to flow from the self-regulatory system and speculate as to whether the result is superior to those that might be expected to flow from non-regulation or from some other form of regulation that might be expected to be devised to fill a regulatory vacuum. This cannot be done empirically, as there is no non-regulated or differently-regulated environment that is sufficiently comparable to form the basis of a comparison. [W Hurlburt, *The Self-Regulation of the Legal Profession in Canada and in England and Wales*, Law Society of Alberta and Alberta Law Reform Institute, 2000.]

As reviewers of the current Victorian regime, these observations make sense to us. …

[The models are then illustrated by diagrams and discussed individually.]

A Return to Greater Self-Regulation

Law Institute and Victorian Bar. The Law Institute and the Bar … views are not the same on all aspects, [but] they are very similar on the

main issues and can conveniently be conveyed by outlining briefly the position of the Institute. …

The Institute's core proposition is that the professional associations should handle complaints, restricting the role of the LO primarily to review and monitoring, although there would still be a small number of cases involving a conflict of interest in which the LO should act initially. The Institute notes that at present about 80 per cent of complaints are lodged first with the professional associations rather than the LO.

It proposes that the Legal Practice Board (LPB) should continue but some of its functions should be returned to the Institute. This, it says, would significantly reduce duplication and save costs. It does, however, suggest that the competition function currently exercised by the LO should go to the LPB. … It recommends, like the Victorian Bar, abandoning the concept of RPAs. … In general, as noted earlier, the Institute and the Bar adhere to the traditional view that complaints are best handled by the professional associations. They do not argue for a pure form of self-regulation but recognise a role for independent elements in the form of the LPB and the LO. They both say, however, that the 1996 legislation brought a series of difficulties, not least cumbersome and confusing processes and undue regulatory expense.

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To improve the process they both propose the re-allocation of functions between the various bodies and a variety of other streamlining initiatives.

Calls for a More Radical Overhaul

In stark contrast to the 'turn back the clock' approaches of the legal profession associations, there are significant groups and organisations in the community, as well as individuals, advocating a completely

independent regulatory scheme, one that removes the associations from their current direct role in the process. The models proposed differ to some degree in their reasoning and in their architecture but in essence they have two driving forces. One is for the process to be completely independent and to be seen to be so, and the other is to have a simple, unitary, straightforward scheme which works well, protects consumers of legal services, is easily understood, and is accessible, accountable and cost effective.

Federation of Community Legal Centres. The Federation of Community Legal Centres (FCLC), supported, among others, by the Victorian Council of Social Service (VCOSS), strongly advocates an approach of this kind. … [T]he Federation recommends the establishment of a Legal Industry Regulator with an independent, non-lawyer Chair and equal numbers of representatives of the legal profession and consumers of legal services. It would have a maximum of seven members. It would adopt a strong co-operative approach that would see lawyers and their professional associations, including lawyers who are not actually members of the professional associations, closely involved at each stage of standards setting and rule-making for the whole profession.

The Regulator would subsume the current LPB, LO and the self-regulatory functions of the professional associations, creating extensive efficiencies and costs savings through 'back office' and communications economies. It would be a 'one-stop-shop' for consumer complaints. A Legal Ombudsman would be retained but with a different role. The Federation would retain the LPT [Legal Professional Tribunal]. It would abolish RPAs.

This new Regulator would be responsible for a number of key functions:

- all regulatory matters, including registration and maintenance of the roll of practitioners, issuing of practising certificates, inspections of lawyers' trust accounts, appointing receivers and managers and dealing with claims on the fidelity fund;
- dealing with anti-competitive behaviour;

- complaints handling;
- costs disputes; and
- the prosecutorial function.

The Federation believes that the Regulator should have a specific division to deal with consumer complaints. It would retain the term 'Legal Ombudsman' as the name of such a division. It would remove the restriction preventing lawyers from holding the position of LO. The submission suggests that an independent regulatory regime of this nature would deserve the confidence of both lawyers (and their professional associations) and consumers (and consumer advocates). …

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Legal Ombudsman. The suggestion that the regulatory system should operate independently of the legal profession associations is strongly supported by the Legal Ombudsman (LO) but the Office has a very different model in mind. The LO proposes that her Office would perform the following functions as part of a 'best practice' model for regulation of the Victorian legal profession:

- receive and handle all conduct complaints and consumer redress matters at first instance;
- appoint inspectors and auditors as required;
- continue to bring charges against practitioners in the LPT and manage subsequent enforcement issues;
- continue to conduct an extensive community outreach programme;
- continue to provide feed-back from the complaint handling process to the public;
- continue to investigate matters relating to competition in the legal services market.

The submission also indicates that, if required, the LO could have a

role in dispute resolution and consumer redress. …

This scheme envisages a continuing role for a Legal Practice Board (LPB), including such functions as maintaining the register of practitioners; issuing practising certificates; acting as trustee of the Fidelity Fund; conducting trust account inspections; and appointing receivers and managers.

The submission also supports the retention of a separate Legal Profession Tribunal (LPT) to deal with allegations of disciplinary breaches. Whether the LPT would deal with consumer disputes would depend upon the policy position adopted for best handling of this aspect. The submission raises a number of different policy options in this regard. In the event the Tribunal did continue to have this jurisdiction, the LO suggests that cases should be handled by a Registrar sitting alone.

The LO says that it is in the best interests of consumers and practitioners that there be independent regulation of the profession. Such a system, she says, would result in increased access to legal services; would be a model that could easily be adopted for a national profession; would improve consumer protection; streamline the regulatory process; simplify the legislation; and produce significant cost savings.

The LO suggests that removing the RPAs from the regulatory system would result in savings in excess of $4.5 million dollars. She says that in excess of $6.24 million dollars is spent unnecessarily each year on the RPAs. There would not be a net saving of the whole amount because under the LO's preferred model her Office would perform the regulatory functions currently allocated to the RPAs and would thus need an increase in its budget.

Finally, the LO recommends that the Attorney-General and not the LPB should make the decisions regarding the allocation of funds under the Act for purposes of legal aid, legal research, law reform and so on. …

New South Wales. [T]he … New South Wales system … has a

common entry point for all complaints — (The Legal Services Commissioner (LSC)). The Commissioner's Office itself

deals with consumer dispute type matters while conduct matters are referred for action to the relevant professional association. (The LSC may take over investigation of a complaint from a legal profession Council.)

Serious conduct matters and consumer disputes which cannot be satisfactorily resolved by other means go to a tribunal type process. (The Legal Services Division of the Administrative Decisions Tribunal.) Complainants can request a review by the LSC of processes conducted by the legal profession associations. A large proportion of consumer matters are successfully mediated by the LSC. …

This model is an example of a co-regulatory approach, where an independent statutory authority acts as the gateway for all complaints, deals with a significant proportion of them itself but essentially channels conduct complaints to the professional associations for investigation and, if necessary, prosecution before an independent tribunal.

Apart from the fact that this approach may be of interest simply because it operates in Australia's most populous jurisdiction, it will presumably be of interest to those who support a co-regulation model, involving an independent element as well as a continuing role for the legal profession associations. On the other hand, it would presumably not be of much attraction at all to those who advocate a completely independent approach to dealing with complaints.

Law Institute Alternative. Additional food for thought may be provided by an alternative model explored in the Law Institute submission. This model would not feature the Institute directly but the Institute would regard it nonetheless as self-regulatory in a broad

sense. The model would involve a reconstituted Legal Practice Board as the regulatory body. Its jurisdiction would be limited to solicitors so that it would probably be re-badged as a Solicitors' Practice Board (SPB). Solicitors would constitute a majority of the directors of the Board but there would be government appointed directors as well.

The Board would perform all the functions which, under the Institute's preferred model, would be performed by the Institute itself, for example, issue practising certificates, collect fees, investigate and prosecute disciplinary breaches, make practice rules, administer the Fidelity Fund and so on.

Under this model the Office of Legal Ombudsman could be abolished. Accountability for the complaints process, says the Law Institute, could be accomplished internally by the appropriate appointment of directors to the Board. For obvious reasons this model would be very different from the New South Wales regime outlined above. …

While the inclusion of too many more models would probably be a source of confusion in itself, there are two other approaches of possible interest. The first is in a submission provided by Victoria's general jurisdiction Ombudsman, Dr Barry Perry, and the second is the newly proposed scheme for Queensland.

Dr Barry Perry. Dr Perry notes that the existing complaints system is too complicated and confusing in both its apparent aims and the number of 'players' involved in the process.

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He says that the objectives need to be clearly identified as do the functions of the bodies required to achieve the objectives. He also says that the system needs to be independent from the parties to the dispute — the consumers of the legal services and the practitioners providing the services. On the more practical side of things, Dr Perry says that there should be one repository for receiving complaints. As

noted earlier, he is certainly not alone in making that suggestion.

Dr Perry believes that the two major objectives of the complaints system are to set, maintain and enforce professional standards and to resolve consumer disputes. He says that if he is right about this the relevant legislation should state these two aims and establish separate bodies responsible for each. Thus, his preferred scheme would involve a Board or Tribunal to deal with professional standards matters and an independent Legal Ombudsman to deal with consumer issues. The Legal Ombudsman, however, would be the common point of entry for all matters. In addition, there would be co-ordination between the two bodies and some cross-referral powers. …

2.34 In November 2001, Sallmann and Wright's *Report of the Review of the Legal Profession Act 1996* was released by the Victorian Attorney-General. The report refers to Sallmann and Wright's earlier Discussion Paper,[29] condemns the existing system as inefficient and expensive, and proposes a new system based on a combination of the models discussed above.[30]

2.35 The following extract is from Sallmann and Wright's November 2001 final report on the regulation of the Victorian Legal Profession:[31]

The Proposed New System

Introduction

One thing which emerged very clearly from the review is that there is no regulatory model which would satisfy all interested parties. In fact, two 'camps' of opinion are clearly identifiable; one which is strongly consumer-oriented and favours an independent approach, and another, which is rather traditional, and is strongly supportive of self-regulation. The 'consumerists' point with approval to the many industry ombudsman schemes which have been established in recent times and sing the praises of their success in dispute resolution. The 'traditionalists', on the other hand, argue the special position of the

legal profession in society and how it should be distinguished from other occupations and industries, not least by its close relationship to the court system, and the Supreme Court in particular. Legal practitioners, they say, are in a special position because of the primary responsibility they have to the Court and regulation of the profession should reflect that special role and position. …

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An Independent Regulatory Model

The central proposal in this report is that there should be a system for regulating the legal profession in Victoria which is independent but retains an active role for the legal profession Councils in the area of conduct investigations. …

In combination, an Office of Legal Services Commissioner (OLSC), headed by a Legal Services Commissioner (LSC) and a Legal Services Board, would be responsible for all regulatory functions required. As in New South Wales, where an OLSC receives all complaints against legal practitioners, the Victorian Office would be expected to refer a good number of the conduct complaints to the relevant legal profession Councils for investigation. The Office would retain and investigate certain complaints itself, would have power to take over a Council investigation, and there would be a right of review to the OLSC (carried out, as in New South Wales, by a special committee established by the Office) for a party who is not satisfied with a Council investigation.

… The three legal practitioner members could consist of two solicitor members and one barrister member. At least two of the other three members could be appointed primarily because of their support from key consumer bodies or they could be appointed more at large from the general community. Any consumer members could be qualified lawyers provided that they were appointed to the Board primarily as

consumer-oriented people who are acceptable to consumer bodies and have not been practising members of the profession for, say, the last five years.

The sixth member, a lawyer or non-lawyer, would ideally have substantial skills and experience in the world of accounting and finance. The chairperson would be chosen at large for a range of important skills and experience and, ideally, would be a non-lawyer. The terms of office of the members of the Board should be staggered in order to ensure continuity of membership. So, if the normal membership terms were, say, three years, some of the initial members could be appointed for two year terms to avoid the prospect of all members of the new Board having to retire at the same time and thus being replaced by a completely new and inexperienced group.

The Board would set overall regulatory policy within the appropriate statutory framework and the OLSC, led by the Commissioner, would carry out the regulatory functions on a day-to-day basis. …

[T]he Commissioner should be a person with very strong management skills and experience, as well as extensive knowledge of legal practice and the legal system. While experience as a legal practitioner may not be an absolute prerequisite to appointment it is very likely that the successful candidate would have such experience. It could also be important for the Commissioner to have expertise in dispute resolution.

The Commissioner would obviously need to have the confidence of the Board, the legal profession, the public and government in carrying out the various functions. In a very real sense the position would need to be a bridge between the profession and the community.

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Dealing with Complaints

… [T]he current distinction in Victoria between consumer and conduct complaints is unhelpful and should be abolished. Many complaints about legal services involve both consumer and conduct elements. All complaints should be lodged with the OLSC and the Office would assess what is involved and allocate the cases accordingly. Consistent with the New South Wales practice, complaints with a substantial consumer dispute component would be dealt with within the OLSC, together with a range of conduct matters such as complaints about poor communication, delay, rudeness and so on. The OLSC would also retain a number of the more serious conduct complaints, where, for example, the legal professional body has a conflict of interest, where issues of substantial public interest are involved or there are other compelling reasons; others would be referred to the legal profession Councils for attention.

Conclusion

… What is required is an independent system which has plenty of formal and informal involvement of members of the legal profession, including the associations. The system should not only be independent, and be seen to be so, but should be centralised to perform all regulatory functions. It needs to be expertly managed and to be cost effective. The way to achieve this is to have an independent regulator accountable to an independent Board, the latter with equal numbers of legal practitioners and consumer or community representatives and, ideally, a non-lawyer chairperson. This independent regulator would have prime responsibility for the whole range of regulatory functions, including complaint handling. …

Overall, adoption of proposals in this report would make regulation of the legal profession simpler, more accountable and more effective and efficient, as well as a great deal less expensive than it is at present. It would not only provide a more open and effective way of dealing with complaints but, because the regulator would be dealing with the other regulatory functions as well, would facilitate the performance of the various tasks in a concerted, modern and coordinated fashion. This scheme would be much more effective than the present one from a

> management perspective; would provide the community with a better service; and would allow the associations, particularly the Law Institute, to enhance their membership and representative roles, while also pursuing a variety of active involvements in the new regulatory arrangements.

2.36 The main recommendations in this Report were adopted in the new Legal Profession Act 2004 (Vic). This system was replaced under the Legal Profession Uniform Law in 2015.[32] Before the Legal Profession Uniform Law was adopted, the New South Wales Commissioner, Steve Mark, stated:[33]

> It is also extremely pleasing that on the path towards a national legal services market, we have established such close relationships with regulators in the other States. Through the establishment of the Conference of Regulatory officers (CORO) held each year, regulators,

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> including statutory regulators, Law Societies, Bar Associations, the Law Council of Australia, trust account inspectors and admitting authorities gather to discuss developments, share experiences and attempt to achieve a level of harmonisation of practices as a major plank of an effective national profession. Agreements have been reached through CORO to address such national issues as development of continuing professional development guidelines and the introduction of incorporated legal practices in all jurisdictions as agreed by the Standing Committee of Attorneys-General.

2.37 A major new development is the application of outcomes-based regulation. This is the adoption and application of broadly stated rules or principles that establish standards that have to be followed by practitioners and firms. This kind of system is already being used by the various Legal Services Commissioners to regulate

ILPs. For example, ILPs have to adopt an appropriate management system and such a system is not specifically defined. Instead, the Commissioners have issued general guidelines to achieve compliance. Furthermore, outcomes-based regulation will be the approach used under a national regulatory system.[34]

2.38 In Queensland, the Legal Services Commissioner, John Briton, and his co-author, Scott McLean,[35] have argued that the adoption of appropriate policies and procedures and good intentions by the ILPs is not enough. The goal is to change the organisation and workplace culture of ILPs to achieve positive outcomes. They believe that eventually this regulatory approach can be applied to all law firms. Thus law firms will be held accountable for the unethical behaviour of their individual lawyers.

2.39 Policing the new legal virtual law practices — online legal services — will require a similar regulatory approach, especially with regard to the problems arising from outsourcing of legal work to lawyers in cheap legal services markets, such as India. These legal practices are developing rapidly in the United States and are just beginning in Australia.[36]

2.40 Other problems with regulatory issues are the development of social networking services to deliver legal services.[37] '[t]he twitter feed *@thelegaloracle* is the first Twitter "law firm" in the world to offer free legal advice in 140 characters on questions that have been tweeted. The Twitter feed is being staffed by a law firm in the UK, Loyalty Law Solicitor.'

2.41 There is also an important regulatory issue for ILPs and for legal practitioners concerning advertising. The general rule regarding advertising is that it must not be reasonably regarded as 'false, misleading or deceptive', or be in contravention of the

Australian Consumer Law. There are now specific rules in some states banning personal injury and work injury advertising — for example, the Legal Profession Amendment (Personal Injury Advertising)

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Regulation 2002 (NSW) and the Personal Injuries Proceedings Act 2002 (Qld). The Australian Plaintiff Lawyers' Association (APLA, now called the Australian Lawyers' Alliance) sought to have the ban declared invalid, but the rules and legislation were upheld by the High Court in *APLA Ltd v Legal Services Commission (NSW)* (2005) 219 ALR 403.[38]

2.42 Regulations under these advertising prohibition Acts[39] have been adopted and successful cases have been brought to enforce the regulations.[40] In the more recent decision of *Hagipantelis v Legal Services Commissioner of NSW* [2010] NSWCA 79, the Court of Appeal dismissed an appeal against a finding of the NSW Administrative Decision Tribunal that the regulations had been breached. The Court of Appeal rejected the appellant's argument that the prohibition on advertising in the regulations extended beyond the relevant regulation-making power.

NATIONAL REGULATORY SYSTEM — LEGAL PROFESSION UNIFORM LAW

2.43 As at July 2015, only two states, Victoria and New South Wales, had adopted a national scheme to regulate lawyers, although Queensland, South Australia, and the Australian Capital Territory

have adopted the Uniform Solicitors' Conduct Rules.

2.44 In the following extract, Robertson[41] summarises the new regulatory system in New South Wales, which is virtually the same in Victoria. Outline what you consider to be the main features. Do you think this is an appropriate model for other jurisdictions?

> … Although the structure of the new regulatory regime is new, the substance has not greatly changed: the new regulatory regime is evolutionary rather than revolutionary, building upon earlier moves towards a single, uniform regulatory regime for all legal practitioners in Australia.
>
> …
>
> By December 2013, only New South Wales and Victoria remained committed to the implementation of a uniform law. For that reason [they] … entered into a bilateral Intergovernmental Agreement to develop a uniform law applicable to New South Wales and Victoria. … The final result of that work is the Legal Profession Uniform Law and associated statutes and regulations, which is based on the draft National Law and National Rules but has been further altered by New South Wales and Victoria and which now more resembles a joint project between the two jurisdictions rather than a national scheme. …

> Even though the new uniform law applies (at least initially) only in New South Wales and Victoria, about 75 per cent of Australian legal practitioners practise in those two jurisdictions, and so the new regulatory regime constitutes a significant step towards a single, national regulatory regime for the Australian legal profession. …
>
> **The new regulatory regime: continuity and change**

…

[For barristers] many of the rules and regulations which have been implemented by the uniform laws replicate or are based on rules and regulations that have were previously in place in New South Wales under the old regulatory regime.

…

For example, the provisions of the uniform legislation are mostly carried over from the 2004 Act and 2005 Regulation, generally with only minor substantive changes. The new Barristers' Conduct Rules are based on the Australian Bar Association's Model Rules, which were adopted by the New South Wales Bar Association in 2011. …

… [The] regulatory changes for barristers in New South Wales are relatively minor, at least compared with the changes that have been experience of our Victorian brethren. 'For barristers in Victoria, the changes have been more significant, because the Victorian Barristers' Rules which previously applied were not based on the ABA Model Rules. …

… 'The scheme has been designed so that other jurisdictions can join in the future, and there are positive indications that other jurisdictions are considering doing so[.]' …

…

The new regulatory regime is essentially comprised of: (i) a uniform law and uniform professional rules which are applicable to all practitioners in New South Wales and Victoria; (ii) some state-specific rules and regulations contained in a state Act and Regulations which apply only in the particular state; (iii) new 'national' regulatory bodies which are responsible for overseeing the development and implementation of the uniform law, rules and regulations; and (iv) state-based regulatory bodies (called 'local regulatory authorities') which are responsible for enforcing the rules and regulations in their jurisdiction.

…

The regulatory framework established by the Uniform Law

Chapter 8 of the Uniform Law establishes several new regulatory bodies to oversee the new regulatory regime: the Standing Committee of Attorneys-General, the Legal Services Council, the Commissioner for Uniform Legal Services Regulation, and the Admissions Committee.

These new regulatory bodies are effectively a 'national' or 'interjurisdictional' regulatory superstructure for the legal profession in New South Wales and Victoria, because they are intended to operate alongside the regulatory bodies that previously exercised functions

under the Legal Profession Act 2004, which will continue to exercise functions under the Uniform Law. The Uniform Law continues to rely on 'local regulatory authorities' to exercise regulatory powers in a particular 'local' jurisdiction. These reforms further continue and entrench the co-regulatory model of regulation of the legal profession, since most of the positions on the new regulatory bodies may be filled by persons without legal expertise.

In the carve up of responsibilities between New South Wales and Victoria, Victoria was designated as the 'host jurisdiction' for the Uniform Law and New South Wales was designated as the 'host jurisdiction' for the Legal Services Council and the Commissioner for Uniform Legal Services Regulation. [See s 5 of the Legal Profession Act 2004] Therefore, both the council and the commissioner are based in Sydney.

The Standing Committee

In order of precedence, the first new regulatory body (if it may be described as such) is the Standing Committee of Attorneys-General

(the Standing Committee), which is comprised by the attorneys-general of the participating jurisdictions (therefore, presently only the attorneys-general for New South Wales and Victoria). The Standing Committee has a general supervisory role in relation to the Legal Services Council, the commissioner for Uniform Legal Services Regulation, and local regulatory authorities (s 391). The Uniform Law also confers other functions on the Standing Committee, such as the power to appoint members of the Legal Services Council.

The Legal Services Council

The Legal Services Council (the council) is established by s 394(1) of the Uniform Law. Section 394(2) of the Uniform Law sets out the objectives which the council is to pursue, which include: monitoring the implementation of the Uniform Law and ensuring its consistent application across participating jurisdictions (s 394(2)(a)); ensuring that the Legal Profession Uniform Framework remains 'efficient, targeted and effective' and promotes the maintenance of professional standards (s 394(2)(b)); and also ensuring that the Framework accounts for the interests and protection of clients (s 394(2)(c)). Schedule 1 to the Uniform Law sets out further provisions relating to the constitution, functions and powers of the council.

As to its membership, the council is constituted by five members drawn from the participating jurisdictions, with the council appointed for a term of three years.[See Schedule 1, cl 2.] The appointment of members to the council is by the 'host attorney general', which apparently is the Victorian attorney-general, with appointments made on the recommendation of the Law Council of Australia (as to one member), on the recommendation of the Australia Bar Association (as to one member), and on the recommendation of the Standing Committee (as to three members, including the chair). The members of the inaugural council were appointed in October 2014. …

An important function of the council is its power to make Legal Profession Uniform Rules. The rule-making function of the council is set out in Part 9.2 of the Uniform Law and is quite complex (and it is unnecessary to examine in any detail). As noted above, pursuant to

that power the council has made the General Rules, the Barristers' Conduct Rules and the Barristers' CPD Rules. The council has made equivalent rules for solicitors. The council

has also made the Legal Profession Uniform Admission Rules 2015, which apply in both New South Wales and Victoria in relation to the qualifications and training required for admission, as well as admission procedure.

The Commissioner for Uniform Legal Services Regulation

The office of Commissioner for Uniform Legal Services Regulation (the commissioner) is established by s 398(1) of the Uniform Law. The objectives of the office of commissioner are set out in s 398(2) and include: promoting compliance with the requirements of the Uniform Law and the Uniform Rules; and ensuring the consistent and effective implementation of the provisions of the Uniform Law and the Uniform Rules concerning complaints and discipline. Schedule 2 to the Uniform Law sets out further provisions relating to the office of the commissioner. The commissioner is appointed by the host attorney-general on the recommendation of the Standing Committee and with the concurrence of the council. [See Schedule 2, cl 2]. …

Local regulatory authorities

The new regulatory regime maintains a local regulatory regime for legal practitioners in New South Wales that is similar to the previous regulatory provisions under the Legal Profession Act 2004. Section 6 of the Uniform Law defines a 'local regulatory authority' as 'a person or body specified or described in a law of this jurisdiction for the purposes of a provision, or part of a provision, of [the Uniform Law] in which the term is used'. Section 11 of the NSW Application Act then designates particular bodies as a 'designated local regulatory authority' to exercise particular functions under a provision of the

Uniform Law in New South Wales. The Victorian Application Act does the same for local regulatory authorities in Victoria by designating certain Victorian bodies to exercise particular functions under the Uniform Law in Victoria.

In New South Wales, the local regulatory authorities are: the Council of the New South Wales Bar Association (the 'Bar Council'), the Council of the Law Society of New South Wales (the 'Law Society Council'), the NSW legal services commissioner (the 'NSW Commissioner'), the Legal Profession Admission Board (the 'NSW Admission Board') and the Civil and Administrative Tribunal of New South Wales ('NCAT'). These authorities all exercised regulatory functions previously under the Legal Profession Act 2004, and each authority continues to exercise the same or similar functions under the Uniform Law as it did under the previous legislation.

The Bar Council is the designated local authority for the following regulatory functions under the Uniform Law:

- Investigating instances of and instigating proceedings in respect of unqualified legal practice (s 14);
- Recommending the removal of the name of a person from the Supreme Court roll (s 23(1)(b));
- The grant, renewal, variation, suspension and cancellation of practising certificates; the imposition of conditions on practising certificates; show cause events; and applications for disqualification orders (Chapter 3);
- Compliance audits and management system directions (ss 256, 257);
- Appointment of a manager for a barrister's law practice (Part 6.4);

- Investigatory powers, except those provisions relating to

complaint investigations (Chapter 7);
- Exchanging information (ss 436, 437);
- Issuing evidentiary certificates (s 446); and
- Applying for an injunction to restrain contraventions of the Uniform Law and the Uniform Rules (ss 447–449).

The Law Society Council is the designated local authority for many of the same functions in respect of the regulation of solicitors in New South Wales.

The NSW Commissioner is the designated local authority in New South Wales in respect of complaints (Chapter 5) and complaint investigations (Chapter 7). However, the Uniform Law provides a power for the NSW Commissioner to delegate any complaints functions under Chapter 5 to a professional association, so long as the professional association is a 'prescribed entity' (see ss 405, 406). The NSW Application Act has prescribed both the Bar Council and the Law Society Council as delegates of the NSW Commissioner (see ss 29(c) and 31(1)(c)).

Sections 414 and 415 of the Uniform Law make clear that the relevant designated local authority has exclusive jurisdiction with respect to complaints and investigations concerning any particular practitioner. Section 415 states that nothing in Chapter 8 of the Uniform Law authorises the Standing Committee, the council or the commissioner to investigate a matter relating to 'any particular conduct', or to reconsider a prior investigation of 'any particular matter', or to reconsider any decision of a local regulatory authority or its delegate. Such investigations are solely for the relevant designated local authority to conduct.

Conclusion

The Legal Profession Uniform Law and the associated legislation, regulations and rules represents an important development in the approach to the regulation of the legal profession in Australia. Finally, after many years of discussion and false starts, two jurisdictions. … have adopted a uniform legislative scheme to provide uniform

> regulations for the legal professionals based in those two jurisdictions. That on its own is a significant achievement. Furthermore, the way in which the legislation is drafted provides the possibility for other jurisdictions to join in the future, and so it may well be that the Legal Profession Uniform Law has finally laid the foundations for a single uniform law regulating all Australian legal practitioners. [footnotes omitted]

2.45 The ten elements of corporate management established by the former Office of the Legal Service Commissioner are still applied by the local regulatory commissioner in New South Wales under the Legal Profession Uniform Law 2015 (NSW). These elements, which are the main focus for regulating lawyers by the Commissioner, are:[42]

1. Competent work practices to avoid negligence.
2. Effective, timely and courteous communication.

3. Timely delivery, review and follow up of legal services to avoid instances of delay.
4. Acceptable processes for liens and file transfers.
5. Shared understanding and appropriate documentation from commencement through to termination of retainer covering costs disclosure, billing practices and termination of retainer.
6. Timely identification and resolution of the many different incarnations of conflicts of interest including when acting for both parties to a transaction or acting against previous clients as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies or

conducing another business, referral fees and commissions etc.

7. Records management which includes minimising the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving etc and providing for compliance with requirements as regards registers of files, safe custody, financial interests.
8. Undertakings to be given with authority, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as OLSC, Law Society, courts or cost assessors.
9. Supervision of the practice and staff.
10. Avoiding failure to account and breaches of s 61 of the Act in relation to trust accounts.

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1. H Glenn, 'Professional Structures and Professional Ethics' (1990) 35 *McGill LJ* 424 at 425–6.
2. New South Wales Law Reform Commission, *Report 31 — First Report on the Legal Profession: General Regulation and Structure*, 1982.
3. New South Wales Law Reform Commission, *Report 31 — First Report on the Legal Profession: General Regulation and Structure*, 1982.
4. New South Wales Bar Association, *Submission to the Legal Profession Advisory Council*, April 1995.
5. For further details regarding multi-disciplinary partnerships or practices, see **2.19**–**2.22**.
6. See C Merritt, 'National Network About to Launch', *The Australian*, 9 February 2007, p 21. For other similar developments with other small firms, see M Priest, 'Bigger Playing Field for Local Practices', *Australian Financial Review*, 23 February 2007, p 52.
7. S Mark & T Gordon, 'Compliance Auditing of Law Firms: A

Technological Journey to Prevention', at <www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_speeches

8. S Mark & T Gordon, 'Compliance Auditing of Law Firms: A Technological Journey to Prevention', at <www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_speeches

9. F Nelson, *Lawyers Weekly*, 19 February 2016, p 1. For an article on the influence of Australian developments abroad, see 'Comment: Firm Offers: Are Publicly Traded Law Firms Abroad Indicative of the Future of the United States Legal Sector?' (2009) *Wis L Rev* 67.

10. F Nelson, *Lawyers Weekly*, 19 February 2016, p 1.

11. Law Council of Australia, National Profession Taskforce, Multidisciplinary Practices Working Group, *Issues Paper — Multidisciplinary Practices: Legal Professional Privilege and Conflict of Interest*, September 2000.

12. S Mark & M Hutcherson, 'New Structures for Legal Practices and the Challenges They Bring for Regulators' (2007), at <www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/olsc-speeches>.

13. S Mark & M Hutcherson, 'New Structures for Legal Practices and the Challenges They Bring for Regulators' (2007), at <www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/olsc-speeches>. For another article on developments in New South Wales, including the listing of firms on the stock market, see S Mark & T Gordon, 'Innovations in Regulation — Responding to a Changing Legal Services Market' (2009) 22 *Georgetown J of Legal Ethics* 501.

14. Mark & T Gordon, 'Innovations in Regulation — Responding to a Changing Legal Services Market' (2009) 22 *Georgetown J of Legal Ethics* 501.

15. Mark & T Gordon, 'Innovations in Regulation — Responding to a Changing Legal Services Market' (2009) 22 *Georgetown J of Legal Ethics* 501.

16. Law Council of Australia, *Issues Paper, Multidisciplinary Practices: Legal Professional Privilege and Conflict of Interest*, *Appendix C — Overseas Developments*, September 2000.

17. This was the situation when the results of a survey were posted on 18 January 2005. See <www.abanet.org/cpr/mdp/home.html>. When the

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18. M Drummond & M Priest, 'Big Firms to Get a Seat on Law Council', *Australian Financial Review*, 9 February 2007, p 58.
19. New South Wales Bar Association, Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW).
20. In relation to the Barristers' Rules of the various jurisdictions, see Bar Association of Queensland, Barristers' Conduct Rules 2011; Victoria, Legal Profession Uniform Conduct (Barristers) Rules 2015 (Vic); Australian Capital Territory, Legal Profession (Barristers) Rules 2014; South Australian Barristers Rules 2013; Western Australian Barristers Rules 2012; Northern Territory Barristers' Conduct Rules 2002; the Tasmanian Rules of Practice 1994 (which define a 'practitioner' as a person practising as a barrister or legal practitioner; Part 8 applies solely to those who practise as a barrister).
21. S Mark, 'Practising in a Virtual World' (August 2010) 51 *Without Prejudice*.
22. S Mark, 'New Technologies — Social Networking Sites' (February 2011) 53 *Without Prejudice*.
23. Law Society of New South Wales, *Scrutiny of the Legal Profession: Complaints Against Lawyers*, 31 July 1992, [2.1], [2.3].
24. See **2.33**–**2.35**.
25. See **2.43**.
26. Extracted at **2.33**.
27. See **2.35**.
28. P Sallmann & R Wright, *Discussion Paper: Legal Practice Act Review*, Victorian Government, Department of Justice, March 2001.
29. See **2.33**.
30. At **2.33**.
31. P Sallmann & R Wright, *Regulation of the Victorian Legal Profession — Report of the Review of the Legal Practice Act 1996*, Victorian Government, Department of Justice, November 2001.
32. See **2.43**.
33. Office of the Legal Services Commissioner (NSW), *Annual Report* 2005–

06, p 5.

34. See S Mark, 'Outcomes-Based Regulation' (February 2010) 48 *Without Prejudice* 1. The scheme has been successful, resulting in a huge drop in the number of complaints against ILPs using the system. See Office of Legal Services Commissioner, *Annual Report 2008–09*, pp 5–6.
35. J Britton & S McLean, 'Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era' (2009) 11 *J of Legal Ethics* 241.
36. S Mark, 'Practising in a Virtual World' (August 2010) 51 *Without Prejudice*.
37. S Mark, 'New Technologies — Social Networking Sites' (February 2011) 53 *Without Prejudice*.
38. For a discussion of the case, see A Gray, 'High Court Validates Restrictions on Lawyer Advertising' (2005) 26 *Qld Lawyer* 131; and N Aroney, 'Lost in Translation: From Political Communication to Legal Communication' (2005) 28 *NSWLJ* 833.
39. For example, the Legal Profession Amendment (Personal Injury Advertising) Regulation 2002 (NSW) and the Personal Injuries Proceedings Act 2002 (Qld).
40. See *Legal Services Commissioner of NSW v Malouf* [2007] NSWADT 215; *Legal Services Commissioner of NSW v Keddie* [2008] NSWADT 185.
41. D Robertson, 'An Overview of the Uniform Legal Profession Act' (2015) (Summer) *Bar News* 36.
42. See S Mark & T Gordon, 'Innovation in Regulation — Responding to a Changing Legal Services Market' (2009) 22 *Georgetown Journal of Legal Ethics* 501 at 507–8.

3

ADMISSION TO PRACTICE

INTRODUCTION

3.1 In every jurisdiction in Australia there are regulatory bodies, composed almost entirely of lawyers, which set the rules to be met for admission to the profession. In a number of jurisdictions these bodies include legal academics; only in New South Wales and Tasmania are there laypersons; and only in South Australia is a law student able to be a member. The function of these bodies is to ensure that only those with the proper degree of competence, and who are of 'good fame and character', are admitted. In some jurisdictions an additional expression is used, namely, that the applicant must be 'fit and proper'. These terms are very general, and have been interpreted in a number of court decisions.

3.2 The actual act of admission is done by the Supreme Court, which may admit any person who meets the requirements of the admission rules, pays the admission fee, and takes the oath or makes an affirmation required by the court. The applicant then signs the roll of practitioners. Depending on the particular jurisdiction, the applicant signs as a barrister and solicitor, as a barrister, as a solicitor, or as a legal practitioner; and in all

jurisdictions the practitioner becomes an officer of the court.

3.3 In this chapter we look briefly at the educational requirements for admission,[1] as well as at the development of a national legal profession under mutual recognition legislation, and a travelling certificate under a national legal profession scheme.[2] Thereafter we deal with the issues concerning the question of what constitutes 'good fame and character'.[3] By the end of this chapter, you should be in a position to decide what educational and character criteria should be met in order for someone to be allowed to practice law.

EDUCATIONAL AND PRACTICAL TRAINING REQUIREMENTS

3.4 Applicants have various means open to them for meeting the educational requirements for admission to legal practice. One method is to obtain a law degree or to complete at least three years' of legal study recognised in an Australian jurisdiction as being sufficient for admission. In New South Wales, the Legal Profession Uniform Admission Rules[4] state

that an applicant must demonstrate understanding and competence in the following areas of knowledge:

- criminal law and procedure;
- torts;
- contracts;

- property, both real (including Torrens system land) and personal;
- equity;
- company law;
- administrative law;
- federal and state constitutional law;
- civil procedure;
- evidence; and
- ethics and professional responsibility.

Would you require any other area of study, or delete any of the areas listed above?

3.5 An additional requirement in all jurisdictions is practical training. This usually means one to two years' experience working in private or public legal practice after completing a practical legal training program.

3.6 Many practical training courses have been established. The first two were by the College of Law in New South Wales and the Leo Cussen Institute in Victoria. The College of Law has been so successful in New South Wales that it now runs practical training programs in Victoria, Queensland, and Western Australia. In New South Wales, students can attend other programs to meet the practical training requirement. These programs are conducted at the University of Newcastle, the Australian National University, the University of Wollongong, Bond University, and the University of Technology, Sydney. In Queensland, Victoria, South Australia, and the Northern Territory, as an alternative to attending a practical training course, students can do at least one year of articles. In Western Australia, besides the one year of articles, students need to complete the Articles Training Program.

3.7 For New South Wales, the following extract from Schedule 2

of the Legal Profession Uniform Admission Rules 2015[5] sets out the objectives of the required practical training:

Practical legal training competencies for entry-level lawyers

Part 1 — Preliminary

1. Objective

The objective of this Schedule is—

(a) to incorporate; and

(b) to adapt, as far as is practicable and convenient for the purpose of these Rules, the form of,

the PLT *Competency Standards for Entry-level Lawyers* published by the Law Admissions Consultative Committee, which came into effect on 1 January 2015.

[page 77]

…

Part 2 — Requirements for applicants for admission

3. Required competencies

(1) Every applicant is required to satisfy the Board that the applicant has achieved the prescribed competence in the Skills, Compulsory and Optional Practice Areas and Values set out in Part 4 and summarised as follows—

Skills

Lawyer's Skills
Problem Solving
Work Management and Business Skills
Trust and Office Accounting

Compulsory Practice Areas
Civil Litigation Practice

Commercial and Corporate Practice
Property Law Practice

Optional Practice Areas

Subject to subclause (2), any two of—

Administrative Law Practice
Banking and Finance
Criminal Law Practice
Consumer Law Practice
Employment and Industrial Relations Practice
Family Law Practice
Planning and Environmental Law Practice
Wills and Estates Practice

Values

Ethics and Professional Responsibility

(2) Subclause (1) applies to every applicant who has undertaken PLT in Australia, whether by completing a PLT course, undertaking SLT [supervised legal training], or any combination thereof approved by the Board.

…

Part 3 — Requirements for each form of PLT

5. Programmed training and workplace experience

PLT must comprise both programmed training and workplace experience as follows—

(a) subject to paragraph (d), in the case of a graduate diploma—

(i) programmed training appropriate to a diploma that is equivalent to at least a Level 8 qualification under the Australian Qualifications Framework; and

(ii) the equivalent of at least 15 days' workplace experience;

(b) subject to paragraph (d), in the case of a training course other than a graduate diploma, the equivalent of at least 900 hours' duration, comprising—
  (i) at least 450 hours of programmed training; and
  (ii) at least 15 days' workplace experience;
(c) in the case of SLT the equivalent of at least 12 months' full-time work which includes a minimum of at least 90 hours' programmed training.
(d) For the purposes of paragraphs (a) and (b), one day comprises 7 working hours.

…

7. Level of training

(1) PLT must be provided at a level equivalent to post-graduate training and build on the academic knowledge, skills and values about the law, the legal system and legal practice which a graduate of a first tertiary qualification in law should have acquired in the course of that qualification.
(2) The level referred to in subclause (1) is a level appropriate for at least a Level 8 Qualification under the Australian Qualifications Framework.

[The schedule then sets out qualification of instructors and supervisors]

…

9. Assessment of applicants

(1) Each form of PLT must employ comprehensive methods, appropriate to post-graduate training, of—
  (a) assessing an applicant's competence; and
  (b) certifying whether or not an applicant has

demonstrated the requisite level of competence,

in each relevant Skill, Practice Area and Value.

(2) Wherever practicable, an applicant's competence in any Practice Area should be assessed in a way that allows the applicant, at the same time, to further develop and to demonstrate competence in, relevant Skills and Values.

10. Resilience and well-being

All PLT providers and SLT providers should—

(a) make applicants aware of the importance of personal resilience in dealing with the demands of legal practice;

(b) provide applicants with appropriate access to resources that will help them develop such resilience;

(c) provide applicants with information about how and where to seek help in identifying mental health difficulties and in dealing with their effects;

(d) make applicants aware of the benefits of developing and maintaining personal well-being in their professional and personal lives; and

(e) provide applicants with information about how and where to find resources to help them develop and maintain such well-being.

[The schedule then provides in detail the competency standard for each area of practice.]

[page 79]

3.8 Is it necessary for the admission requirements to be so detailed? How are instructors competent to deal with issues of 'resilience and well-being'?

3.9 Students undergoing the College of Law training program in New South Wales have a choice of 47 different courses to meet the

requirements — some are part-time and a number are online courses.

MUTUAL RECOGNITION

3.10 The following extract from the Attorney-General's *Working Party Report* on the legal profession in Victoria[6] gives the following description of mutual recognition developments in Australia:

> 12.2.1 Australia's mutual recognition scheme derives from an intergovernmental agreement executed by the Commonwealth, State and Territory Heads of Government in May 1992. The purpose of the scheme is to promote the freedom of movement of goods and service providers in a national market by recognising in each State and Territory the regulatory standards adopted elsewhere in Australia for the sale of goods and registration of occupations. Under the scheme, the Commonwealth passed the Mutual Recognition Act 1992 and each State has either adopted the Act under s 51(37) of the Commonwealth Constitution (see, for example, Mutual Recognition — Victoria Act 1993, s 4 [now in the 1998 Act]) or has referred power to the Commonwealth to the extent necessary to apply the MRA to that State.
>
> 12.2.2 In relation to occupations, the mutual recognition principle is that a person who is registered in one State or Territory (a jurisdiction) for an occupation is entitled, after notifying the local registration authority of another jurisdiction, for the equivalent occupation to be registered in that other State for the equivalent occupation and, pending such registration, to carry on the equivalent occupation in the other jurisdiction. The mutual recognition principle does not affect the operation of laws that regulate the carrying on of an occupation in the second jurisdiction, provided that those laws apply equally to all persons wishing to carry on the occupation in the second jurisdiction and are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the

occupation (MRA, s 17).

12.2.3 … A local registration authority is entitled to refuse registration of an interstate applicant only if the documents required to be submitted by the applicant are false or misleading or if the occupation in which registration is sought is not an equivalent occupation and cannot be made so by the imposition of conditions (s 21).

12.2.4 For legal practitioners, this principle applies both to the requirement of admission by a court and to the requirement to obtain a practising certificate (s 18(3)). A practitioner entitled to practise in one jurisdiction is therefore entitled to practise in another jurisdiction upon giving the required notice. It is not necessary for a practitioner applying for registration

in another State to comply with any formalities related to registration requiring personal attendance (s 41). The practitioner must however pay the necessary fees in the second jurisdiction and comply with laws in that jurisdiction regarding professional indemnity insurance, fidelity arrangements and trust accounts. …

3.11 All jurisdictions enacted a Mutual Recognition Act by 1995, based on the Mutual Recognition Act 1992 (Cth).

3.12 The Law Council of Australia approved and adopted Uniform Admission Rules in 1994 that were drafted by the Priestley Committee. These rules were part of the Law Council's report published in July 1994, titled *Blueprint for the Structure of the Legal Profession: A National Market for Legal Services*. As of March 2016, all jurisdictions had enacted uniform admission legislative provisions.

3.13 The Legal Profession Uniform Law 2015 in New South

Wales and Victoria has provisions similar to other jurisdictions that enable a national travelling certificate, allowing admission to any other jurisdiction in Australia. The provisions include:

- Under the definitions in s 6 of the Uniform Law:
  'Australian legal practitioner' means an Australian lawyer who holds a current Australian practising certificate;
  'Australian practising certificate' means—
  (a) a practising certificate granted to an Australian lawyer under Part 3.3 of this Law as applied in a participating jurisdiction; or
  (b) a practising certificate granted to an Australian lawyer under a law of a non-participating jurisdiction entitling the lawyer to engage in legal practice; …
- According to s 42 of Pt 3.3 'Australian Legal Practitioners', the objectives of the Part are:
  (a) to provide a system for the grant and renewal of Australian practising certificates in this jurisdiction to eligible and suitable persons who are already admitted to the Australian legal profession in any jurisdiction; and
  (b) to facilitate the national practice of law by ensuring that the holders of Australian practising certificates can engage in legal practice in this jurisdiction regardless of their home jurisdiction. …
- Section 43 'Entitlement to practice' states:
  (1) An Australian legal practitioner is entitled to engage in legal practice in this jurisdiction.
  (2) That entitlement is subject to any requirements of this Law, the Uniform Rules and the conditions of the practitioner's Australian practising certificate.

3.14 In the Australian Capital Territory case of *Re an Application to be Admitted as a Legal Practitioner* [1999] ACTSC 4, the Supreme Court waived the requirement for practical training under the Uniform Admission Rules because the applicant showed

qualifications at least equal to those prescribed in the training course.

3.15 In *Re Tkacz* [2006] WASC 315, the Court applied the Mutual Recognition Act 2001 (WA), but still examined the application in detail, finding that reciprocal admission is

not automatic. The Court allowed the admission for an applicant who had been admitted in New South Wales, even though he had a conviction for corruption while being a public officer. Tkacz had given the complete details of the crime to the admission authorities. The Admissions and Registrations Committee of the Legal Practice Board (WA) was given advice by counsel that they had to admit Tkacz under the Mutual Recognition Act. The Chairman of the Board issued a certificate that Tkacz had complied with the provisions of the Mutual Recognition Act. The Supreme Court approved the admission, but maintained the inherent jurisdiction of the court over admissions to scrutinise any application.

3.16 The Full Court of the Western Australian Supreme Court in *Re Sales; Ex parte Sales* [2007] WASC 115, granted admission to an applicant, who had been admitted in Queensland, but who was under investigation in that state and had not renewed his practising certificate in that state. Martin CJ noted at [1]–[14]:

> [1] This is an application for admission as a practitioner which previously came before the Full Bench of this Court differently constituted on 27 March of this year. The applicant is admitted as a practitioner in Queensland. On 27 March, the Court had before it two letters from Mr John Briton, the Legal Services Commissioner of

Queensland, both dated 19 December 2006. The first was a letter to the Legal Practice Board of Western Australia in which Mr Briton advised the Board that the Legal Services Commission of Queensland ('the Commission'), had determined that the evidence obtained during an investigation into the professional conduct of the applicant was sufficient to establish either unsatisfactory professional conduct or professional misconduct. Attached to this letter was a copy of a letter which the Commission had written to Mr Sales.

[2] The letter to the Legal Practice Board of Western Australia went on to observe that the Commission had determined that there was no public interest in commencing disciplinary proceedings on the basis that Mr Sales was no longer practising in the State of Queensland.

[3] The second letter from Mr Briton was a letter to Mr Sales. This letter was also before the Court on 27 March. In the course of that letter, the Commission advised Mr Sales that the evidence obtained during the investigation of a complaint against him was sufficient to establish either unsatisfactory professional conduct or professional misconduct with four detailed sets of particulars of the circumstances giving rise to that conclusion. The letter also observed, however:

> '[D]ue to the fact that you are no longer practising as a solicitor in Queensland it is not in the public interest to proceed with the disciplinary action and to commence the prosecutor process. It is for this reason alone that the Commission is not processing this action.'

[4] It is clear from subsequent correspondence from Mr Briton that those two letters were quite misleading. In a letter dated 10 April 2007 from Mr Briton to the Chairman of the Legal Practice Board of Western Australia, Mr Briton particularised the complaints that were investigated by the Commission and they were three in number.

[5] In the most recent letter, Mr Briton referred to the Queensland legislation applicable to an application to the relevant disciplinary body by the Commission. That legislation required the Commission to be satisfied that the evidence arising from the investigations, that had been conducted, established that there was a reasonable likelihood of a finding by the disciplinary body of unsatisfactory professional conduct or professional misconduct, which Mr Briton described as 'the reasonable likelihood test'; and secondly, that it was in the public interest to make a discipline application, which Mr Briton described as 'the public interest test'.

[6] In relation to the three matters that were investigated, in the most recent letter from Mr Briton he advised that the Commission had come to the conclusion that in relation to two out of three of those matters, there was insufficient evidence to support a finding that there was a reasonable likelihood that a disciplinary body would find the respondent guilty of unsatisfactory professional conduct or professional misconduct. So in respect of those two matters, the Commission found that the reasonable likelihood test was not satisfied.

[7] The third matter related to an allegation that Mr Sales had paid $2450, belonging to the complainant, into the bank account of Mr Sales' wife rather than into the trust account of the legal firm by which Mr Sales was employed at the relevant time. Mr Briton advised that having considered all of the relevant evidence obtained during the course of the investigation, he was satisfied that the evidence obtained was sufficient to satisfy the reasonable likelihood test.

[8] I digress to emphasise that because the matter never proceeded further, Mr Sales has been given no opportunity to answer that allegation or those propositions and that opportunity would of course be required by ordinary principles of procedural fairness.

[9] In Mr Briton's most recent letter, he advised that the public interest discretion was only exercised by him in respect of the third allegation investigated because of course, as he most recently advised, in respect of the two other allegations, the reasonable likelihood test

was not satisfied.

[10] In relation to the application of the public interest test to the third matter; being, the matter in which he considered there was an arguable case, Mr Briton advised in his most recent letter that he took into account a number of factors in exercising the public interest discretion, including first, the fact that the respondent had no previous adverse findings by a disciplinary body; second, that the allegation is not one involving dishonesty or misappropriation; third, that there was no aspect of the allegation which goes to unfitness to practice; fourth, that the likely outcome of any proceedings in the event of a finding of guilt would, in the circumstances and in his view, most likely result only in a finding of unsatisfactory professional conduct, a reprimand and a small financial penalty; and finally, he took into account the fact that Mr Sales was no longer residing or practising in Queensland.

[11] It is important that I reiterate that no adverse finding has been made against Mr Sales. Mr Sales has not been given the opportunity to put forward his case which procedural fairness would have required in relation to any such finding. That opportunity will not arise under the current circumstances because of Mr Briton's view that it was not in the

public interest for him to pursue that matter for the various reasons which he had now more fully enunciated.

[12] Mr Sales is therefore entitled to have his application for admission to this Court dealt with on the basis that no inference adverse to him whatsoever should be drawn from the circumstances of the complaint made in Queensland. In those circumstances, there is no basis for any exercise of the inherent jurisdiction to refuse Mr Sales' admission.

> [13] It is obviously most regrettable that the admission of Mr Sales should have been delayed because of the unsatisfactory and misleading terms of the correspondence originally emanating from Mr Briton.
>
> [14] In my opinion, for these reasons, Mr Sales should be admitted and in due course we will call on Mr Sales to tell us whether he would like us to admit him on the papers or to include him in the next admission ceremony in early June. …

3.17 The Law Council of Australia has sought to achieve mutual recognition with other countries. For example, American lawyers can obtain 90-day visas to give legal advice in Australia on United States law. Furthermore, they are permitted to join local firms, as long as they do not give Australian legal advice. Since American States vary in their admission policies, the Law Council has concentrated its efforts to obtain rights for Australian practitioners in California and New York. Australian law degrees are now recognised in California, but it is still necessary to pass the Californian bar exam in order to be admitted. In New York, Australian lawyers can only sit the bar exam after completing a one year masters' degree.[7]

'GOOD FAME AND CHARACTER'

3.18 The following problem highlights some of the possible types of character defects that may prevent an applicant from being admitted: Tom Smith is a police detective, who has just completed six years of part-time law studies. He is presently completing his practical training course and wants to apply for admission as a legal practitioner. He has consulted you for legal advice about what he should include in his application for admission, and wants to know whether he may not be admitted. He tells you the following story

about his life:

> 'I have been an effective police officer for more than 18 years. During that time, because of my excellent police work, I have been promoted several times to my present position of a detective in the drug squad. I have been quite controversial during my career. I was twice investigated concerning using too much physical force during drug busts; I was only protecting myself and both internal investigations led to my being exonerated. I have had several fights in pubs when under the influence of alcohol and not in uniform, but have never been charged for these altercations. Seven years ago, just before I commenced my legal studies, I was demoted one rank after an internal inquiry which found me guilty of attempted fabrication of evidence during a drugs investigation. Since that time, I have not only been restored to my former position, but have also been promoted. While I was a law student, I wrote an article for the *Police Journal* on the ethics of police work, which caused

> considerable debate. In the article I argued that police are above the rule of law — they are of necessity above the courts and the lawyers, because their task is to protect society from the real criminals.
>
> 'In the last two years, I have appeared several times before a Royal Commission on Police Corruption concerning alleged involvement in drug dealing. To my knowledge no charges appear to be forthcoming, but I am still under investigation. I did nothing wrong, and I have cooperated with the Commission and even gave evidence of drug dealing by other officers. I have been drinking more frequently because of this investigation, and once received a drunken driving conviction, which resulted in a fine. I have been seeing a psychologist working for the Police Department once a week in order for me to be more effective in my work, and to deal with some of my domestic

problems with my wife and 14-year-old daughter.'

What additional information might you need from Tom? Do you need to investigate his story in more detail and, if so, would you need his consent? Do you think Tom should be admitted to practise based on the above information?

3.19 Matthew Hale was a white supremacist who once burned an Israeli flag and is the leader of the East Peoria World Church of the Creator. Hale graduated from law school and then passed the bar exam, but the Illinois Bar Association's hearing panel refused to grant him a licence to practise law. The panel, by a 2:1 vote, said Hale is '… free … to incite as much racial hatred as he desires and to attempt to carry out his life's mission of depriving those he dislikes of their legal rights but in our view he cannot do this as an officer of the court'. Hale believed in spreading the creed of Creativity, a racial religion for the survival, advancement, and expansion of the white race. He argued that the denial of his licence was a free-speech issue. In offering to represent Hale on the matter, Harvard Jewish Law Professor, Alan Dershowitz,[8] said:

> Character committees should not become thought police. It's not the content of the thoughts I'm defending; it's the freedom of everybody to express their views and to become lawyers. Although I find his views utterly reprehensible and despicable, I don't believe anybody should be denied admission to the bar on the basis of their views.

3.20 In the following extract from the case *Re Matthew F Hale* 723 NE 2d 206 206 (1999 Ill), the Supreme Court of Illinois discusses Hale's appeal. Heiple J dissented from the Order of the court of 12 November 1999, denying Hale's petition requesting a full review and oral hearing by the Illinois Supreme Court of the findings and conclusions of the Character and Fitness Committee denying him admission:

Petitioner Matthew F Hale applied for admission to practice law in Illinois. The Committee on Character and Fitness concluded that his application should be denied. Petitioner now asks this court to review the Committee's decision. Thus, the question before the court at this juncture is not whether petitioner should be licensed to practice law. The question, rather, is whether the Supreme Court should consider his appeal. Because the petition raises

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questions of constitutional significance that should be resolved openly by this court, I dissent from the majority's refusal to hear this case.

The crux of the Committee's decision to deny petitioner's application to practice law is petitioner's open advocacy of racially obnoxious beliefs. The Hearing Panel found that petitioner's 'publicly displayed views are diametrically opposed to the letter and spirit' of the Rules of Professional Conduct. The Inquiry Panel found that, in regulating the conduct of attorneys, certain 'fundamental truths' of equality and nondiscrimination 'must be preferred over the values found in the First Amendment'. Petitioner contends that the Committee's use of his expressed views to justify the denial of his admission to the bar violates his constitutional rights to free speech. That constitutional question deserves explicit, reasoned resolution by this court. Instead, the court silently accepts the conclusion of the Committee, which asserted that 'This case is not about Mr Hale's First Amendment rights.' To the contrary, this case clearly impacts both the first amendment to the federal Constitution and article I, section 4, of the Illinois Constitution.

In addition, the Committee's ruling on petitioner's application presents a second important issue which this court should address. The Committee seems to hold that it may deny petitioner's application for admission to the bar without finding that petitioner has engaged in any specific conduct that would have violated a

> disciplinary rule if petitioner were already a lawyer. The Committee merely speculates that petitioner is on a collision course with the Rules of Professional Conduct and that, if admitted, he will in the future 'find himself before the Attorney Registration and Disciplinary Commission'. I believe this court should address whether it is appropriate for the Committee to base its assessment of an applicant's character and fitness on speculative predictions of future actionable misconduct.
>
> The question also arises: If all of petitioner's statements identified by the Committee had been made after obtaining a license to practice law, would he then be subject to disbarment? That is to say, is there one standard for admission to practice and a different standard for continuing to practice? And, if the standard is the same, can already-licensed lawyers be disbarred for obnoxious speech?
>
> The Illinois Supreme Court is the licensing authority for all Illinois lawyers. Its rules cover all aspects of admission to the bar and professional conduct thereafter. It has the power to license, regulate, and to disbar. The issues presented by Mr Hale's petition are of such significant constitutional magnitude that they deserve a judicial review and determination by this court.
>
> For the reasons given, I respectfully dissent from the denial of the petition for review.

The US Supreme Court also refused to hear the case.

3.21 Do you think someone with similar views to Hale would be admitted in Australia?

3.22 There have been several important cases concerning lack of candour, dishonesty, criminal convictions, and political activity. *Re Davis* (1947) 75 CLR 409[9] and *Ex parte Lenehan*

(1948) 77 CLR 403,[10] which occurred within a year of each other and were decided over 60 years ago, are briefly discussed later in this section. These cases deal with the problem of deeds that took place many years before the application for admission. The below extracts focus on two more recent cases, namely, *Re B*[11] and *Wentworth*,[12] which are concerned with problems of being outspoken and lying respectively.

3.23 In *Re B* [1981] 2 NSWLR 372 (New South Wales Court of Appeal), Wendy Bacon, a well-known activist and journalist, applied for admission to the bar. With her application, she submitted a number of very favourable references from well-regarded members of the public and the profession. She also included in her application all information concerning former arrests and convictions for her political activities. The objections to her admission by the Prothonotary and the Bar Association were based on her political and social activism. The main reason for her admission being refused by the court related to her action in standing bail for a prisoner (SS). Bacon claimed that the bail moneys were obtained by way of a loan from a close friend of both SS and Bacon, VA, who had recently inherited the money. The court found that a third friend and barrister, L, had conveyed the funds from SS's Melbourne sources to Sydney, in order to be used for SS's bail application. Bacon did not call any of the relevant parties — SS, VA, or L — as witnesses to support her claim.

3.24 In the following extracts at 380–1 and 394–5, Moffitt P first discusses her activism, and then the bail matter:

> … If a person meets the requisite learning standards and is of good fame and character so he meets the requirement that he be a fit and proper person to be admitted to practise as a barrister, it hardly need be said that there is no other discretionary bar to admission, whether

on the basis of race, colour, religion, sex, political outlook or otherwise. The judicial system and the right to participate in it is an essential part of our democratic institutions. …

It follows from the foregoing and, having regard to the background of this case, that it can and should be stated that in itself being a radical in a political sense or being what might be regarded by some as an extremist in views on sex, religion or philosophy provides no bar to admission as a barrister, unless of course, the attitude of the prospective or practising barrister can be seen to render him not a fit and proper person because his character, reputation or likely conduct fall short of the standards expected of a practising barrister. It is an open institution subject only to the requirements of being a fit and proper person. The court has the responsibility to pass judgment on what standards must be met for a person to be adjudged fit and proper, but it does so in the context of democratic institutions and a long history here and elsewhere of the exercise of the power and judicial pronouncements of the question of fitness.

The other matter which should be emphasised is that the question in any case is whether the applicant for admission is a fit and proper person at the time of admission. A person can only be judged by what he has done and what he has professed in the past and, properly judged, what he claims of himself when he makes an application for admission. Some matters in the past may

be so incompatible with being a barrister, not only then, but also later when the application for admission is made, that the court will not be persuaded that the applicant is a person fit and proper for admission, despite claims made by or about him to the contrary. Character does not change readily and an applicant for admission or readmission may have some difficulty in persuading a court that his past character or a past outlook manifested by conduct or the profession of ideas

which were incompatible with being a barrister, have changed.

Some matters in the past may more easily be set to one side, in particular the conduct of young persons, being conduct not seen in human experience as determinative or necessarily so of ordinary character or future attitudes or conduct. What a student may do as a student particularly of a student activist type in the exuberance of development and the exploitation of new freedoms opened to his developing mind, might call for some scrutiny of a claim to present fitness, but could and mostly will provide little sound guide to his fitness to be a barrister, when he undertakes the actual responsibility of being such and has ceased to be a student. Many of the great have been radical in their youth and seen by others to be such. The Bar and other democratic institutions would be the less, if such people had been or are excluded on some narrow minded, authoritarian or punitive basis.

Despite what I have said, a very real question may arise as to present fitness in some cases where the particular past conduct and attitudes beyond youth and towards maturity constitute a sustained course of conduct which would have been quite incompatible with their being a barrister. The present is such a case where such a real question arises. The past conduct commenced when the plaintiff was 24 and a graduate and has extended over some eight years. …

…

I [also] conclude that clearly the plaintiff has not told this court the truth, as she knows it, of important and critical aspects of the bail matter. Not only am I unpersuaded to accept her evidence. … I am convinced that there was no genuine loan to her … that she was not the owner of that money and that she conspired with others to pay over the money of others representing that it was hers in order to have SS released from jail on bail well knowing, as she conceded, that such a payment would at least be improper. Her evidence as to her lack of knowledge as to the origin of the money at the time she put up the bail money was untrue. …

In her dealings with other people, the plaintiff has presented herself as apparently straightforward and truthful. I would think that her writings confirm this in that she says explicitly what she thinks. No doubt her writings and past conduct is a source for her reputation for intellectual honesty and frankness. This is quite different to being honest to those in authority, if it will stand in the way of a desired end considered a worthy cause. The end now is to be admitted to the Bar. The purpose is to enable her in some way to pursue worthy causes having the status of a barrister or maybe practising as one. … She was prepared to be untruthful and to mislead the court in pursuit of the desired end, namely to be a barrister so as to be better able to pursue some of the causes which she espoused. That a person can be trusted to tell the truth and regardless of the ends not participate in a breach of the law is fundamental to being a barrister. … The bail matter and her evidence in respect of it establish she is not fit to be a barrister.

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3.25 Reynolds JA noted as follows at 397–8:

[Bacon] is at present aged 35 years and a consideration of the material disclosed by her, as amplified by cross-examination, satisfies me that at an earlier stage in her career her attitude to the law was such that it could not properly be said that she was a fit and proper person to take her place at the Bar of New South Wales. Indeed, it was not argued to the contrary but it was submitted that with maturity and a greater awareness of her responsibility that phase of her life has closed and she is now a fit and proper person.

By the year 1970 the applicant was aged 24, held a degree from Melbourne University and was engaged in post-graduate studies at the University of New South Wales. From that time until quite recently she has been involved in activities which may be described as political activism, protesting and campaigning in respect of numerous diverse

causes to the extent that on many occasions she has been found to be guilty of infractions of the law and on many other occasions of conduct which warranted her arrest, but which was not thereafter shown to amount to an offence.

The range of causes to which she has lent her vigorous patronage is wide indeed. They include the repeal of laws concerning the restriction of the publication of pornography and the infliction of penalties therefore, the preservation of existing types of residential accommodation in the area of The Rocks, Woolloomooloo, and Victoria Street, Kings Cross, the dismissal of the Whitlam Government, the export of nuclear material, the complaint by a prisoner named Raymond Denning that he had been assaulted while in jail, the conviction and sentence of Violet and Bruce Roberts for murder, a football tour by a South African team, the continued incarceration of Sandra Wilson, the allegations giving rise to the 'Beach' inquiry in Victoria, prison reform generally and especially in relation to the plight of female prisoners, the treatment of a well-known criminal Darcy Dugan and the closure of Katingal Maximum Security Unit at the Long Bay penitentiary. She is an active member and was concerned in the formation of two groups known respectively as the Prisoners Action Group and Women Behind Bars.

Since 1970 she has been convicted of ten offences. Thirteen other charges have resulted, either at the original hearing or on appeal, in the charge being dismissed. In four other cases, following arrest, the matter was not proceeded with. The most recent offence was one of trespass committed on 4 July 1977.

This history shows her to have been what might be described as a professional protester who devoted her energies over a period of six or seven years, between the ages of approximately 24 to 31, in activities where she was unconcerned as to whether what she was doing was in breach of the law. In 1972 she published a writing in which she expressly declared her contempt for the law. This article teems with statements which evince a defiance of law, the courts and authority generally and it is undoubted that it was the terms of this document

which constrained her counsel to concede that at an earlier time she was unfit to be a barrister.

In 1977 she, having had considerable experience in the courts both appearing for herself and listening to the conduct of the many prosecutions in which she was involved, decided that

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she would embark on a law course and she enrolled in a graduate law course at the University of New South Wales. She said:

> 'Although at that stage I did not intend to practise law, I had come to feel that I would be able to play a more effective part in improving the conditions of women and prisoners if I extended my knowledge of the law and the workings of the criminal justice system.'

During the course of her [legal] studies she was further engaged in campaigns and was convicted on one occasion for refusing to leave the premises of the Public Service Association when requested in relation to some protest concerning the prisoner Raymond Denning. She says:

> 'It was not until the latter stages of my law course, that I made a decision to apply to be admitted to practise as a lawyer. This decision came about as a result of my greater understanding of the law and of the legal system. I came to a deeper appreciation than I had previously had of the ways in which I could pursue the interests of disadvantaged clients and my own ideas for change through the legal system.'

3.26 Reynolds JA then discussed in detail the circumstances surrounding B's depositing of bail moneys. The judge examined her

explanation concerning the deposit of these moneys, and concluded she falsely pretended 'that they were her moneys and knowing the true course thereof '. He said at 402:

> Having so concluded, can it be said that the applicant has shown herself to be a fit and proper person to be admitted to the Bar? I do not think so. … It is not a question of any differences of view as to her political ideology or indeed a dislike of the vigour with which she has pursued the many causes she has espoused. It is rather a question of whether a person who aspires to serve the law can be said to be fit to do so when it is demonstrated that in the zealous pursuit of political goals she will break the law if she regards it as impeding the success of her cause. That she has done many times in the past, though it may be said that in those cases dishonesty was not involved.

Helsham JA also came to the conclusion that B was dishonest concerning the bail incident.

3.27 In *Wentworth v New South Wales Bar Association* (SC(NSW), Full Court, 14 February 1994, unreported), Wentworth's application for admission was opposed by the Bar Association. Campbell J, in the lower court, found that she was not of good character. The judge also found that she lacked an understanding of what the proper conduct was in relation to the making of applications constituting abuses of the process of the court, and that that situation was unlikely to change. McLelland, Carruthers, and Studdert JJA held as follows:

> … The most material legislative provisions are s 4 and s 9 of the Legal Profession Act 1987, which are in the following terms:
>
> > '4(1) The Supreme Court may admit persons as barristers, whether or not as provided by subs (2).

> '(2) The Supreme Court shall, on any day appointed by the Supreme Court for the purpose, hear and determine any application made on that day for the admission as a barrister of a person approved by the Barristers Admission Board as a suitable candidate for admission. …
>
> '9 A candidate, however qualified in other respects, shall not be admitted as a barrister unless the Supreme Court is satisfied that the candidate is of good fame and character.'

The use of the word 'may' in s 4(1) indicates that the power thereby conferred may be exercised or not by the Court at its discretion (Interpretation Act 1987 s 9). Such a discretion is not of course unlimited: its limits are those indicated by the nature of the purpose for which the discretion is conferred.

A principal purpose for which the discretion in s 4(1) is conferred is to enable the Court to ensure, as far as possible, that the public, and in the public interest other legal practitioners and the Courts, are protected from the activities as barristers of those likely to act in a manner inconsistent with the standards of professional conduct required of barristers. The likelihood that a person will act in such a manner does not necessarily mean that such person is not 'of good fame and character'. Therefore, in exercising its discretion under s 4(1), the Court is not limited to the questions whether the applicant has sufficient educational qualifications and whether she is of good fame and character. The limits of the discretion extend to embrace a consideration of any likely acts of the applicant as a barrister inconsistent with proper standards of professional conduct and are aptly indicated by the question whether the applicant is 'suitable … for admission', an expression which occurs in s 4(2). Subs (1) and subs (2) of s 4 provide two alternative routes to admission by the Court. The route provided by subs (2) requires approval by the Barristers Admission Board of the applicant as a 'suitable candidate for admission'. In these circumstances it would be anomalous if the Court, in an application under subs (1), could not consider whether the applicant was 'suitable … for admission'. This view corresponds

with that expressed by the High Court in an interlocutory appeal in these proceedings (*Wentworth v NSW Bar Association* (1992) 176 CLR 239). The majority of the Court said (at 251):

> '… the right to practise in the Courts is such that, on an application for admission, the Court concerned must ensure, so far as possible, that the public is protected from those who are not properly qualified and, to use the language of s 4(2) of the Act, from those who are not "suitable … for admission".'

It is relevant to note that in *Wentworth v NSW Bar Association* [(1992)] 176 CLR 239, the majority of the High Court (at 254) assimilated the position under the Legal Profession Act 1987 with that pertaining before that Act:

> 'The terminology of the criterion for admission may have changed, so that the precise question, in terms of s 4(2), is whether the person is 'suitable … for admission', rather than whether he or she is a 'fit and proper person' as was previously required by the Charter. But that is a mere change in terminology which cannot affect the nature of the Court's duty to have regard, in admission proceedings, to the protection of

> the public. And it clearly appears from s 4(2) that no change in the nature of the Court's duty was intended, for, by that subsection, the Supreme Court must 'hear and determine' an application for admission, even though the person concerned has been approved as a suitable candidate by the Board. Thus the change of terminology affects neither the nature of the issues to be determined nor, as was argued, the

nature of admission proceedings.'

It is clear from the remaining part of that judgment (particularly at 255) that the High Court regarded the question whether the appellant was 'suitable … for admission' as a matter for determination by the Supreme Court on the hearing of her application. We do not consider that these expressions of view by the High Court were either obiter dicta or per incuriam, as submitted for the appellant. We therefore agree with the view expressed by Campbell J 'that to succeed in this application the plaintiff must establish that she is a person "suitable … for admission" and that this requirement, except in terminology, is the same as the earlier requirement that [an applicant] establish that she is a "fit and proper person" to be admitted to the Bar'.

Although the power conferred on the Court by s 4(1) is, in the sense described above, a discretionary power … this Court should not depart from findings of primary fact made by Campbell J to the extent that such findings depend upon an assessment of the demeanour or credibility of the appellant or other witnesses who gave oral evidence, unless it can be shown that Campbell J 'has failed to use or has palpably misused his advantage' of having seen those witnesses, for example by his findings being inconsistent with admitted or proved facts or 'glaringly improbable' (see *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 178; and *Dawson v Westpac Banking Corporation* (1991) 66 ALJR 94 at 99, and cases there cited).

Campbell J, citing passages in *Ex parte Evatt* (Court of Appeal, 12 April 1972, unreported) and *Ex parte Davis* 50 SR 158, said that the opposition of the Bar Association to the admission of the appellant is a 'weighty matter' to be considered on her application. His Honour also said that he had expressed his conclusion on the application without taking into account as a specific consideration the formal opposition of the Bar Association, but that such opposition strengthened and confirmed that conclusion.

There will no doubt be cases in which the fact of opposition by the Bar Association to an application for admission as a barrister should

properly be treated by a Court hearing the application as having some probative value on the question of suitability for admission, and in such cases the weight to be given to the Act of such opposition is likely to vary with the particular circumstances. In the present case, the evidence indicates that opposition by the Bar Association to the appellant's application for admission was definitively resolved upon at a meeting of the Bar Council on 25 June 1991.

That meeting had before it a written opinion by senior and junior counsel retained by the Bar Association. During the hearing before Campbell J counsel for the appellant called for the production of that opinion. The Bar Association resisted production on the ground of a claim for legal professional privilege. Counsel for the appellant then conceded that Campbell J had no alternative but to uphold that claim, and his Honour did so.

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Accordingly, the opinion was not available to the appellant or to the Court. Consequently, a significant means of examining the nature and soundness of the reasons for the resolution of the Bar Council authorising opposition to the application, and therefore the evidentiary weight to be attributed to that opposition, namely the opinion, has been withheld from forensic consideration. The claim for privilege having been made and upheld, the fact of the Bar Association's opposition could not in our view thereafter have been properly treated as having probative value on the question of the appellant's suitability for admission. We note, as already indicated, that Campbell J's relevant conclusions were not dependent upon taking the Bar Association's opposition into account, and we do not propose to treat it as having any probative value in reaching our own conclusions.

3.28 The court then discussed some of the cases of unfounded

allegations and dealt with the most serious examples of unfounded allegations:

> It is convenient to consider first a document in the form of a statutory declaration by the appellant dated 9 June 1987 which was an annexure to, and comprised the principal part of, an affidavit of the appellant dated 16 June 1987 which she filed in the Court of Appeal in support of a notice of motion of that date in which she sought a variety of forms of relief against 19 separate respondents, included among whom were various lawyers, doctors, a police officer and numerous lay persons, all of whom had been in one way or another associated with the criminal proceedings, the common law proceedings or the further litigation. The appellant caused the affidavit including the annexed statutory declaration to be served on each of the 19 respondents. It thus had a wide initial circulation.
>
> The statutory declaration contained many allegations of serious misconduct by numerous judges, including those indicated below.
>
> In para 37 the appellant asserted that judge A 'badgered' the jury into coming to a decision, before he summed up, as even then the evidence that the rape and assault had occurred was fairly solid and the judge would have had to properly direct the jury to find the defendant guilty on the evidence, which he knew, and set out in a judgment on 22/11/85 when he refused the application of [the husband] for costs of the trial, on the basis of the evidence.
>
> In para 40 the appellant asserted that the jury acquitted the husband 'as a result of the collusion of [judge A] with [17 named individuals including the husband, the Crown prosecutor, the barrister who had appeared for the husband in the committal proceedings, senior and junior counsel and the solicitor for the husband in the criminal trial and several witnesses and potential witnesses], other crown officers, and others, in an attempt to pervert the course of justice'.
>
> In para 65, para 66 and para 67, the appellant asserted 'It is clear, from his decision, that [judge C] had given extensive regard to the no bill document which he should not have had access to, and scant regard to

the contents of the Statement of Claim and affidavit of particulars' and further asserted her belief 'that [judge C] was so influenced by the false propositions advanced in the no bill document, and by the press reports of the two trials, that he acted with a predetermination and bias which was unjudicial' and that 'these views were reinforced by his discussions with other lawyers and brother judges, especially [11 named individuals including senior counsel for the husband in the criminal trial, senior counsel for

the husband in the common law proceedings and nine judges] and other members of the Bar of NSW, the legal profession, and other judges'.

3.29 The court also gave a number of other examples of serious allegations made against judges, examined the allegations, and said they were ill-founded. The court concluded:

> The appellant had no reasonable basis for a belief that any discussions of an improper kind had occurred between any particular judge and any other judge or judges or legal representatives or any other person. The appellant relies heavily on the fact and terms of decisions given from time to time against her as providing material supportive of an inference, and in many instances the principal or only basis for an inference, of the corrupt behavior which she alleges against judges. Those decisions, whether there are errors in them or not, are incapable of giving rise to or supporting any such inference.
>
> What does appear is, as Campbell J observed, 'that if the point of view for which [the appellant] has contended does not succeed before a Court, she will frequently find an explanation in actual bias, prejudgment or other improper conduct on the part of the judicial officer involved. The possibility that her view might be incorrect or that the decision making body has simply been in error does not

appear to be acceptable to [the appellant]'.

The appellant has sought in her evidence, and through the submissions of her counsel, to justify the allegations she has made, with minor qualifications. We are of the opinion that nothing that has been suggested in evidence or argument provides any acceptable basis for belief by the appellant in the truth, or for the making and dissemination in the manner earlier referred to, of any of the allegations to which we have referred. The statutory declaration in the context in which it was deployed by the appellant is properly to be described as scandalous.

We turn next to consider the affidavit of the appellant of 7 May 1986 filed in the Court of Appeal in support of her summons of that date in which she sought to overturn the judgments in the common law proceedings on the basis that they were 'obtained by fraud, perjury and conspiracy to pervert the course of justice'. That affidavit was relied on by the appellant in the application to strike out her amended statement of claim heard by judge C on 5 June 1986 in which judgment was delivered on 19 June 1986.

In para 72 of that affidavit the appellant asserted that she 'has been gravely harmed by the verdict of the juries, being partly due to the demonstrated malice, bias and hostility exhibited by the judges.

> '(i) In the criminal trial [judge A] allowed Counsel for the defendant to act in a way contrary to all rules of the Court, … the Act and the Bar Association Rules, and in no way kept the conduct of the Court within the terms of the Evidence Act leading to a grave miscarriage of justice.'
>
> …
>
> '(vi) … The hostility and bias of the various witnesses and [judge B] and the improper conduct of proceedings, combined with the determined perjury of witnesses and the suborning of other potential witnesses and the rendering of falsely sworn affidavits only intended to libel [the appellant]

and contradicted by the defendant's material

> facts as pleaded (in particulars), and/or other evidence or statement of other witnesses demonstrate an organised attempt of various persons to pervert the course of justice by not allowing proper facts to go to a jury for determination and this attempt and/or conspiracy to pervert the course of justice has resulted in a grave miscarriage of justice.'

The allegation in relation to judge A is based, at least principally, on the cross examination of the appellant by senior counsel for the husband and, in particular, cross examination as to her credit in the course of which various denigratory suggestions were put to her and denied. The cross examination was vigorous and of a kind which would naturally give rise to strong feelings of resentment in the appellant. But grave allegations against the husband, which he denied, were being pursued at the trial, the credibility of the appellant was a critical matter, and the judge's role in the cross examination was extremely limited. The transcript of the criminal trial reveals no reasonable basis for the assertion of 'demonstrated malice, bias and hostility' (or any one of the three) on the part of judge A on the grounds specified, and having regard to the evidence of the appellant, we conclude that there was no such basis.

Para 72(vi) contains a strong implication that judge B was a party to a conspiracy with various other persons to pervert the course of justice in the conduct of the common law proceedings. That such a suggestion was intended by the appellant is evident from the course of argument before the Court of Appeal in the appeal from judge C's decision of 19 June 1986. With reference to the judgment of judge C the following exchange is recorded in the transcript of argument:

> 'Ms Wentworth: He goes to the essential allegations at 3 and 4 (reads 140 M-R) and I could not agree with him more, it is disreputable.'

[The passage identified as '140 M-R' read by the appellant from judge C's judgment was in the following terms:

> 'It can be seen that in essence that the plaintiff says that the verdict reached at the trial came about because the defendant instigated a conspiracy which involved not only a large number of witnesses, but also several lawyers and which involved at least one Judge, the Crown, the Police Department and a few doctors either not performing their duty or being involved in activities which to say the least would be disreputable.
>
> Kirby P: Do you agree with his description of what is the general nature and essence of your case?
>
> Ms Wentworth: Yes your Honour, I would indeed.']

After discussion concerning another passage from judge C's judgment read by the appellant, there is the following exchange:

> 'Kirby P: … It is one thing to say a Judge misdirected himself in giving a wrong direction as to the admission of evidence or in a charge to the jury, and you will be heard to advance that case in your appeal in the substance of the matter, but it is quite another thing and it would be as disreputable and as scandalous, to say that a

> Judge has been involved in some sort of conspiracy with a party to procure a verdict by fraud — that is a very serious

allegation.

Ms Wentworth: I realise that your Honour.

Kirby P: It ought only to be made supported by the strongest evidence.

Ms Wentworth: I have done that your Honour. …'

There was no basis on which the appellant could responsibly have made such a suggestion of conspiracy on the part of judge B.

We now turn to consider an affidavit of the appellant of 7 October 1986 filed in the Court of Appeal in support of her notice of motion of that date seeking to set aside the dismissal by judge F on 23 July 1986 of the contempt application against the barrister. In para 14 of that affidavit the appellant asserted her belief 'that the judgments and orders of [judge F] were predetermined and actuated by bias, and that he allowed [counsel for the barrister] to abuse the process of the Court, for a reason that had nothing to do with the case before him, and that this was his real reason for forcing [the appellant] on in a matter, in which an interlocutory proceeding had to be determined before the main case could be heard'.

In relation to this allegation, it is sufficient that we express our entire concurrence in the view expressed by Campbell J, 'There is no basis for the allegations made by [the appellant] other than her own willingness to infer that decisions contrary to her interests must be motivated by some improper conduct'.

The appellant, both in her evidence before Campbell J and through her counsel in submissions before the Court, has sought to propound or explain the grounds upon which she based the allegations to which we have referred. In each case it is our conclusion that there were no grounds upon which the allegation in question could have been responsibly made.

The instances of allegations of judicial misconduct to which we have referred provide a sufficient foundation for a decision on this aspect of the appeal, and it is unnecessary for present purposes to deal with the

numerous others disclosed in the evidence.

The making, in the course of litigation, of baseless or insupportable allegations of serious misconduct on the part of others, whoever those others may be, is conduct which, in a barrister, would be inconsistent with a fundamental aspect of the professional standards required of barristers.

Where the objects of such allegations are judges of the Courts before which the barrister practises, such conduct also has a strong tendency to be destructive of the relationship of mutual confidence and trust between the Court and the Bar which is essential to the proper and efficient administration of justice.

If, as a barrister, the appellant were to conduct herself as she has as a litigant in person in the respects referred to above, she would be unfit to remain at the Bar. If it is proper to conclude that, were she to be admitted as a barrister, she would be likely to conduct herself in a similar way, then she is not a suitable person to be so admitted.

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On the critical question whether the likely future conduct of the appellant as a barrister can properly be measured by her past conduct as a litigant in person, it is relevant to note that in her principal affidavit in reply to the case of the Bar Association, an affidavit of 8 October 1992, the appellant asserted (in para 1.15) 'I believe and always have believed that. … I was entitled to make the allegations and take the steps I have taken in relation to [various proceedings including all the proceedings to which we have earlier referred]'. In his judgment, Campbell J said:

> 'During her cross examination [the appellant] did, at times, concede that certain things might be done differently now that she has more legal training. However, those matters

> were all on the periphery. The impression which emerged strongly from the cross examination was the obduracy with which [the appellant] held to the correctness of the actions that she had taken and the allegations she had made. I was left with a strong impression that nothing of significance has or would change in relation to such matters. … Of course, as a barrister [the appellant] would be conducting litigation for her clients and not for herself. Having read a great deal of what [the appellant] has written and heard her cross examination, I am convinced that she would conduct her clients' litigation in much the same way as she has her own.'

We can discern no error in these findings which are amply justified on the evidence.

For the above reasons we are of the opinion that Campbell J was correct in finding that it is likely that, if the appellant were to be admitted as a barrister, she would abuse the privilege conferred upon a barrister as to the making of defamatory allegations, and would not properly discharge the responsibilities that privilege carries with it. This is sufficient to lead to the conclusion that the appellant is not a suitable person to be admitted as a barrister.

The second principal finding on the basis of which Campbell J concluded that the appellant had not been shown to be a person suitable for admission as a barrister was that she lacked understanding of a fundamental matter of proper conduct in relation to the making of applications constituting abuses of the process of the Court, and that situation was unlikely to change. This finding had reference to the filling (and pursuit) by the appellant, as previously referred to, of three notices of motion in the Court of Appeal of 7 October 1986, 16 June 1987 and 3 July 1987 respectively, and her present expressed belief and attitude as to the propriety of those applications, notwithstanding trenchant judicial criticism by the members of the Court of Appeal in dismissing the three notices of motion summarily as an abuse of process on 22 July 1987.

3.30 The court then examined the three notices of motion in detail and concluded:

> We agree with Campbell J that the evidence shows both a lack of understanding by the appellant of a fundamental matter of proper conduct in relation to the filling of documents constituting abuses of the process of the Court, and the unlikelihood of that situation changing.
>
> The third principal finding on the basis of which Campbell J reached his ultimate conclusion was that it was doubtful that the Court could have confidence in the truth of what the appellant says. His Honour found that there is a real, as opposed to fanciful, or remote, risk that a Court may be deliberately, in the sense of not by mere inadvertence or error, misled by the appellant, and his Honour did not consider that a Court could have confidence in the truth of what she

> says in a difficult situation which is, as his Honour observed, the time at which the importance of such confidence comes to the fore. His Honour's findings on this issue were based on several matters. One comprised statements made by the appellant to judge F on 21 July 1986 to which date the hearing of the contempt application relating to the barrister had on 19 June 1986 been adjourned by judge C. When the matter came before judge F the appellant, who did not wish to proceed that day, unequivocally told the judge that the matter was in the list not for hearing that day but to fix a date for hearing if the parties were ready to proceed.
>
> Campbell J's judgment deals in considerable detail (which there is no need to repeat) with what occurred before judge F, and with the history of the matter, from which his Honour reaches conclusions to the effect that judge C had on 19 June 1986 stood the matter over for hearing on 21 July 1986 subject to the availability of a judge to hear

the matter, that the appellant was aware of that fact, and that the appellant, not wishing the matter to proceed, deliberately misrepresented to judge F what had been said by judge C. We consider those conclusions to be unassailable.

Campbell J also found that on three separate matters the appellant had given evidence in cross examination before him which she did not believe to be true. These matters related to

(a) her belief as to the effect of a document issued to her by the Barristers Admission Board;
(b) her belief as to the effect of certain particulars supplied by the Bar Association; and
(c) her belief as to whether she had had a fair hearing on a particular occasion before the Court of Appeal.

Each of these matters is discussed in considerable detail by Campbell J in his judgment … We do not discern any error in his Honour's consideration of these matters or any legitimate basis for challenging his Honour's conclusion that the appellant was desperately untruthful in the instances given, or his Honour's failure to be satisfied that a Court could have confidence in the truth of what the appellant said, on the basis of there being a real risk of a Court being deliberately misled by the appellant. …

In the notice of appeal as ultimately amended there were 99 separate grounds of appeal. We have not found it necessary to deal with every one of these. On the approach to the matter which we have taken, many are irrelevant to the disposition of the appeal. Our conclusions on those which are relevant to the basis for our disposition of the appeal are subsumed or implicit in these reasons for judgment.

For the above reasons we are of the opinion that his Honour's conclusion that the appellant had not been shown to be a person suitable for admission as a barrister was correct, and that accordingly the appeal should be dismissed.

It is therefore not necessary for us to consider the question, which is not without difficulty, whether any of the material supporting the

conclusion that the appellant has not been shown to be a person suitable for admission should also lead to a finding adverse to her under s 9 of the Legal Profession Act.

3.31 The court dismissed the appeal and cross-appeal, and ordered Wentworth to pay the respondent's costs of the appeal, other than such costs as were solely referable to the cross appeal.

[page 98]

The court stated that it had the discretion to decide whether an applicant was 'suitable' for admission to the profession, and that this went beyond 'good fame and character'. What did the court deem to be the actions that made Wentworth an 'unsuitable' applicant? What else would you deem to be 'unsuitable' behaviour of an applicant for admission? Wentworth's appeals to the Court of Appeal and the High Court failed. It was stated that the Bar Association had legal costs of an estimated $600,000 in fighting her application for admission. Was the Bar correct in opposing her admission?

3.32 In *Morrissey v New South Wales Bar Association* [2006] NSWSC 323, the applicant was a very skilled legal practitioner in the State of Virginia and had come to Australia to seek a new life. He did some university and government legal work, finished the course at the College of Law, and then applied for admission. He had very favourable affidavits from leading legal academics and prominent members of the Australian profession, but had failed to give full disclosure to his referees of his legal problems in Virginia. These problems included several contempt convictions, a conviction for violating two disciplinary rules, for which he had his

licence suspended for six months, and later a conviction of assault and battery, for which he was disbarred in December 2001. His application before the Admission Board was not with full disclosure and he attempted to remedy these omissions before the court. He admitted most of the events, but emphasised that there were political reasons involved. Although there were political problems, he still did not give an accurate account of the findings of the courts in Virginia, especially revealing his history of violent physical encounters. In rejecting his application for lack of candour and honesty, McClellan CJ stated at [154]:

> It is possible that if appropriate disclosure had been made his transgressions in Virginia could have been put behind him and his determination to commence a new career free of political difficulties and the misjudgements of youth accepted.

3.33 Do you agree with the court's final statement that if Morrissey had made complete disclosure, he may have been admitted? There is no doubt that Morrissey had a colourful background. Would it be better for the profession to have members who are willing to test 'the system'?

3.34 Richard Ackland,[13] in discussing the *Morrissey* case, said:

> It's all a bit unfair, really. Here's someone being attacked by the Bar Association for overlooking his past, the same association that provided home and succour to people who overlooked the need, for up to 40 years, to lodge tax returns. …

Is this comment a fair comparison?

3.35 Is there any time a lawyer can be untruthful? Many consumers of legal services believe lawyers are lying when they manipulate facts and use their advocacy skills. If you were confronted with these allegations, how would you defend the role of lawyers using these skills?

3.36 *New South Wales Bar Association v Thomas (No 2)* [1989] 18 NSWLR 193 (Court of Appeal) concerned a senior police officer, who had been a principal witness in committal proceedings. During the course of the proceedings, the officer was admitted as a barrister. Another witness in the proceedings did not reveal in his testimony, given before the officer's admission, his character as a police informer. This was known to the officer, who failed to reveal this fact to the magistrate or to counsel for the prosecution or defence, until made to do so in cross-examination conducted after his admission. Proceedings by the New South Wales Bar Association were taken against the barrister more than 10 years later, seeking a declaration that his conduct as a police officer was 'contrary to the standards of practice becoming a barrister'. The Bar Association argued that his conduct 'showed lack of candour to the court, amounted to a conscious deception of Crown counsel, the magistrate and others, involved a serious risk of the miscarriage of justice to the accused and would not have been exposed but for the chance questioning of the opponent', which 'ultimately revealed the truth'. Thomas emphasised the quandary he was in. Although admitted to the bar at the time, he was a full-time officer operating in the police context with the motivations of a policeman. The court accepted Thomas's unusual position and dismissed the proceedings, but did express an opinion that Thomas's conduct as a police officer 'fell short of what is required of a person who is a barrister though not acting as a barrister at the time'. Kirby P noted at 204:

> The rank of barrister is one of status. With it go obligations which cannot be shaken of or forgotten simply because the holder of the office has not been practising in the daily work of a barrister. If a

> person does not wish to assume the obligations to the courts of a barrister, that person should not seek admission by the Court as such. Once admitted, the additional duties of invariable candour as well as honesty to a court prevail. In my opinion, the fact that the opponent did not consider himself a barrister in respect of his relationship to the court when giving evidence was erroneous. If he did not wish to accept the additional obligation of the Bar, he should have delayed his admission until he was willing to accept the obligations or wanted to practise as a barrister. There is no status of a partial barrister, or a barrister for some purposes or at some hours only. If a person is a barrister, he or she has accepted a special role in the administration of justice. … The role of a barrister is one with privileges which may, or may not, be exercised. But it is a role with obligations to courts which cannot be ignored by a schizophrenic-like delineation between activities in court as a policeman and activities as a barrister. In my opinion this Court should permit no diminution of the obligations of that status, whilst ever a person enjoys it.

3.37 In *Re Davis* (1947) 75 CLR 409, it was discovered a year after he was admitted as a barrister that Davis had not revealed in his application that he had been convicted of breaking, entering, and stealing when he was 21 years old. The conviction had occurred 12 years before he applied for admission. Since that time, Davis had no other breaches of conduct that affected his 'good fame and character'. The High Court upheld the finding that he was 'not a fit and proper person to be made a member of the Bar'. Dixon J stated at 420:

> The Bar is no ordinary profession or occupation. The duties and privileges of advocacy are such that, for their proper exercise and effective performance, counsel must command the personal confidence, not only of lay and professional clients, but of other members of

> the Bar and of judges. It would also seem to go without saying that conviction of a crime of dishonesty of so grave a kind as housebreaking and stealing is incompatible with the … admission to the Bar. …

3.38 Dixon then traced Davis's unusual background, including mental problems and financial struggles to become a barrister, and seems to indicate that these could possibly have negated the conviction if Davis had been honest with the authorities and revealed the conviction. Dixon said, 'a prerequisite would be a complete realisation … of his obligation of candour to the court. … The fulfilment of that obligation of candour with its attendant risks proved too painful for the appellant. …'

3.39 The *Davis* case should be contrasted with *Ex parte Lenehan* (1948) 77 CLR 403, where the applicant revealed to the admitting authorities that he had committed a number of dishonest acts as an articled clerk about 20 years before his application. He was refused admission by the New South Wales Supreme Court, but successfully appealed to the High Court. The High Court found that he had led an exemplary life since that time, including distinguished war service, and excused what he had done in his youth.

3.40 More recent cases also help us to understand what requirements are needed to be admitted. See if you can list what is needed if you had to advise an applicant who had made past mistakes. What should they disclose?

3.41 In his application for admission to the bar, a Queensland solicitor had failed to reveal that the Law Society had suspended his

practising certificate. He was struck of the roll for lack of candour.[14] The Victorian Supreme Court said that an applicant for admission who had a good reputation and character, also needed to be a fit and proper person. The defendant had pleaded guilty to six counts of making a false report. She had made accusations of sexual assault. She failed to inform the Board of Examiners of the relevant circumstances surrounding the charges she had made, and this seriously misled the board. It was also held that she had little, if any, insight into the consequences of her allegations for the innocent persons accused of crimes of such a repellent nature. The court found she was not a 'fit and proper person', and refused her application for admission.[15] In contrast, an applicant who failed to disclose some of his past criminal convictions was still admitted, Doyle CJ finding that the failure to disclose was an error of judgment due to some degree because of his immaturity, and not a deliberate attempt to mislead the board.[16]

3.42 Johnson J of the New South Wales Supreme Court in *Jackson (previously known as Subramaniam) v Legal Practitioners Admission Board* [2006] NSWSC 1338, upheld the findings of the Admission Board denying Jackson's admission. There had been criminal proceedings against Jackson. It was alleged she had made a false statutory declaration and had given false evidence that she was the driver of a motor vehicle at the time of a red-light camera offence that had occurred 10 years before her application for admission. Jackson had been acquitted

on one of the two counts in an appeal, and the Crown decided not

to seek a re-trial of the second count. Jackson had not provided the board with information about the Criminal Appeal. The board found that Jackson had given glaringly improbable evidence at the criminal hearing, and held that Jackson lacked candour and was not of good fame and character. In his decision, Johnson J said that, as a minimum, Jackson should have provided the board with the judgment of the Criminal Court of Appeal,[17] which was '… [the] latest and most complete statement of the findings made against [Jackson] at the time of her application … ',[18] continuing at [255]:

> The Plaintiff used the occasion … to advance a self-serving argument that she had been 'a victim of a horrendous unjustified District Court matter over a "red traffic light offence"' which 'ran over many years, for political reasons, at the expense of my health and career'. The plaintiff stated 'I have no conviction in law against me'.

3.43 Johnson J said she was technically correct that she had no conviction in law, but pointed out that she could have been tried again. He also said that the matter was not a mere traffic offence, but concerned interference with the administration of justice. Thus, Jackson's characterisation of the traffic matter 'in her disclosure to the Board fell short of the requirements for proper and full disclosure'. He concluded by saying at [272]:

> The Plaintiff is not assisted by the passage of time. … I have found that she [still] … is not a credible witness … [and] persists in a claim that she is the victim of processes which were based, essentially, upon her own confessions. The Plaintiff 's disclosure to the Board … was incomplete and self-serving, and did not demonstrate a proper perception of her duty of candour.

3.44 Jackson was never convicted of interference with the administration of justice. Do you think it was fair that after 10 years she was refused admission?

3.45 In recent years, a number of law students have been arrested and convicted for opposing developments that they felt were detrimental to the environment. Should these convictions be a barrier to admission? What if these students continue this behaviour after being admitted to practice? Should the profession allow this kind of behaviour? What kinds of political activities would you deem to be appropriate for a law student?

3.46 In *Re Application by Hinds* [2003] ACTSC 11, an Aboriginal applicant was admitted even though he had a history of criminal convictions. These included two for drunken driving, making a false complaint, and convictions for breaching five domestic violence orders. He admitted all his convictions and fully cooperated with the court. He had a record of community activities and had no convictions since 1996. In *Skerritt v Legal Practice Board of Western Australia* [2004] WASCA 28, an applicant who had been denied admission by the board was admitted. He had admitted a conviction for stalking and had once, many years ago, tried to commit suicide. The court said the latter event should not be a barrier to his admission and sent the matter back to the board for a rehearing. He was then admitted.

3.47 In the recent case of *Montenegro v Law Society of NSW* [2015] NSWSC 67, the Law Society opposed the applicant's admission because he had failed to provide the full story in relation to a number of the charges in his application. Justice Campbell, in allowing his admission, said he had 'disclosed sufficient information to persuade me he was not deliberately suppressing information'. Is this a correct decision? By contrast, in another New

South Wales case later that year, *Comeskey v New South Wales Bar Association* [2015] NSWSC 824, admission was denied because the applicant revealed convictions months after he made his application. Furthermore, these revelations were made only in response to the seeking of information by the respondent.

3.48 The above cases show that sometimes criminal convictions are not a barrier to admission when candour is present, but these applicants did not spend time in gaol. Should someone who has spent a significant time in gaol be allowed admission into the profession? Would it make a difference if the crime they committed was very serious, such as rape, murder, or manslaughter? How many years are needed for an applicant to be considered reformed, and what does an applicant need to do during this period?

STUDENT MISCONDUCT

3.49 In *Law Society of Tasmania v Richardson* [2003] TASSC 9, an applicant was admitted, even though he had failed to reveal that a university committee had found him guilty of professional misconduct. The applicant had been advised by the Dean of the Law Faculty and his lecturer on legal ethics that it was not necessary to reveal this information. After filing the action, the applicant had the academic committee's decision overruled because of lack of natural justice, but this decision does not affect his actions at the time of the filing of the action.

3.50 The case of *Re OG, a Lawyer* (2007) 18 VR 164; [2007] VSC 520 (Full Supreme Court of Victoria) has set a higher standard in relation to disclosure of student misconduct than that applied in the *Richardson* case. In the *OG* case, OG and a fellow student, GL, were found by their lecturer to have colluded on an assignment,

when the instructions were to do the assignment on their own. They both received a nil mark. When doing their practical training at the Leo Cussen Institute, one of the lecturers emphasised the need for students to have complete candour concerning their past misdeeds in their applications for admission. The lecturer specifically referred to allegations of plagiarism. In his application, GL revealed the incident and that the lecturer found collusion with a fellow student on the assignment. GL also said that the assignments were similar because of 'mere coincidence' because it followed on and was based on a group project completed a few weeks earlier. He said he was advised he could appeal to the University Board to defend his reasoning, but accepted their view that the appeal would be rejected and he would have a mark on his record. Thus he decided to accept the nil mark.

3.51 In his application for admission, OG also disclosed that he received a nil for an assignment, but he gave false reasons for receiving the mark. He alleged that he thought that it was a group assignment, but mistakenly had written it up individually. In reality, it was totally an individual assignment. On reading OG's allegations, the Secretary of the Board judged the disclosure to be minor, and he was admitted. After OG had been admitted, the board asked

GL for a full affidavit explaining in detail what had occurred in the incident he had revealed. GL did not disclose in his affidavit OG as the fellow student involved, nor in the next two affidavits. It was only at the board hearing that OG was identified and it was revealed that OG had already been admitted. GL was then referred

to a special hearing in which OG was asked to give evidence. At that hearing, GL presented his version and what he already had alleged in his affidavits. OG declined to give any evidence and was not present at the final hearing. At that hearing, GL was denied admission based on the fact that 'the quality of the disclosure found in GL's affidavit and the evidence he's given' as a witness, did not constitute candour and full and frank disclosure.

3.52 The board then sought revocation of OG's admission, which makes this a disciplinary case. The board made an extensive report to the Full Court, including an affidavit from GL. OG filed his own affidavit denying he had ever discussed the requirements of the assignment with GL. The Full Court in a joint judgment examined in detail the affidavits and the findings of the Board. It then noted at [98]–[99]:

> [98] …
>
> (1) First, the similarities between the two second assignments were so significant as to make very probable that there had been collusion or copying.
>
> (2) Secondly, as Mrs Higgs deposed, she came to that conclusion when marking the assignments and reported it to Mr Kidd.
>
> (3) Thirdly, as she also said in evidence, the protocol or procedure to be followed in those circumstances was well established and clear; and, at least so far as GL was concerned, we know from his evidence that it was followed to the letter. He was summoned before two academics and the allegation of collusion and copying was put to him squarely and he was given an opportunity to respond to it.
>
> (4) Fourthly, we know from GL's evidence that his meeting with the academics concluded on the basis that they were not persuaded by his denials, but that they wished to hear from OG before coming to a final view.
>
> (5) Fifthly, we know from OG's evidence that Professor Polonsky

began the meeting with the statement that there were 'similarities' between OG's second assignment and another student's second assignment and by demanding an explanation as to how OG had gone about composing his second assignment.

(6) Sixthly, we know that, after Professor Polonsky and Mr Kidd had had their meeting with OG, the view of the university remained that GL had colluded with OG.

(7) Seventhly, there is EK's evidence that he was present during at least one conversation between GL and EK during 2006 about whether they should disclose that they had been awarded a zero grade or mark, in which OG said in substance to GL that they should not disclose it because the university could not identify who had copied.

(8) Eighthly, we reject OG's evidence that he did not understand that he was suspected of having copied or colluded with another student. In our view it is plainly more probable

than not that Professor Polonsky put the allegation of collusion to OG more or less directly, just as it had been put to GL. But, even if Professor Polonsky said no more than OG swears was the case — which is to say, an assertion that the assignments appeared to be similar and a demand that OG explain how he had gone about composing his assignment, we think that it must have been obvious to OG that the professor suspected collusion and was looking for an explanation to satisfy him that it had not occurred. Given OG's obvious intelligence and his education, we do not see how else rationally he could have interpreted the professor's demand.

(9) Ninthly, the statements that EK heard OG make to GL at the Leo Cussen Institute about GL's disclosure are tantamount to an admission that OG did understand that Professor Polonsky suspected copying or collusion, albeit that there was no finding one way or the

other.

[99] In coming to those conclusions we bear in mind that these are in effect professional disciplinary proceedings and that, while the standard of proof is the civil standard, the degree of satisfaction for which that standard calls in this context is proportionate to the gravity of the facts to be proved. We have also given weight to the presumption of innocence and the exactness of proof expected in matters of this kind. [*Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336, 350 and other cases cited.] We have borne in mind, too, as counsel for OG contended that we should, that, to begin with, GL was hesitant to answer questions and that, on the first day of giving his evidence in this court, he several times objected to answering questions on the basis of privilege against self incrimination (after he was reminded of the privilege). It is true, as counsel for OG contended that, because of GL's objections, counsel for OG was on the first day of GL's evidence significantly restricted in testing his veracity and the reliability of his testimony. But those problems were short lived. Overnight after the first day of giving evidence, GL took the advice of very senior Queen's Counsel who, next day, was given leave to appear on GL's behalf for the duration of GL's testimony. After that, GL took very few objections and, with what appeared to us to be the confidence of having counsel there to look after his interests, he answered virtually all questions put to him, directly and fully. From that point on, counsel for OG were not inhibited in testing GL's testimony and they availed themselves of that opportunity by going back to matters as to which GL had taken objection the previous day and obtaining answers to their questions on those matters. …

3.53 The Court then reviewed the evidence of discussions between GL and OG that took place before disclosure, stating at [101]–[129]:

[101] Similarly, we accept GL's evidence that he had at least one discussion with OG about disclosure before GL sent his letter of disclosure to the Board of Examiners on 28 August 2006. Although there are some aspects of GL's evidence which we do not accept, in

particular that the degree of collusion was as limited as that to which he deposed in his affidavit of 21 September 2007, there was no reason for him not to tell the truth about later conversations. In the scheme of things, it makes sense that GL would have had a pre-disclosure conversation with OG about what each of them should disclose about the circumstances in which they were awarded a zero grade or mark. Despite an attempt by OG in his evidence to downplay

the extent of their friendship, it is plain that they were good friends and that both of them stood to be affected by any disclosure which either of them might make. Further, on this point, GL's evidence about having a pre-disclosure conversation with OG was as we have noticed to some extent corroborated … [by other] evidence.

…

Errors in OG's disclosure letter of 9 September 2006

[109] Turning then to OG's disclosure letter of 9 September 2006, it is possible that he may have made a mistake in writing that the second assessment was worth 15% rather than 20% of the total subject assessment. That would be a relatively easy mistake to make and, apart perhaps from attempting to minimise the significance of the event, there would not seem to be any reason for deliberately misstating the percentage of the total mark which the assignment was worth. Giving OG the benefit of the doubt, it seems to us that the difference between 15% and 20% is so relatively small as to make little if any apparent difference to the significance of the event.

[110] On the other hand, we reject OG's explanation for writing in his disclosure letter that: 'I mistakenly wrote up the [group] assignment individually'. We do not accept that he did make a mistake about it. There were only two assignments — the first [group] assignment and the second [individual] assignment — and at the time of disclosure it

was only just over a year since OG had been called before Professor Polonsky and Mr Kidd to answer allegations that he had colluded with GL in the composition of the second [individual] assignment. In the circumstances, in our view it is fanciful to suppose that OG was in any doubt at the time of writing his letter as to the fact that the university believed that he copied or colluded with GL. …

…

The Board's contentions

[119] The Legal Services Board contends that OG's letter of disclosure to the Board of Examiners of 10 September 2006 falsely represented that the reason why OG was awarded a zero mark for his second assignment was because he wrote up a joint assignment as an individual assignment and falsely represented that OG did not attend the tutorial at which the second assignment was discussed and as a result misunderstood the assessment requirements. For the reasons already given, we accept that contention.

[120] The Legal Services Board further contends that OG made each of those misrepresentations deliberately or recklessly and thereby deliberately or recklessly failed to make full and frank disclosure of the true circumstances in which he was awarded a zero mark for the second assignment. For the reasons already given, we also accept that contention. We are satisfied that OG well knew that he had been suspected of collusion and that his mark had been reduced to zero for that reason. Thus by representing that the mark was reduced to zero for the reasons set out in his disclosure letter he deliberately or recklessly misrepresented the circumstances in which he was awarded the zero mark.

[121] The Legal Services Board submits that, having found that OG deliberately or recklessly misrepresented the circumstances in which he was awarded a zero mark for

his second assignment, it is open to find that OG was on 14 November 2006 unfit to be admitted to practise and thus to set aside the order made that day for his admission to practise.

The duty of disclosure

[122] The rules which govern applications for admission to practise law in this state require that an applicant make full disclosure in writing to the Board of Examiners of every matter which is relevant to consideration of the applicant's fitness for admission to the legal profession, including but not confined to any formal charges of criminal offences. To that end, each applicant is bound to lodge with the Secretary of the Board of Examiners an affidavit sworn by the applicant that he or she has complied with that obligation of disclosure. [R 4.03(1)(b) and Sch 8.]

[123] As OG was taught at the Leo Cussen Institute, that obligation of disclosure requires that an applicant be frank and honest with the Board of Examiners, and so with the court, about anything which might reflect adversely on the fitness and propriety of the applicant to be admitted to practise. Nice questions sometimes arise as to how much that entails. Increasingly, there is an expectation that even ancient peccadillos should not be left out. [*Re Del Castillo* (1998) 136 ACTR 1, 7 (FC).] In the past, perhaps, the obligation was not always seen as going quite so far. But the need for honesty has never been in doubt. Admission to practise is conditioned upon an applicant having a 'complete realization … of his obligation of candour to the court in which he desire[s] to serve as an agent of justice' [citing *Re Davis* and *Thomas* cases]. An applicant must at least disclose anything which he or she honestly believes should not be left out. Plainly, candour does not permit of deliberate or reckless misrepresentation pretending to be disclosure.

Revocation of the order

[124] In *Re Warren* [[1976] VR 406] the court said:

> 'There can be no doubt that if a candidate is admitted to

practise as a barrister and solicitor of this Court and it is afterwards discovered that the certificate of the Board upon which he was admitted ought not to have been granted, because the candidate has not complied with the Rules, this Court has ample power in its inherent jurisdiction to revoke the admission, and we do not understand Mr Ostrowski, who appeared for Miss Warren, to challenge that proposition. An order admitting a candidate to practise is an order made *ex parte* and there is an inherent power in all Courts to review *ex parte* proceedings: see *Re Reid Murray Acceptance Ltd* [1964] VR 82, at pp 89–90, and the cases there cited. This principle must apply *a fortiori where* the order made is an order admitting a person to practise: cf *Re a Solicitor*, [1952] VLR 385 and the authorities there cited, especially at p 388.

'It is, however, not desirable to attempt to lay down the circumstances in which an order admitting a candidate to practise might be revoked. An obvious example would be where the order has been obtained by fraud, but there may well be other cases besides. It is sufficient for present purposes to say that we are satisfied that no case here exists for revoking Miss Warren's admission. [p 408]'

[page 107]

[125] All things considered, we have concluded that we should revoke the order admitting OG to practise. As we have found, he deliberately or recklessly misrepresented to the Board of Examiners the circumstances in which he came to be awarded a zero grade or mark for his second assignment. His actions, therefore, were the antithesis of a 'realization … of his obligation of candour to the court in which he desire[s] to serve as an agent of justice'. [citing the *Davis* and *Thomas* cases] We say nothing of what has happened since, including

his evidence in this court and his attempt to shift the entire blame onto GL by alleging that GL had copied by utilising his access to OG's computer and also changed OG's own assignment on that computer. It cannot be doubted that the Board of Examiners would not have granted OG a certificate if it had been aware of the misrepresentation. He should not be permitted to benefit from the fact that he managed to mislead them.

[126] Section 2.3.7 of the Legal Profession Act 2004 requires the court to keep a roll of persons admitted to the legal profession under the Act and s 4.4.39 of the Act expressly preserves the inherent jurisdiction of the court with respect to the control and discipline of members of the profession. It derives from the power to admit practitioners [*Re Davis*] and, among 'a great variety of other orders', it extends to striking a practitioner from the roll. [*Re A Solicitor* [1952] VLR 385, 386–388; *Frugtniet v Board of Examiners [No 2]* [2005] VSC 332, [7]] We have power, therefore, to strike a practitioner from the roll for failure to make full and true disclosure to the Board of Examiners. [*Re Davis*] It is right so to order in this case.

[127] Counsel for OG submitted that, whatever may be the finding of the court as to the question of whether OG made full disclosure before admission, there is evidence that he has since performed satisfactorily at the Bar as a member of counsel and thus that the court should in the exercise of discretion desist from striking him from the roll.

[128] We reject that contention. If OG seeks to be readmitted to practise, he will need to persuade the Board of Examiners that he is a fit and proper person.

Conclusion

[129] There will be orders accordingly that the order admitting OG to practise be revoked and that he be struck off the roll.

3.54 There are two Queensland cases concerning student misconduct. In *Re Humzy-Hancock* [2007] QSC 034, it was alleged that there was plagiarism present, and also collaboration with

another student who had copied some of the applicant's assignment. McMurdo J said at [42]–[43]:

> [42] None of the allegations of plagiarism is proved. I find that in each case the failure to give proper attribution was the result of poor work and not an intention to pass of the work of another as the applicant's work.
>
> [43] As to the alleged collaboration, I accept the applicant's evidence that he did not knowingly provide a copy of his assignment, or a draft of it, to the student who reproduced parts of the applicant's work.

3.55 In the second case, *Re AJG* [2004] QCA 88, the applicant admitted there had been a finding of misconduct for substantially copying from another student. Admission was denied,

even though the Admission Board did not oppose the applicant's admission. The board viewed the incident as being a one-off mistake due to the applicant having financial and domestic stress present at the time of the misconduct. The court allowed the applicant to apply again in six months and the applicant was then admitted.

3.56 The judgment of McMurdo J in the *Humzy-Hancock* case[19] has been criticised by Corbin and Carter[20] for taking a subjective approach to the plagiarism, instead of an objective one. They said that McMurdo J sought to find an intention to commit plagiarism and found no such intention. Instead the judge said that the applicant had only done 'poor work'. Corbin and Carter state:

> The conduct alleged and ultimately found to have occurred nonetheless amounts to conduct that ought to be unacceptable to the

> Supreme Court, as the conduct in question demonstrated a disregard for the legal and ethical norms of the academic community. These are not characteristics becoming of a prospective legal practitioner.

3.57 Another case of plagiarism, *Legal Services Commissioner v Keough* [2010] VCAT 108, concerned a postgraduate law student who was already admitted to practice. The Victorian Civil and Administrative Tribunal found that the plagiarism constituted professional misconduct and cancelled his practising certificate for six months. The student had not only plagiarised on an assignment, but then had his paper published in a journal. Do you think that the penalty in this case was appropriate?

3.58 In a recent academic misconduct case, *Re Application by Onyeledo* [2015] NTSC 60, the court found that the applicant's disclosure of academic misconduct was incomplete and did not satisfy the requirement of full and frank disclosure. The court ordered that the applicant undergo a further course in legal ethics or any other course to enable him to understand the full and frank disclosure requirements. The court adjourned the matter to give the applicant an opportunity to take a course and then make a claim for admission. Is this decision too lenient?

3.59 When practitioners seek readmission after having been struck of the rolls, they must show not only that they are of 'good fame and character', but also that they completely accept the decision that resulted in their removal from the rolls. Further, they must show the authorities that they have been rehabilitated.

3.60 There has been a vigorous discussion concerning life disbarment in various issues of the *California Bar Journal* in 1996–97 and again in 2005–06. There is strong support by some commentators for the idea that there are certain circumstances where practitioners have behaved in a manner that is so serious

that they should be barred for life from the profession. There has not been a discussion concerning life disbarment in Australia. Do you agree with this suggestion? If so, should there be any difference between permanent disbarment and permanent denial of admission?

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3.61 In *Re the Legal Practitioners Act 1970 and Re An application by Michael Alexander Gordon Emmett to be re-admitted to practise as a barrister and solicitor* [1996] ACTSC 6 (22 February 1996), the court emphasised that readmission should be granted with the greatest caution, and only with solid and substantial grounds for displacement of the original order. The court also said that the findings of the court that had ordered the removal of the practitioner's name from the roll must be taken as correct and immutable, and that acknowledgment of their error is an indispensable starting point for any applicant. The applicant had been struck off in 1979 for misappropriating funds, preparing false documentation, and lacking candour with the court. He had shown a willingness to be rehabilitated and accepted complete responsibility for his past wrongdoings. He had attributed his misconduct and the failure of his first marriage and problems with his second marriage to his sustained alcoholism. The evidence showed he had a strong desire to change his habits, but he still had serious problems with alcoholism. However, he sought readmission on a restricted basis and welcomed supervision. Emmett was not seeking to be let loose on the public, but wished to be readmitted 'for the benefit of his family and his own self-esteem'. The court refused the application, noting at [25]:

> Although he is 62 years of age and may not have a good many years remaining before him, we are of the opinion that this application is premature. We do not doubt his sincerity in his acceptance of his past misconduct and his determination not to succumb to his alcoholism again. We accept that his alcoholism was and is the source of his unfitness to practise. In the light of his commendable and proper attitude towards his condition, he should be encouraged to seek legal employment in the public or private profession. We know that is dificult with his present status, but if he can do so and if he can then demonstrate, after a real and substantial period of time, that not only has his present resolve been maintained, but under supervision he is capable of engendering some confidence in his performance as a readmitted barrister and solicitor, he may then apply again for re-admission much better armed to displace the [original] finding of unfitness. …

3.62 Can you suggest a different course of action that the court could have taken? Was the court too severe, considering the applicant is 62 years old?

3.63 In *Horak v Secretary of the Law Institute of Victoria* (SC(Vic), Hedigan J, 27 July 1995, unreported), the Solicitors' Board refused Horak's application for an employee's practising certificate. His practising certificate had been cancelled in 1989, and he only had the right to apply for a full practising certificate after two years as an employee solicitor. He was allowed to apply to be admitted as an employee solicitor as of 1 January 1994. His professional problems were related to his intimate relationship with one Mrs Reid. He lived with her for some years, and was her solicitor in a matrimonial quarrel. Hedigan J stated at [2]–[18]:

> [2] … It is unnecessary to condescend to all of the detail of this unhappy episode. It involved him being charged in 1989 before the Solicitors Board with a number of breaches of professional standards. Two of those appear to have been common law misconduct in a

professional respect; first in that he improperly dealt with Mr Reid knowing he had a solicitor, and dealt with him in a way which was improper — it might be described generally as making inappropriate threats. Secondly, that his conduct towards one Miss Mooney, a law clerk engaged in the matrimonial dispute, was aggressive and confrontationist to her and in

breach of appropriate standards. The third charge involved a breach of one of the statutory rules, in that he gave a false account, it was alleged, to the Secretary of the Professional Standards Committee of the Institute.

This latter matter involved an epic letter of 14 December 1989 written by the appellant, which involved a disgraceful attack on members of the profession couched in offensive and intemperate language, to such a degree that might suggest to some minds a degree of emotional imbalance, if not worse.

… The Board found the solicitor guilty of misconduct in the relevant respects, rejecting his evidence and accepting the evidence of a number of witnesses about the events. … Mr Horak appealed that decision and that appeal did not succeed. …

[3] [Since then] he has derived income … by selling certain chattels, including a car. He has worked spasmodically involving some work in sales and other work of a more physical labour kind, and he has been in receipt of Social Services.

… He undertook an LLM course at Melbourne and, according to his evidence, paid three and a half thousand dollars, embarking upon patents and intellectual property studies, but was forced to abandon it because of his inability to fund further study.

[4] Then, 1 January 1994 having come and gone, he made application

to the Board for an employee's practising certificate. And on 29 March, the Board, chaired by Mr BL Murray QC, with Mrs Pannam and Mr Spence as members, heard his application and refused it.

In the course of giving the reasons for refusal the Board said:

> 'Without seeking to impose any obligation on the applicant, we would suggest to him that if he makes some further application after the lapse of sufficient time he should support that application by medical evidence and by psychiatric evidence. We are by no means convinced that what Mr Woods (apparently a witness who gave evidence) described as 'traits of character' have been sufficiently dealt with. We think that those traits of character are alive and well, and are absolutely incompatible with the proper conduct of a solicitor's practice. It is essential that a solicitor acting for clients is able to look objectively and impersonally at the problems that he is dealing with, and we are by no means satisfied that in his present condition, Mr Horak is in that situation.'

Mr Horak virtually re-applied immediately [and by a] majority decision … the Acting Chairman dissenting, the Board rejected the application. … It is from that decision that an appeal has been made. …

[8] The reasons for [the Board's majority] decision … appear to indicate that they have accepted the evidence of Dr Kenny. There was no reason not to. There was no contrary evidence which was called. They appear to have taken the view that since Dr Kenny was not prepared to say that Mr Horak would never, as a consequence of stress, be likely to behave inappropriately in a similar manner again, that there was a sufficient risk of it happening, so as to lead to them not being satisfied that Mr Horak had discharged the burden on him to satisfy the Board that he was a fit and proper person to be granted an employee's practising certificate.

The Acting Chairman, Mr Harris, took the view that the evidence was sufficient to establish, to his satisfaction, that Mr Horak was a fit and proper person. He was of the opinion that the reservations expressed by Dr Kenny — and I interpolate, also by Mr Lewenberg — were not such as to amount to much more than a prudent guarding against embracing the unacceptable proposition that the future can be known for certain.

… Essentially, Dr Kenny, who is an experienced consultant psychiatrist, formed the view that the judgment of Mr Horak at the time of the breaches that led to his certificate being cancelled was distorted by his emotional involvement with Mrs Reid.

[9] He also indicated that on occasions when he had encountered other examples of professional persons seeking to perform their professional duties while 'involved' with their client, that such a loss of judgment was quite commonplace. He also gave evidence that based upon his clinical examination and the history, there had been no psychiatric illness or disturbance in the prior life of Mr Horak (that is prior to the 1989 events) and there was no evidence of any continuing psychiatric illness or disturbance. He also expressed the view that he thought that Mr Horak had coped well over the past few difficult years, and expressed the opinion that he was not likely to make the errors of judgment that led to the 1989 events again. He also described Mr Horak as highly intelligent, well-educated, enthusiastic, energetic and animated.

Mr Lewenberg gave evidence, he being the former principal of Mr Horak, and generally expressed a good opinion of him. He said he was prepared to employ him, not solely in any spirit of charity, as I apprehend, but because he needs a solicitor of some experience. He was candid that unless Mr Horak was up to the mark, he would not be kept on. He expressed the view, based upon his previous experience with him, and I suppose his own experience as a solicitor, that he did

not think that he was likely to offend again. In any event, he clearly stated he was prepared to and desired to employ him.

There is also a significant body of other evidence, not challenged by the Law Institute in the Board proceedings or in this appeal.

[The judge then describes the favourable psychological reports of two other doctors and five other witnesses who gave favourable reports.]

[12] … Mr Lacava, who appeared for the Law Institute, adopted an even-handed position, but he did cross-examine Mr Horak, and rightly emphasised in his submissions to me that the form of the affidavit sworn by Mr Horak in support of the notice of appeal had an unpleasant resemblance to the baseless and deplorable outbursts in the letter of 14 December 1989.

The notice of appeal in this case and the affidavit in support, apart from making general allegations of ultra vires bias and a failure to accord natural justice to him, alleged that he had been told that the Board was to be constituted by members who had heard it previously. He said to me that he did not expect to have members of the Board who had sat on the matter previously. He also said in his affidavit that there was a want of impartiality by some members of the Tribunal, and that the Tribunal or the Board had knowingly and recklessly dealt with the matter; in effect, being unable to deliver natural justice to him because of bias.

No particulars were given of the allegations of bias, and none were given before me. Mr Horak appeared to be reluctant to give details of what was in his mind, although at one point of time it appeared to be connected with some contact by a member or members of the Board with inappropriate persons. It was not clearly spelled out and was ultimately even described by himself as being supposition and that as it was only supposition, he did not wish to develop that aspect further.

[13] This has been a matter of considerable concern to me in that the affidavit has the hallmarks of a stress-driven outburst, degenerating into baseless imputations and intemperate language, much as did the letter of 14 December 1989. However, I have reached the conclusion that, like the 1989 letters, it is likely that the form of the affidavit was driven by particular circumstances then prevailing; in the case of the affidavit, doubtless by disappointment at the result and perhaps a misplaced sense of injury that Mrs Pannam, who had twice found against him, sat yet again.

He gave an explanation that all that he intended to do, based upon his accessing of the monograph Whitmore and Aronson on Administrative Law, was to set out all of the grounds which might be raised when seeking to attack upon administrative law grounds the decision of the Board; that is, that it was not meant to be specific or make specific allegations of actual bias or actual want of impartiality in any member of the Board.

Not without some reservations, I have reached the conclusion that he did not intend in his affidavit to make specific criticisms founded upon actual bias. He had no basis on which to do so, but was led by inexperience, and perhaps even bitterness that he had failed to get his certificate once again, into going too far. I should say that any suggestion that any member of the Board approached the matter in any spirit of bias or with pre-judgment must be without foundation. There is no basis for any suggestion that Mrs Pannam, who sat on each of the hearings, approached the matter other than with complete impartiality or founded her views on anything other than a conscientious appraisal of the evidence before her. The same is true of other members of the Board.

[14] In any event, having read the affidavit over the luncheon adjournment, Mr Horak unequivocally withdrew the whole of the relevant matters, that is the matters to which I have referred, without reservation.

I formed the view, on observing him, that that was not done — notwithstanding I have little doubt that he had a conference with his

counsel about it — and it would have been not improper to do so, or to get instructions about it as a necessary tactical ploy, but that it was genuinely withdrawn on the basis that he concedes that no such allegation can be rightly made.

That being said, the issue here is, has the appellant discharged the burden on him to establish that, notwithstanding his previous misconduct, he is a fit and proper person to have granted to him an employee's practising certificate? The burden does lie on him, and it is on the balance of probabilities, this being a civil proceeding, but having regard to the well-known principles pronounced by Sir Owen Dixon in *Briginshaw v Briginshaw* (1938) 60 CLR 336; see also *In the Matter of TS* [1981] VR 577 and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

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I have reached the conclusion that I am satisfied that the appellant is a fit and proper person to be given an employee's practising certificate. The events which led to his practising certificate being cancelled in the first place, not to be applied for before January 1996, and on the conditions to which I have earlier referred, fell within a short time frame and were driven by circumstances that are not likely to recur, namely that he acted for a client with whom he was then involved in an intimate sexual relationship, and that he was acting for her in a Family Law matter, notorious as a field of litigation in which passions run high. …

[16] There was some evidence of an assault matter involving the police. He gave a description of events to Dr Kenny as to how that came about, and affirmed it on oath before me. I am mindful, however, that the police version has never been heard, and that he pleaded to a number of the charges laid against him, he giving the explanation that at the end of the day, although he wanted to fight the case, believing that it was he who was assaulted rather than the other

way round and that his financial circumstances did not justify it.

I am bound to say I think the circumstances of the plea are rather clouded. Whilst I do not ignore it, it seems to me the assault matter is not a significant feature in the matters I have had to consider when making the determination, which I do, that he is a fit and proper person.

It may be, I think, that there have crept into the consideration of this matter issues concerned with Mr Horak's personality rather than his character and fitness to practise. Mr Harris, who dissented, dealt with that aspect, and I propose to repeat what he said:

> 'Nevertheless the real question is whether now in the light of his past history and the recent medical psychiatric material, the solicitor is a fit and proper person to be entrusted with the rights and duties of a professional man in the law. The ranks of practising lawyers contain a wide spectrum of personality, manners, intelligence, understanding, commonsense, and ability to deal with clients. These variations are reflected both by variations in the efficiency with which work is done and variations in the reaction of individual clients to a particular profession. Incidentally, the possible over-supply of solicitors in Victoria does not mean that this Board should act as a kind of sieve, thinning the ranks in a quality control operation. Variations in the norm of an orthodox solicitor do not necessarily warrant intervention by the Board. True, the protection of the public is at the forefront of the Board's obligations. In the present instance the limited privileges and the aspect of supervision involved in an employee certificate will, in the Chairman's opinion, comply with the fulfilment of the Board's obligations.'

[17] This felicitously expressed view of the matter relating to the variations in individuals accords with the view which I have formed. Mr Horak is a long way from being an ideal representative of the legal

profession, but he is intelligent, he is admitted to practice, he is qualified, and he has been tempered by the fires of a long suspension. He is capable of learning from the lessons of the past.

The weight of the evidence to which I have referred is in favour of the conclusion that he is a fit and proper person to hold an employee's practising certificate. That evidence surely must outweigh the speculation that he may offend again. Perhaps he will. If he does, that will

have to be dealt with. But the evidence, medical, personal and professional, gives reason for confidence that he is unlikely to offend in that way again.

In addition, it appears that he has made efforts to hold on, whilst waiting through a difficult period. I have no doubt he has had a difficult time. He has had to sell assets, he has suffered a serious illness — happily now apparently resolved — and he has had the psychological and physical difficulties connected with the police matter. It seems to me that these events have played their part in forming some resolution in him to go on to practise in the law without further misconduct. He would, however, be well advised to avoid a tendency to self-justify in a quarrelsome and sometimes offensive way.

[18] Notwithstanding that there must always be some uncertainty in the mind of judges in cases of this kind, particularly when one has the misfortune to disagree with experienced members of the Board, I cannot say that I am grieved to decide the appeal in his favour, that is, to find myself of the view that he is a fit and proper person.

The alternative is bleak indeed. Here is an intelligent, trained lawyer, who was dealt with very firmly in respect of a virtual single incident in 1990, but is still unable to practise, even as an employee, in 1995.

> Surely, working in a law firm with some sort of limited supervision by the employer is likely to bring about an improved mental and emotional state in him after years of sporadic work, which has neither fulfilled his gifts nor his working capacities. It can hardly be thought that Mr Horak would not some day be likely to get a practising certificate. Very little is to be said in favour of leaving him wallowing in a trough of despair and frustration any longer.
>
> Nevertheless, these matters aside, I have reached the view that he is a fit and proper person in the circumstances and on the evidence I have heard. Accordingly, the Appeal is allowed.

3.64 Can you reconcile the different results in the *Emmett* and *Horak* cases? It appears that Horak, by working as a legal clerk, has a far better chance of being readmitted than someone working in non-legal work. Former legal practitioners have difficulty in proving honesty and will have no opportunity to prove it in the legal field because no one will want to employ them. Such work may not be sufficient to allow them back into the profession. See *Re Harrison* (2002) 84 SASR 120, where the applicant worked for trade unions with an unblemished record and was denied readmission. By contrast, see the extract of *Re Evatt* below[21] for a successful application.

3.65 The 'fit and proper' test is obviously a very flexible formula. Do you think that it gives too much flexibility to the courts? What could be an alternative test? In reading the extract from the next case, do you agree with the court's decision that developing a financially successful alternative career, which allows numerous charitable acts, meets the test of being rehabilitated?

3.66 In *Evatt v New South Wales Bar Association* (CA(NSW), Full Court, CA 153/81, 15 December 1981, unreported), Evatt, a barrister, had been struck off by the High Court. This case represented his third application for readmission. The first had

been heard a little more

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than a year after disbarment, when the Supreme Court concluded that to readmit him after so short a time would be in effect to qualify, or go behind, the decision of the High Court. Evatt's second application was heard almost three years later, while he was a full-time student in fine arts at the University of Sydney. The court held, however, that 'the time since disbarment … is not overlong and hardly falls within the definition of a career of honourable life for so long a time as to convince the court that there has been a complete repentance and a likelihood of perseverance in honourable conduct'. When Evatt made this third application he had become a prominent art dealer in Sydney. Street CJ found:

> … He customarily charged brief fees which the Supreme Court held to be 'beyond recognised standards and … unjustified as professional fees and … excessive in the circumstances'. His fees, to his knowledge, substantially exceeded what would be recoverable as party and party costs and he knew that they would be paid out of the extortionate deductions of costs [done by the instructing solicitors] that he was party to procuring for the solicitors. Again, the ultimate finding of the High Court on this aspect was:
>
> > 'The respondent, therefore, not only assisted the solicitors in gross malpractice, but did so knowing that their malpractice would provide the source of part of his own excessive fees.'
>
> The claimant could draw no comfort from his proffered explanation of lack of appreciation of the implications: either he knew that the deductions were extortionate and thus deliberately participated in the

misconduct of the solicitors; or he failed to appreciate the misconduct involved thus manifesting what might be described as a blind spot upon a matter of fundamental professional ethics and propriety. The High Court, at the conclusion of its judgment, said in this connection:

> 'The respondent's failure to understand the error of his ways of itself demonstrates his unfitness to belong to a profession where, in practice, the client must depend upon the standards as well as the skill of his professional adviser.'

… The claimant comes to court in the present application seeking to demonstrate objectively a genuine and sincere adoption of proper standards by evidence that over a number of years he has followed honourable, upright and responsible standards. …

What then, has the claimant accomplished in the years since 1972 [his second application]? In the intervening years he has taken up and followed with considerable success the occupation of an art dealer. He had placed before the Court an impressive volume of evidence both in his own affidavit and from other deponents establishing his activities, stature and reputation in that field. Whilst the case is not to be judged on mere numbers of deponents, it can be noted that 21 artists, 8 art dealers, 2 art critics, 2 curators and 2 publishers in the art field have sworn affidavits deposing in highly flattering terms to his competence and, more importantly, integrity in the conduct of his flourishing business. I shall not take time to quote from these affidavits. Many of the deponents bear household names of no little eminence in their respective fields within the art world. The other deponents include 7 who have been associated with the claimant in activities of a public nature related to the arts.

This body of evidence, in its entirety, is impressive indeed as

demonstrating objectively that the claimant holds a reputation for honourable and fair trading and that he has manifested a laudatory degree of sympathy and altruism in his dealings with artists undergoing financial stringencies. The man of whom these deponents speak is a man aware of his obligations to others, a man very different from the young barrister, seduced by the prospect of easy money, who abused his clients and debased his professional standards and all sense of recognition of his obligation to the public as a member of the Bar. The claimant is not a new man, but the evidence satisfies me that he is a changed man. His proved conduct in recent years is antithetical of the careless disregard of others that characterised his earlier career at the Bar. The claimant's undoubted intellectual texture, coupled with the chastening effect of the disgrace that he brought upon his head, with all of its implications, can be seen from the evidence of his conduct over the years since 1972 to have led to his disciplining himself and channelling his energies, his capabilities and his life into a way which conforms with the standards that are prerequisite for membership of the Bar.

I shall not attempt to canvass the evidence. Seven members of the Bar and five solicitors who have known him of old and most of whom have spoken for him on earlier occasions continue their regard for him. This evidence is perhaps more directly referable to the subjective side of his reformation. He has participated in a voluntary capacity in a number and variety of public activities associated with the art world. He has held, and continues to hold, a number of offices of honour within this field. He has, in short, fully met what I have earlier described as the challenge held out to him in 1972. The evidence adduced on his behalf satisfies me to the requisite degree of confidence that the claimant can now be regarded as a fit and proper person to be restored to the Roll.

3.67 It took Evatt more than 13 years to be readmitted; for Davis it took over 30 years to be readmitted;[22] Harrison (which is a more recent example of the strict requirements) was denied readmission 20 years after being struck off.[23]

1. At **3.4**–**3.9**.
2. At **3.10**–**3.17**.
3. At **3.18**–**3.67**.
4. Legal Services Council, Legal Profession Uniform Admission Rules 2015 Sch 2.
5. Legal Services Council, Legal Profession Uniform Admission Rules 2015 Sch 2.
6. Victorian Government Department of Justice, *Attorney-General's Legal Profession Working Party Report*, 1995.
7. A Boxsell, 'LCA Scales back US Ambitions', *Australian Financial Review*, 11 March 2011, p 45.
8. Hale later dismissed Dershowitz as his lawyer. Hale is also leader of a small Peoria group called the American White Supremacist Party. The World Church of the Creator, founded in 1973 in Florida, espouses a holy war against Jews and blacks. See *The State Journal-Register*, 30 January 1999; Associated Press, 9 February 1999; and CNN, 13 November 1999.
9. See **3.37**–**3.38**.
10. See **3.39**.
11. See **3.23**.
12. See **3.37**.
13. R Ackland, 'Nothing but the Full Gory Truth will do', *Sydney Morning Herald*, 28 April 2006, p 11.
14. See *Barristers' Board v Khan* [2001] QCA 92.
15. See *Victorian Lawyers RPA Ltd v X* [2001] SC Vic 429.
16. See *Re Application for Admission as a Legal Practitioner* [2004] SASC 426.
17. *R v Subramaniam* [2002] NSWCA 372.
18. At [254].
19. See **3.54**.
20. L Corbin & J Carter, 'Is Plagiarism Indicative of Prospective Legal Practice?' (2008) 17 *Legal Education Rev* 53.
21. At **3.66**.
22. See **3.22**.
23. See **3.64**.

4

DISCIPLINE

INTRODUCTION

4.1 The power to discipline lawyers is vested in the inherent power of the courts and by statute in the professional associations. The disciplinary system varies from jurisdiction to jurisdiction, but it does have some common features, namely:

- a body, commissioner, or ombudsman to receive the initial complaints and institute investigations;
- a committee to recommend dismissal of the complaint, minor sanctions, or referral to a tribunal for more serious matters;
- a commissioner or ombudsman or a professional association's council to dismiss the complaint, impose minor sanctions, or refer the matter to a tribunal;
- a tribunal to deal with serious matters; and
- the right of appeal from the tribunal's decision to the Supreme Court.

4.2 In all jurisdictions the tribunals have lay representation, but the majority are composed of lawyers, or lawyers and judges. All jurisdictions apply one or both traditional categories of misconduct

— 'professional misconduct' or 'unprofessional conduct'. Further, in some jurisdictions, legislation has enacted new categories for less serious breaches of professional conduct.

4.3 This chapter looks at what is involved in the inherent jurisdiction of the Supreme Court, the statutory categories of misconduct, the courts' definitions of misconduct within practice, and how the courts deal with breaches of conduct outside professional practice. Within all these categories there will be examples of mitigating factors that may reduce the severity of the penalty for misconduct.

INHERENT POWER OF THE COURTS

4.4 The inherent power to discipline legal practitioners stems from the original power of courts in Australia to admit practitioners to practice. Thus, the inherent power to discipline flows from the original Charter of Justice of 1823 in New South Wales, granting courts the power of admission. This power to discipline includes the right to suspend or disbar, and has been said to be protective of the public. The power can also be used to punish practitioners financially.

4.5 The jurisdiction of the court was discussed by Lord Wright in his judgment in *Myers v Elman* [1940] AC 282 (House of Lords) at 317–19 as follows:[1]

> … A solicitor (or in former days a solicitor or an attorney) was long ago held to be an officer of the Court on the Roll of which he was

entered and as such to be subject to the discipline of that Court. The Court might strike him off the Roll or suspend him. …

But alongside the jurisdiction to strike off the Roll or to suspend, there existed in the Court the jurisdiction to punish a solicitor or attorney by ordering him to pay costs, sometimes the costs of his own client, sometimes those of the opposite party, sometimes, it may be, of both. The ground of such an order was that the solicitor had been guilty of professional misconduct (as it is generally called) not, however, of so serious a character as to justify striking him off the Roll or suspending him.

Though the proceedings were penal, no stereotyped forms were followed. Hence now the complaint is not treated like a charge in an indictment or even as requiring the particularity of a pleading in a civil action. All that is necessary is that the judge should see that the solicitor has full and sufficient notice of what is the complaint against him and full and sufficient opportunity of answering it. Thus, formal amendments of the complaint are not necessary, so long as the variations of the change are sufficiently defined and the solicitor is given sufficient liberty to make his answer. The summary jurisdiction thus involves a discretion both as to procedure and as to substantive relief, though there was and is an appeal.

The cases of the exercise of this jurisdiction to be found in the reports are numerous and show how the Courts were guided by their opinion as to the character of the conduct complained of. The underlying principle is that the Court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally. …

The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice. Thus, a solicitor may be held bound in certain events to satisfy himself that he has a retainer to act, or as to the accuracy of an affidavit which

his client swears. It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obloquy. The term professional misconduct has often been used to describe the ground on which the Court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the Court and to realise his duty to aid in promoting in his own sphere the cause of justice. This summary procedure may often be invoked to save the expense of an action. Thus it may in proper cases take the place of an action for negligence, or an action for breach of warranty of authority brought by the person named as defendant in the writ.

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4.6 Disney[2] states that:

> Any practitioner may be made liable summarily as an officer of the court for contempt of court or for breach of undertakings given to the court, a client or a third party, or for improper dealings with or retention of a client's money or property. The inherent disciplinary jurisdiction (particularly in its protective function) shares many common features with the inherent jurisdiction to punish for contempt of court. Conduct by a practitioner which is in contempt of court may amount to misconduct attracting the disciplinary jurisdiction, particularly where the practitioner has wilfully persisted in a course of contemptuous conduct. Nonetheless, the jurisdictions are not co-extensive and conduct by a practitioner which amounts to contempt does not necessarily indicate unfitness to remain upon the Roll.

4.7 The Appeal Panel of the Legal Services Division of the Administrative Decisions Tribunal (NSW) upheld the decision of the tribunal in *Bar Association of New South Wales v Di Suvero*

[2000] NSWADT 194 and 195. It found that a barrister who uses abusive language that is disrespectful towards the judge and opposing counsel, can be found guilty of 'unsatisfactory professional conduct' without being held in contempt. The barrister was suspended from practice for three months and he then retired. The language held to be abusive included, on five separate occasions, the word 'improper' concerning the actions of the prosecutor. He also said to the judge, who had closed the court to the public for most of the Crown's case: 'We will have a Star Chamber in the proceedings where sometimes the Court is closed and sometimes open.'[3] The Appeal Panel[4] said at [34]:

> … [I]t is quite possible and appropriate that conduct found to be in contempt could in turn give rise to disciplinary proceedings that might lead to disciplinary penalties being imposed. This is not prevented by any scheme of the Act and there is, in our view, no common law bar. We agree with the tribunal that conduct which does not amount to contempt may still amount to a breach of professional discipline.

4.8 Do you think an advocate has a right to point out misbehavior by a judge or opposing counsel without being disciplined? Should an advocate be punished for using the word 'improper'? Is that such an offensive word? How strenuously do you think an advocate may represent their client, especially in criminal cases? How would you define 'fearless' or 'zealous' advocacy? Do you think that the actions of Di Suvero are within the great tradition of a criminal defence lawyer if he was doing his best to uphold the rights of an unpopular defendant?

4.9 The cases raise the issue of whether we should have a different standard for how far a lawyer can go in their advocacy in a criminal as compared with a civil matter. This was discussed in the Legal Practice Tribunal by De Jersey J in *Legal Services*

Commissioner v Turley [2008] LPT 4 (Queensland):

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The respondent is a 66 year old solicitor who was admitted in 1967. He has not previously been found guilty of any professional breach. He admits the two charges which have been brought against him. The first charge is that during child protection proceedings in the Magistrates Court at Gladstone he made scandalous and offensive submissions. He was acting for the respondent mother. He described the service of an affidavit on his client as: 'The lowest act of any department that this office has seen. Certainly the lowest act I have seen in 35 years by the department.'

He referred to the Department of Child Safety officers in these terms:

> 'One has only to go through what the department has said and what appears in newspapers to see that one cannot trust the department. It is almost staffed by animals.'

Then, referring to an order that the children undergo psychological treatment he said:

> 'I put it that you are asking the client, my client, to let her children be killed or destroyed by Dr Keane … [a]nd that the children should be returned to my client and not put in the hands of these people who are almost like a (coven) of witches.'

The second charge concerns a letter written by the respondent to the presiding Magistrate three days after that hearing. In the course of the hearing the Magistrate had mildly admonished the respondent in these terms:

> 'If you continue using language like that I will report you to

> the Law Society.'

In his subsequent letter the respondent said:

> 'We are concerned with threats made by yourself during the conduct of the interim hearing on 2 January 2007. Our view is that your threats constitute a threat with menaces not only arising in this case but in other matters into the future. We note that you threaten in reference to the Legal Services Commission and in its context that reference to the Legal Services Commission was of a disadvantage. We feel that such was the degree of impropriety of that threat that you should disqualify yourself from further conduct of this matter.'

That is characterised by the applicant as 'an improper ex parte communication with the Bench'. That is so. In addition, it was an untenable contention. The Magistrate had taken a perfectly proper course in referring to a possible report to the respondent's professional association. It was his reasonable attempt to pull the respondent into line. The Magistrate should not have been subjected subsequently to the intimidation which was involved in that letter or subjected to pressure that he should disqualify himself when there was simply no justification for the contention that he should do so.

At the time of these events the respondent was suffering from depression and other medical problems for which he is now undergoing proper treatment. In the report of Dr Lynagh of 14 March 2008 the doctor says:

> 'In my assessment, Mr Turley is in dire need of psychological help and personal support. He certainly would benefit from psychological counselling in the first

> instance to assist with stress management and personal coping strategies. However, in time, more in-depth personal counselling and/or psychotherapy should be considered. As regards returning to legal practice I recommend to Mr Turley that he seek ongoing professional support and monitoring by an appropriate psychologist in relation to any debilitating stress he may experience so as to facilitate a smooth adjustment back into the workforce. It may be wise for him to consider a work role which involves less demanding legal tasks and intense adversarial court work.'

Each of the breaches amounts to professional misconduct. Each surpasses unsatisfactory professional conduct. The use of grossly offensive language in the course of Court proceedings and an intimidatory approach to a judicial officer based on an untenable interpretation of what had occurred in the Court proceedings are matters of some gravity.

The appropriate response, allowing for the respondent's personal circumstances and his previously unblemished record, is certainly a public reprimand and an order that he pay the costs of the applicant. The amount of those costs has been agreed in the sum of $1500.

But this Tribunal has the opportunity now to mould an order which will assist the respondent to avoid the recurrence of these sorts of problems. He has offered undertakings to undertake further psychological counselling and treatment and on that basis the applicant seeks the orders I have indicated already; additionally, a fine and an order limiting the respondent's involvement in practice for the next 12 months, … upon the respondent, by his counsel, undertaking to the Tribunal as follows:

1. To undertake such psychological counselling and other treatment as Dr Ionnidis may recommend;
2. To obtain a report from Dr Lynagh or another appropriately qualified psychologist in respect of his mental state and provide that report to the applicant within the ensuing 12 months [the

Court made the following orders]:

(a) order that the respondent is publicly reprimanded;
(b) order that the respondent pay the applicant's costs in the agreed amount of $1500;
(c) order that for the ensuing 12 months the respondent engage only in legal practice under supervision and not apply for a principal level practising certificate or other statutory equivalent;
(d) order that in the next 12 months the respondent obtain and provide to the applicant a report detailing established supervision arrangements within four weeks of commencing or recommencing employment as a legal practitioner.

4.10 The *Turley* case is analysed by Jones,[5] who points out that the highly inappropriate submissions of Turley do not merely present a question of decorum, but provide a context to examine the proper place of a lawyer in the administration of justice. Should the Magistrate have used his contempt power to control this matter?

4.11 In *Council of the Law Society of New South Wales v Griffin* [2016] NSWCATOD 40, a solicitor, who was also an actor, was found guilty of professional misconduct for an email to a judge concerning a case he was in, which stated: 'I consider your conduct in this matter is questionable and further that the Australian public and democratic values require and deserve a higher standard of decision making.' He also said: 'Your decision was likely made without good faith and with bias.' He was given a reprimand and required to take a course in legal ethics.

4.12 Abusive and disrespectful language by legal practitioners has now come under the scrutiny of the Legal Services Commissioner (NSW). In his discussion of cases and principles on courtesy, Mark[6] discusses a number of cases, including *Di Suvero*, and refers to *Re Constantine Karageorge*, Disciplinary Tribunal (NSW) No 12 of 1986, *New South Wales Bar Association v Jobson* [2002] NSWADT 171, *Re David Anthony Perkins*, Disciplinary Tribunal (Vic) T0070 of 2004, and *Re Paul Reynolds* Disciplinary Tribunal (Vic) T030 of 2004 (regarding sexual harassment of a client). If only disrespectful language is used, should this be enough for a reprimand?

4.13 The following is an example of a discipline problem: John is a well-known and respected solicitor, with a reputation for his skills and efficiency. He and his wife serve on a couple of local charity boards. He has been in practice with a small suburban firm of four partners and three associates for 12 years. In the past three years he has run into severe family problems. He and his wife have been having domestic problems and, at times, loud verbal disputes. At one time he even physically pushed her away when she was yelling at him. He also has problems with his son, who stole a car and has been sent to a youth training centre. As a result, he has not performed well in his legal work. His partners have been considerate and helped him with some of his work. He even took time off, but then went back to work full-time. He has been drinking frequently after work with friends at the local pub. He is seeing a psychologist about his personal problems. A few months after the 'trouble' in the family began, there were two complaints against John to the disciplinary authorities regarding delays in processing divorce matters. John replied promptly by completing the matters. Last year there were two more delay matters, this time in relation to conveyancing. Again John completed the work within

a few weeks of being contacted. None of these complaints were followed up because he completed the work. Far more serious has been the case of Joan, a 84-year-old widow, who went to John over injuries she suffered as a passenger in a car accident. He failed to file her complaint before the statute of limitations had passed. Joan has gone to another solicitor and is suing John and his firm for negligence. After investigation, the matter was referred to the disciplinary tribunal. The tribunal has to decide whether John's conduct constitutes professional misconduct or a lesser breach and, if so, what an appropriate penalty would be. the Tribunal also has to decide how Joan will be compensated. Many in the local community know about John's problems, including this matter. Discuss the issues involved, including what Mary, John's counsel, should advise John. Refer to any relevant statutory provisions.

STATUTORY CATEGORIES OF MISCONDUCT

4.14 In all jurisdictions there are statutory provisions that regulate the conduct of practitioners. The extracts below define the meaning of the words 'unsatisfactory professional conduct' and 'professional misconduct', and indicate the types of conduct that fall within these definitions. Common law categories of misconduct are referred to at **4.32**–**4.39**.

4.15 The following extract is from the New South Wales Legal Profession Uniform Law 2015, which is mirrored for Victoria:

> **296 Unsatisfactory professional conduct**
>
> For the purposes of this Law,

'unsatisfactory professional conduct' includes conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

297 Professional misconduct

(1) For the purposes of this Law,
'professional misconduct' includes:
   (a) unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence, and
   (b) conduct of a lawyer, whether occurring in connection with the practise of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.

(2) For the purpose of finding that a lawyer is not a fit and proper person to engage in legal practice as referred to in subsection (1) (b), regard may be had to the matters that would be considered if the lawyer were an applicant for admission to the Australian legal profession or for the grant or renewal of an Australian practising certificate and any other relevant matters.

298 Conduct capable of constituting unsatisfactory professional conduct or professional misconduct

Without limitation, the following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct:

   (a) conduct consisting of a contravention of this Law, whether or not:
      (i) he contravention is an offence or punishable by way of a pecuniary penalty order; or
      (ii) the person has been convicted of an offence in relation to the contravention; or
      (iii) a pecuniary penalty order has been made against the

person under Part 9.7 in relation to the contravention;

(b) conduct consisting of a contravention of the Uniform Rules;
(c) conduct involving contravention of the Legal Profession Uniform Law Act of this jurisdiction (other than this Law), whether or not the person has been convicted of an offence in relation to the contravention;
(d) charging more than a fair and reasonable amount for legal costs in connection with the practice of law;
(e) conduct in respect of which there is a conviction for:
    (i) a serious offence; or
    (ii) a tax offence; or
    (iii) an offence involving dishonesty;
(f) conduct as or in becoming an insolvent under administration;
(g) conduct in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act;
(h) conduct consisting of a failure to comply with the requirements of a notice under this Law or the Uniform Rules;
(i) conduct in failing to comply with an order of the designated tribunal made under this Law or an order of a corresponding authority made under a corresponding law (including but not limited to a failure to pay wholly or partly a fine imposed under this Law or a corresponding law);
(j) conduct in failing to comply with a compensation order made under this Chapter.

…

4.16 The following extract is from the Queensland Legal Profession Act 2007 (Qld):

418 Meaning of unsatisfactory professional conduct

Unsatisfactory professional conduct includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

419 Meaning of professional misconduct

(1) Professional misconduct includes —

(a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and

(b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

(2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate.

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420 Conduct capable of constituting unsatisfactory professional conduct or professional misconduct

(1) The following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct —

(a) conduct consisting of a contravention of a relevant law, whether the conduct happened before or after the commencement of this section;

Note —

Under the Acts Interpretation Act 1954, section 7, and the Statutory Instruments Act 1992, section 7, a contravention in relation to this Act would include a contravention of a regulation or legal profession rules and a contravention in relation to a previous Act would include a contravention of a legal profession rule under the Legal Profession Act 2004.

(b) charging of excessive legal costs in connection with the practice of law;

(c) conduct for which there is a conviction for —
a serious offence; or
a tax offence; or
an offence involving dishonesty;

(d) conduct of an Australian legal practitioner as or in becoming an insolvent under administration;

(e) conduct of an Australian legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act;

(f) conduct of an Australian legal practitioner in failing to comply with an order of a disciplinary body made under this Act or an order of a corresponding disciplinary body made under a corresponding law, including a failure to pay wholly or partly a fine imposed under this Act or a corresponding law;

(g) conduct of an Australian legal practitioner in failing to comply with a compensation order made under this Act or a corresponding law.

(2) Also, conduct that happened before the commencement of this subsection that, at the time it happened, consisted of a

contravention of a relevant law or a corresponding law is capable of constituting unsatisfactory professional conduct or professional misconduct.

(3) This section does not limit section 418 or 419.

…

4.17 The following extract is from the South Australia Legal Practitioners Act 1981 (SA):

68 — Unsatisfactory professional conduct

In this Act —

'unsatisfactory professional conduct' includes conduct of a legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.

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69 — Professional misconduct

In this Act —

'professional misconduct' includes —

(a) unsatisfactory professional conduct of a legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and

(b) conduct of a legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to practise the profession of the law.

70 — Conduct capable of constituting unsatisfactory professional conduct or professional misconduct

Without limiting section 68 or 69, the following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct:

(a) Conduct consisting of a contravention of this Act, the regulations or the legal profession rules;
(b) Charging of excessive legal costs in connection with the practice of law;
(c) Conduct in respect of which there is a conviction for —
  (i) a serious offence; or
  (ii) a tax offence; or
  (iii) an offence involving dishonesty;
(d) Conduct of a legal practitioner as or in becoming an insolvent under administration;
(e) Conduct of a legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act 2001 of the Commonwealth;
(f) Conduct of a legal practitioner in failing to comply with an order of the Tribunal made under this Act or an order of a corresponding disciplinary body made under a corresponding law (including but not limited to a failure to pay wholly or partly a fine imposed under this Act or a corresponding law);
(g) Conduct of a legal practitioner in failing to comply with a compensation order made under this Act or a corresponding law;
(h) Conduct of a legal practitioner in failing to comply with the terms of a professional mentoring agreement entered into with the Society.

…

4.18 The following extract is from the Tasmanian Legal

Profession Act 2007 (Tas):

420. Unsatisfactory professional conduct

For the purposes of this Act —

unsatisfactory professional conduct includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the

standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

421. Professional misconduct

(1) For the purposes of this Act —

professional misconduct includes —

(a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and

(b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

(2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate.

422. Conduct capable of constituting unsatisfactory professional conduct or professional misconduct

(1) Without limiting section 420 or 421, the following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct:

(a) conduct consisting of a contravention of this Act, the regulations or the legal profession rules;

(b) charging of excessive legal costs in connection with the practice of law;

(c) conduct in respect of which there is a conviction for —

(i) a serious offence; or

(ii) a tax offence; or

(iii) an offence involving dishonesty;

(d) conduct of an Australian legal practitioner as or in becoming an insolvent under administration;

(e) conduct of an Australian legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act 2001 of the Commonwealth;

(f) conduct consisting of a failure to comply with the requirements of a notice under this Act or the regulations (other than an information notice);

(g) conduct of an Australian legal practitioner in failing to comply with an order of the Tribunal made under this Act or an order of a corresponding disciplinary body made under a corresponding law (including but not limited to a failure to pay wholly or partly a fine imposed under this Act or a corresponding law);

(h) conduct of an Australian legal practitioner in failing to comply with a compensation order made under this Act or a corresponding law.

(2) Conduct of a person consisting of a contravention referred to in subsection (1)(a) is capable of constituting unsatisfactory professional conduct or professional misconduct whether or not the person is convicted of an offence in relation to the contravention.

…

4.19 The following extract is from the Western Australia Legal Profession Act 2008 (WA):

402. Term used: unsatisfactory professional conduct

For the purposes of this Act —
unsatisfactory professional conduct includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

403. Term used: professional misconduct

(1) For the purposes of this Act
professional misconduct includes —
(a) unsatisfactory professional conduct of an Australian legal Practitioner, where the conduct involves a substantial or consistent failure to maintain a reasonable standard of competence and diligence; and
(b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

(2) For the purposes of finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an

applicant for admission or for the grant or renewal of a local practising certificate.

404. Conduct capable of constituting unsatisfactory professional conduct or professional misconduct

Without limiting section 402 or 403, the following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct —

(a) conduct consisting of a contravention of this Act or a previous Act;
(b) charging of excessive legal costs in connection with the practice of law;
(c) conduct in respect of which there is a conviction for —
  (i) a serious offence; or
  (ii) a tax offence; or
  (iii) an offence involving dishonesty;
(d) conduct of an Australian legal practitioner as or in becoming an insolvent under administration;
(e) conduct of an Australian legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act;

(f) conduct of an Australian legal practitioner consisting of a failure to comply with an order of the Complaints Committee, or the State Administrative Tribunal or Supreme Court exercising jurisdiction under this Act or an order of a corresponding disciplinary body made under a corresponding law (including but not limited to a failure to pay wholly or partly a fine imposed under this Act, a previous Act or a corresponding law);

(g) conduct of an Australian legal practitioner in failing to comply with a compensation order made under this Act or a corresponding law.

…

4.20 The following extract is from the Northern Territory Legal Profession Act 2006 (NT):

464 Unsatisfactory professional conduct

For this Act:
'unsatisfactory professional conduct' includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

465 Professional misconduct

(1) For this Act:
'professional misconduct' includes:
(a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
(b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

(2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice, regard may be had to the suitability matters that would be considered if the practitioner were an applicant:
(a) for admission to the legal profession under this Act; or
(b) or the grant or renewal of a local practising certificate.

466 Conduct capable of constituting unsatisfactory professional conduct or professional misconduct

(1) Without limiting section 464 or 465, the following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct:
  (a) conduct consisting of a contravention of this Act;
  (b) charging of excessive legal costs in connection with the practice of law;
  (c) conduct in respect of which there is a conviction for:
    (i) a serious offence; or

    (ii) a tax offence; or
    (iii) an offence involving dishonesty;
  (d) conduct of an Australian legal practitioner as or in becoming an insolvent under administration;
  (e) conduct of an Australian legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act;
  (f) conduct of an Australian legal practitioner in failing to comply with an order of the Disciplinary Tribunal made under this Act or an order of a corresponding disciplinary order made under a corresponding law (including but not limited to a failure to pay wholly or partly a fine imposed under this Act or a corresponding law);
  (g) conduct of an Australian legal practitioner in failing to comply with a compensation order made under this Act or a corresponding law.

(2) Also, without limiting section 464 or 465, the following acts or omissions are capable of constituting unsatisfactory professional conduct or professional misconduct:

(a) a failure by an Australian legal practitioner to comply with any requirement made by the Law Society or investigator, or a person authorised by the Society or investigator, in the exercise of powers conferred by Part 6.4;

(b) a contravention by an Australian legal practitioner of any condition imposed by the Society or investigator in the exercise of powers conferred by Part 6.4;

(c) a failure by a legal practitioner director of an incorporated legal practice to ensure the incorporated legal practice, or any officer or employee of the incorporated legal practice, complies with any of the following:

(i) any requirement made by the Society or investigator, or a person authorised by the Society or investigator, in the exercise of powers conferred by Part 6.4;

(ii) any condition imposed by the Society or investigator in the exercise of powers conferred by Part 6.4.

…

4.21 The following extract is from the Australian Capital Territory Legal Profession Act 2006 (ACT):

386 What is unsatisfactory professional conduct?

In this Act:
'unsatisfactory professional conduct' includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

…

387 What is professional misconduct?

(1) In this Act:
'professional misconduct' includes —

(a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
(b) conduct of an Australian legal practitioner whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

388 What is unsatisfactory employment conduct?

In this Act:
'unsatisfactory employment conduct', of an employee of a solicitor, means conduct in relation to the solicitor's practice (whether or not with the knowledge or agreement of the solicitor) that is conduct in relation to which a complaint under part 4.2 (Complaints about Australian legal practitioners and solicitor employees) has been, or could be, made against the solicitor.

389 Conduct capable of being unsatisfactory professional conduct or professional misconduct

Without limiting section 386 or section 387, the following conduct can be unsatisfactory professional conduct or professional misconduct:

(a) conduct consisting of a contravention of this Act;

Note ***This Act*** is defined in the dictionary.

(b) charging of excessive legal costs in connection with the practice of law;
(c) conduct in relation to which there is a conviction for —

(i) a serious offence; or
(ii) a tax offence; or
(iii) an offence involving dishonesty;

(d) conduct of an Australian legal practitioner as or in becoming an insolvent under administration;

(e) conduct of an Australian legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act;

(f) conduct of an Australian legal practitioner in failing to comply with an order of the ACAT made under this Act or an order of a corresponding disciplinary body made under a corresponding law (including but not limited to a failure to pay all or part of a fine imposed under this Act or a corresponding law);

(g) conduct of an Australian legal practitioner in failing to comply with a compensation order made under this Act or a corresponding law.

Note Various provisions of this Act identify particular conduct as conduct that can be unsatisfactory professional conduct or professional misconduct (see eg s 138(1) (Obligations of legal practitioner partner relating to misconduct — multidisciplinary partnerships)).

…

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4.22 The New South Wales Court of Appeal in *Chan Yuan Xu v Council of the Law Society of New South Wales* [2009] NSWCA 430, had to deal with an appeal from finding of the New South Wales Civil and Administrative Tribunal because of several ethical breaches by a solicitor when dealing with one transaction, namely,

the purchase of property. Handley J limited the category of professional misconduct by finding that, although the conduct of the solicitor was 'incredibly sloppy', that by itself did not constitute professional misconduct. In applying the Legal Profession Uniform Law 2015 (NSW), Handley J said:

> [U]nsatisfactory professional conduct constitutes conduct … that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. … Although, by themselves, they were not acts of professional misconduct, repeated acts of this character would properly be characterised in that way. Although the acts were isolated and there is no evidence that they had been repeated in other transactions the solicitor should nevertheless be publicly reprimanded for them as acts of unsatisfactory professional conduct.

4.23 Handley J overruled the Tribunal's finding of professional misconduct as well as the Tribunal issuing penalties of a $3000 fine, a public reprimand, and an order to pay the Law Society's costs. Instead, Handley J held that the solicitor had committed unsatisfactory professional conduct and should be publicly reprimanded, fined $1500, and that the Law Society pay its own costs. Handley J appears to make a distinction between misconduct that results from a series of closely related actions within one transaction, and misconduct that results from more than one transaction and/or unrelated actions within one transaction.

4.24 What if a barrister admits that he made submissions that were incompetent, but denies any lack of diligence? Are both incompetence and lack of diligence required for a finding of unsatisfactory professional conduct?[7]

4.25 Due to public outcry concerning tax-avoiding lawyers who had declared bankruptcy to avoid paying taxes, in July 2001 all jurisdictions in Australia agreed to adopt provisions granting

powers to disciplinary authorities to suspend, cancel, or refuse to issue a practising certificate in relation to certain acts of bankruptcy. There has also been a willingness to pursue practitioners who have not paid their taxes. There have been a number of lawyers either struck off or suspended under these provisions.[8] It appears that the profession has been willing to reinstate those who have been suspended. A *Sydney Morning Herald* editorial[9] noted:

> Most people, who have little or no choice in the matter of paying taxes, would think barristers, once suspended for non-payment of taxes, should not practise unless they meet their tax debts. In the present cases, Mr Walker [then the President of the Bar] is vague about whether those reinstated to practise have cleared their debts. He seems satisfied that they

> have demonstrated 'insights into previous shortcomings' and a 'willingness and a capacity to do things differently in the future'.

4.26 Do you agree with these views that a legal practitioner needs to clear tax debts before receiving a practising certificate? Where would they get the money to pay such debts without practising?

4.27 In *New South Wales Bar Association v Cameron* [2009] NSWADT 59, it took seven years to have the barrister struck off for bankruptcy.[10] It should, however, be noted that bankruptcy or insolvency for a legal practitioner does not always result in disbarment.[11]

4.28 In considering the following cases where practitioners have

used psychiatric evidence, identify what elements the judges are looking for when determining whether there are mitigating circumstances that justify a reduction in penalties. The most interesting was the successful argument in *Bar Association v Harrison* (Legal Services Tribunal, June 1997, unreported) by a barrister who used evidence from a psychologist to show he had a psychological block about filing a tax return. See also the use of psychiatric evidence in *Victorian Bar Incorporated v Himmelhoch* [1999] VSC 222 and *Law Society of South Australia v Murphy* [1999] SASC 83. In two South Australian cases, *Legal Profession Board v Phillips* (2002) 83 SASR 467 and *Legal Profession Board v Hanaford* (2002) 83 SASR 277, the courts were unwilling to accept mental illness as an excuse for behaviour resulting in unprofessional conduct. In the South Australian case of *Legal Practitioners Conduct Board v Thomson* [2009] SASC 467, the legal practitioner was struck off for not being a fit and proper person — Thomson had suffered a brain injury in 1988 that had led to ongoing depression and post-traumatic stress disorder and the Supreme Court found she lacked the ability to carry out legal work. In *Legal Practitioners Conduct Board v Jones* [2010] SASC 51, the South Australian Full Supreme Court rejected a mitigation plea by the practitioner because of difficult personal circumstances, which included his ex-wife's serious health problems, his son's deployment in overseas military operations, and his need for anger management.

4.29 In *Quinn v Law Institute of Victoria* [2007] VSCA 122, the court allowed additional evidence on appeal that the practitioner suffered from depression because he had breached an undertaking to the Commissioner of Legal Services to complete CPD requirements. The Court of Appeal reduced the penalty from a nine month suspension of his certificate followed by a 12 month

restriction to practise as an employee solicitor, to only being restricted to practise as an employee solicitor because of mitigating circumstances, namely, that he suffered from depression, physical illness, and as a consequence, financial problems.

4.30 In *Prothonotary of the Supreme Court of New South Wales v Fitzsimons* [2012] NSWSC 260, Adams J at [65]–[69] did not strike off a practitioner who had been convicted of criminal offences and had served a prison sentence. He had misappropriated clients' funds, but had demonstrated remorse for his crimes and had repaid the misappropriated funds. The practitioner argued he was not a fit and proper person at the time of his misdeeds

because the behaviour had resulted from having a bipolar disorder and from gambling and alcohol addictions, but that these problems were now under control. The judge accepted his submissions, but said that his mental illness did not explain his failure to report the misappropriation to the Law Society. While the judge found that professional misconduct had taken place, he allowed the practitioner to remain on the Roll, subject to certain conditions, namely, that the practitioner had to be an employee under the care of a general practitioner and was denied access to the trust account, and that he was required to follow 'any regime of treatment or medication prescribed for him, including undertaking of any tests as directed. He was also required to give written authority to his medical practitioners to provide progress reports to the Law Society when requested to do so.'

4.31 In the recent case of *BRJ v Council of the New South Wales*

Bar Association [2016] NSWSC 146, the finding by the New South Wales Civil and Administrative Tribunal of unsatisfactory professional conduct was upheld. There was a finding that the appellant suffered from a mental condition — anorexia nervosa — that affected her judgment and cognition. The court still found that the appellant's conduct fell short of the standard of competence and diligence that a member of the public was entitled to expect of a reasonably competent legal practitioner. Her mental condition was not such as to deprive her of alleged conduct that constituted unsatisfactory professional conduct. As a result of her mental condition, she was not reprimanded and there was no disciplinary action taken. In *BRJ v Council of the New South Wales Bar Association (No 2)* [2016] NSWSC 228, the court ordered her to pay the costs of the Bar Association for the appeal.

COMMON LAW CATEGORIES OF MISCONDUCT

4.32 The case law has helped develop the general definition of what is considered to be serious and less serious professional misconduct. In *Re Vernon; Ex parte Law Society of New South Wales* (1966) 84 WN (NSW) (Pt 1) 136 (New South Wales Court of Appeal), the Court noted (per Herron CJ, Sugerman and McLelland JJA):

> When application is made to the Court to strike a solicitor off the roll for professional misconduct, the question for the Court is whether, having regard to the circumstances brought before it, it is any longer justified in holding out the solicitor in question as a fit and proper person to be entrusted with the important duties and grave responsibilities of a solicitor. …
>
> The meaning of the expression [professional misconduct], and the general nature of the conduct for which a solicitor may be struck off

> the roll or suspended from practice [is] … well settled. In *Re A Solicitor; Ex parte The Law Society* [1912] 1 KB 302, Darling J quoted with approval and applied to the conduct of a solicitor a definition which Lopes LJ, with the assistance of Lord Esher MR and Davey LJ, had prepared in *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 of 'infamous conduct in any professional respect' in relation to a medical practitioner. That definition, as quoted by Darling J from the judgment of Lopes LJ is: 'If it is shown that a medical man, in the pursuit of his profession has done something with regard to it which would reasonably be regarded as disgraceful or dishonourable by his professional brethren of good repute and

> competency', then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect'. 'A definition', Darling J said, 'could not be more authoritative than one drawn after careful consideration by each of those three learned judges. … The Law Society are very good judges of what is professional misconduct by a solicitor, just as the General Medical Council are very good judges of what is misconduct as a medical man'.

4.33 The Supreme Court of South Australia in *Re R, a Practitioner of the Supreme Court* [1927] SASR 58, said at 60:

> In our view 'unprofessional conduct' is not necessarily limited to conduct which is 'disgraceful or dishonourable', in the ordinary sense of those terms. It includes, we think, conduct which may reasonably be held to violate, or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession of good repute and competency.

4.34 How would you find out who are members of the

profession of 'good repute and competency'?

4.35 More than 77 years ago, the High Court discussed the general common law definition of professional misconduct in *Kennedy v the Council of the Incorporated Law Institute of New South Wales* (1939) 13 ALJ 563, where Rich J said at 563:

> … a charge of misconduct as relating to a solicitor need not fall within any legal definition of wrongdoing. It need not amount to an offence under the law; it is enough that it amounted to grave impropriety affecting the solicitor's professional character, and was indicative of a failure either to understand or to practise the precepts of honesty or fair dealing in relation to the courts, his or her clients or the public. The particular transaction which is the subject of the charge must be judged as a whole, and the conclusion whether it betokens unfitness to be held out by the court as a member of a profession in whom confidence can be placed; or, on the other hand, although a lapse from propriety, is not inconsistent with general professional fitness and habitual adherence to moral standards, is to be reached by a general survey of the whole transaction.

4.36 And Dixon J said at 564:

> His fitness to continue on the roll must be judged by his conduct and his conduct must be judged by the rules and standards of his profession; his unfitness appeared when he did what solicitors of good repute and competency would consider disgraceful or dishonourable. He made a bold attempt by irregular means to interfere with that part of the course of justice which affected the ascertainment of facts by the testimony of witnesses.

4.37 In the *Kennedy* case, the 'irregular' behaviour of the solicitor involved was that he went to the home of a witness for the opposing party and tried to intimidate her into changing her testimony. The solicitor defended his behaviour on the basis that he was anxious to win for his client, which ambition, according to

McTiernan J, had become 'more powerful than his attachment to the standards which a solicitor should observe'. McTiernan J said the desire to win did not excuse his conduct, and the court struck him off the Roll of practitioners.

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4.38 In *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, the High Court distinguished between what was serious and less serious misconduct. The court struck off a barrister for abusing his advocacy privileges during four prosecutions for maintenance which were brought by his client against the solicitor acting for the client's wife in divorce proceedings between them. The court said at 199 and 200:

> The rules which govern the conduct of members of a body of professional men, such as the Bar of New South Wales, may (though there is, of course, no logical dichotomy) be divided roughly into two classes. In the one class stand those rules which are mainly conventional in character. [Breach of these written rules is less serious, as they regulate the conduct of members of the profession in their relations with one another — for example, advertising restrictions and the retainer rules. The court says a breach of these rules would warrant disbarment only if it were shown to be 'part of a deliberate and persistent system of conduct'.] Rules of the other class … are fundamental. They are, for the most part, not to be found in writing … because they rest essentially on nothing more and nothing less than a generally accepted standard of common decency and common fairness. To the Bar in general it is more a matter of 'does not' than of 'must not'. A barrister [Clyne] does not lie to a judge who relies on him for information. He does not deliberately misrepresent the law to an inferior court or to a lay tribunal. … He does not, in cross-examination to credit, ask a witness if he has not been guilty of

some evil conduct unless he has reliable information to warrant the suggestion which the question conveys.

4.39 In *PG v Law Society of Australian Capital Territory* [2004] ACTSC 99, the Court of Appeal upheld a finding of unsatisfactory professional conduct for the making of a false statement. The applicant had acted for clients in a conveyancing transaction and had executed a certificate that stated he had explained the documents to the clients. The board found that he had the clients sign the certificate without explaining the documents. Does the action by the practitioner constitute perjury? See the High Court decision in *Smith v New South Wales Bar Association (No 2)* (l992) 66 ALJR 605, where the barrister's testimony was not accepted by a court, but was not considered 'deliberate lying' by the High Court and thus did not constitute perjury. What if a practitioner files affidavits that have not been attested to and properly signed by the client? Should this lead to being struck off?[12]

INQUISITORIAL ASPECTS — CANDOUR AND COOPERATION[13]

4.40 The following two cases concern the requirement for cooperation and candour with the authorities investigating lawyers' possible misdeeds. The need for cooperation is in opposition to the principles and the basic premise of the adversary system, but there are certain restrictions on how much cooperation is required.

4.41 In *Re Veron; Ex parte Law Society of New South Wales* (1966) 84 WN (NSW) (Pt 1) 136 (New South Wales Court of Appeal) at 142, the evidence proved that Veron had kept clients'

funds of 1000 pounds sterling per case for himself. This fact was established by an investigator and supported by many affidavits of his clients. Herron CJ, Sugerman and McLelland JJA stated:

> … No affidavit was filed by the respondent or on his behalf by way of denial or explanation of the matters deposed to. … As we have said, no affidavit as to the facts was filed by the respondent or on his behalf despite the fact that we repeatedly drew counsel's attention to the omission. Eventually Mr Gruzman [counsel for the respondent] stated that he had with his junior considered the matter carefully with his client and had decided not to file any affidavit of the respondent. He also stated that his client would not offer to give oral evidence in the witness box. This course, we think, was irregular. The respondent is an officer of the court. The Full Court of the Supreme Court held in November 1965 that on the material presented to it by the Law Society a prima facie case of misconduct was made out and called upon the respondent to show cause why he should not be dealt with. The matter arises within the disciplinary jurisdiction of the Court and if the respondent after consideration declines to give his account on oath of the matters charged he cannot complain if the Court holds against him that the facts deposed to by [the investigator] and other witnesses are substantially true. From the earliest times, and as far back as the recollection of the individual judges of this Court goes, disciplinary proceedings in this jurisdiction in this State have always been conducted upon affidavit evidence and not otherwise. They are not conducted as if the Law Society … was prosecutor in a criminal cause or as if we were engaged upon a trial of civil issues at *nisi prius*. The jurisdiction is a special one and it is not open to the respondent when called upon to show cause, as an officer of the court, to lie by and to engage in a battle of tactics, as was the case here, and to endeavour to meet the charges by mere argument.

4.42 Do you think that making practitioners cooperate with the disciplinary authorities denies them basic rights available to others? What reasons would you give for treating legal practitioners

differently from others charged with misconduct?

4.43 In *Malfanti v Legal Profession Disciplinary Tribunal* (1993) 4 LPDR 17, BC 9303657,[14] the complaint against Malfanti, who had practised for 26 years without any complaints, alleged failure to repay a loan made to him by Kabbara. Malfanti alleged that the moneys were given to him for purchase of shares. Hunt & Hunt, representing Kabbara, then complained to the Law Society, alleging a failure by Malfanti to account. An inspector was appointed, and on the basis of the report and Malfanti's reply, a complaint was lodged by the society with the tribunal. It alleged that:

1. the solicitor had deliberately misled his clients, the Law Society, the investigator and Hunt & Hunt over the purchase of shares;
2. there were discrepancies in his trust account;
3. he had intermingled his funds with those of his clients;
4. he had failed to obtain adequate security from one client for moneys loaned by the solicitor on behalf of other clients.

4.44 The tribunal dismissed the charges concerning Kabbara and several others, but did find certain irregularities in Malfanti's trust account constituting professional misconduct. He was later fined $12,000 and ordered to pay the costs of the Law Society on a solicitor and client basis. The solicitor, Malfanti, appealed. Clarke JA found as follows:

> … [I]t is important that I say something about the course of the proceedings. … Most of that time was taken up with the agitation of the issues raised by the grounds in respect of which a finding in favour

of the solicitor was made, particularly those grounds relating to Kabbaras. What is more the solicitor was placed in a very difficult position insofar as the normal procedures of the Tribunal were not followed and there were no statutory declarations made by the Kabbaras. As a consequence not only was the solicitor unable to put on a declaration in reply but each of the witnesses … gave oral evidence. This was a time consuming exercise.

… Mr and Mrs Kabbara would not speak to the Law Society's legal representatives prior to the hearing. Not surprisingly in these circumstances, the evidence given by the Kabbaras did not substantiate [the allegations]. Furthermore, Mr Kabbara gave evidence denying that the solicitor had ever been his solicitor. This evidence was regarded by the Tribunal in its decision as critical insofar as it destroyed, in the opinion of the Tribunal, the underlying basis of the grounds of complaint relating to the sum of $50,000 paid by the Kabbaras to the solicitor. In the light of this evidence [and evidence supporting the appellant from another witness] … his counsel submitted to the Tribunal at the end of the Law Society's case that [these allegations] … should be regarded as at an end and that the solicitor should be required to answer only the case made in relation to the later grounds. For reasons which are not presently apparent to me, counsel for the Law Society objected to the submission and submitted that the course suggested by counsel for the solicitor was incompatible with the nature of the proceedings. As I understand his submission, it was to the effect that it is incumbent upon a solicitor to give evidence in order to assist the Tribunal to determine what orders should be made in the case. At the end of the argument the Tribunal agreed with this submission and required the solicitor to give evidence concerning all complaints including those which were not supported by evidence. To put it mildly this was unfortunate for that decision unnecessarily prolonged the hearing insofar as the solicitor was required to give evidence-in-chief concerning a number of matters in respect of which there was no case against him. Furthermore, counsel for the Law Society then proceeded to cross-examine him on those matters. Of course it is true to say that disciplinary proceedings before

the Tribunal are different in principle from criminal and civil, inter parties, proceedings and as has been said by this Court it is not open to a solicitor when called upon to show cause, as an officer of the Court, 'to lie by and engage in a battle of tactics … and to endeavour to meet the charges by mere argument' (*Re Veron; Ex parte Law Society of New South Wales* (1966) 84 WN (NSW) (Pt 1) 136, at 141–2). But in the same case their Honours went on to say that:

> 'We are well aware that if a solicitor is called upon to show cause he may do so in several ways. He may (a) argue that the material before the court discloses no evidence of misconduct; (b) argue that the facts adduced in evidence do not warrant a finding of misconduct; (c) meet the situation by a denial or explanation. …'

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Veron … provides no support for the view that where, as counsel for the solicitor here suggested, the facts adduced in evidence disclose no evidence of professional misconduct, a solicitor is nonetheless obliged to go into the witness box and give evidence in reply to evidentiary material which is incapable of establishing professional misconduct on his or her part. In principle I see no reason why a solicitor should not seek to argue that the evidence adduced against him or her is incapable of establishing in law one or more of the grounds relied upon by the Law Society. Indeed if counsel for the solicitor seeks to argue that there is no evidence to support any of the grounds in the complaint I find it difficult to understand why a submission analogous to a 'no case' argument should not be entertained when the Law Society closes its case. The position may not be the same where the solicitor wishes to contend that some grounds are not supported by evidence while conceding that others are. In some cases, for example, where there are discrete issues involved in the particular grounds the subject of the submission, it may be convenient to entertain a

submission of no case. In others where, for instance, the grounds in respect of which the submission is to be made are, or possibly may be, linked with other grounds in respect of which it is conceded there is evidence it may be proper for the Tribunal to require the solicitor to give his or her evidence without ruling upon the submission.

It is impossible in my view to lay down a rigid rule. The Tribunal is bound to mould its procedures to enable it efficiently and effectively to carry out its functions in an expeditious manner. In making these comments I have not overlooked the principle that a solicitor who appears before the Tribunal is bound to assist it in its investigations. (See *Johns v Law Society of New South Wales* [1982] 2 NSWLR 1, per Moffitt P at 6.) I do not hold the opinion, however, that that obligation extends to requiring a solicitor to enter the witness box to furnish a reply on oath to evidentiary material which is incapable of establishing a case of professional misconduct. … In addition, the Tribunal's requirement that the solicitor respond to the evidence … bears some relevance on the question of costs.

When it came to final addresses, counsel for the Law Society submitted that questions 1–3 and 5 should be answered 'No'. In other words at the end of the hearing he recognised that the evidence did not justify findings adverse to the solicitor on these grounds.

The Tribunal went further, as I have pointed out, and answered all questions except those to which I have referred in the solicitor's favour. A primary reason for doing so was that it was not satisfied that there was at the relevant times a relationship of solicitor and client between the Kabbaras and the solicitor. This finding was unsurprising in view of the fact that Mr Kabbara stoutly denied at all times that any such relationship existed.

I turn then to the grounds found proved and the associated question whether, even if the grounds were established, it had been shown that the solicitor was guilty of professional misconduct.

The Tribunal concluded that there were debits in the solicitor's trust account. … The solicitor said that the debit resulted from his failure to

transfer that amount from the capital adjustment account and it was only at the end of May, when he was doing his trust balances, that he noticed that the account was in a debit situation and he straightened it out fairly quickly. It is clear, therefore, that there was a debit but there is no material justifying the

inference that there was a wilful breach of [the rules]. … Indeed the solicitor denied that he had intentionally created the debit and no reason appears why his denial should be disbelieved.

… This court has more than once spoken of the need for the Law Society to exercise care in drafting the grounds of complaint so that they are easily comprehensible and the solicitor served with notice of those grounds of complaint would immediately know precisely what it is that is alleged against him or her.

Furthermore, it was incumbent upon it to identify that professional misconduct which it found proved. It is impossible to tell from the reasons whether the critical finding flowed from affirmative answers to all the findings adverse to the solicitor or only one or two and if so which. The Tribunal carries out functions of fundamental importance to the legal profession and to the public generally. It has great responsibilities which carry, as a necessary incident, obligations to conduct enquiries before it in an efficient and expeditious manner and in such a way as to accord justice to the parties before it. One aspect of that obligation is the giving of reasons which clearly explain the findings of fact. … The Tribunal's reasons in this case were quite inadequate. …

The court set aside the orders of the tribunal and dismissed the complaint. The Law Society was made to pay the solicitor's costs of the appeal and two-thirds of his costs before the tribunal.

4.45 In *New South Wales Bar Association v Liversey* [1982] 2 NSWLR 237, a barrister was given a more severe penalty for not being frank and for giving a false explanation concerning the professional misconduct. Moffitt J said what was minor may become serious if the practitioner misleads the authorities, and 'a response which is honest and frank in this adversity may well demonstrate that he is a person truly to be relied on'. Liversey successfully appealed to the High Court on the basis of bias of the judges of the Court of Appeal in *Liversey v New South Wales Bar Association* (1983) 151 CLR 288. Liversey later decided to agree to being struck off the Roll instead of having a new hearing. See *Legal Practitioners Complaints Committee v De Alwis* [2006] WASCA 198 at [111], where lack of co-operation by the practitioner contributed to a finding that he was unfit to practise.

4.46 In contrast to the *Liversey* and *De Alwis* cases, a solicitor, Madden, who was struck off by the Tribunal, had this severe penalty removed on appeal, and instead was made to work under the supervision of another lawyer for 12 months. The Court of Appeal in *Legal Services Commissioner v Madden (No 2)* [2008] QCA 302 said at [124]:

> It is in the appellant's favour that he fully cooperated in the investigations leading to these charges; he accepted his guilt of the charges of professional misconduct and agreed to the facts. … [H]e undertook a practice management course at his own expense.

The court also pointed out that Madden had apologised to the clients he hurt and compensated one of them for the money that was owed.

4.47 There are also statutory requirements concerning the requirement for cooperation and candour, such as s 606 of the Legal Profession Act 2004 (NSW), which requires a legal

practitioner to respond within 28 days to any request by the NSW Legal Services Commissioner.

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Failure to do so can result in a finding of professional misconduct and will usually result in a reprimand, a fine, and the payment of costs of the Commissioner.[15]

PENALTIES, PROCEDURES AND OVERCHARGING

4.48 The imposition of penalties for professional misconduct or a lesser misconduct appears to have three main objectives:

- to protect the public from corrupt or incompetent practitioners;
- to protect the image and standing of the legal profession; and
- to rehabilitate the practitioner.

4.49 When the matter is before a regulatory authority, the penalties available are set out in the particular statute. For example, under s 299 of the Legal Profession Uniform Law (NSW and Vic), orders by a local regulatory authority when finding unsatisfactory professional conduct can be:

> (1) …
>
> (a) an order cautioning the respondent or a legal practitioner associate of the respondent law practice;
>
> (b) an order reprimanding the respondent or a legal practitioner associate of the respondent law practice;
>
> (c) an order requiring an apology from the respondent or a legal practitioner associate of the respondent law practice;

(d) an order requiring the respondent or a legal practitioner associate of the respondent law practice to redo the work that is the subject of the complaint at no cost or to waive or reduce the fees for the work;
(e) an order requiring:
(i) the respondent lawyer; or
(ii) the respondent law practice to arrange for a legal practitioner associate of the law practice—
to undertake training, education or counselling or be supervised;
(f) an order requiring the respondent or a legal practitioner associate of the respondent law practice to pay a fine of a specified amount (not exceeding $25 000) to the fund referred to in section 456;
(g) an order recommending the imposition of a specified condition on the Australian practising certificate or Australian registration certificate of the respondent lawyer or a legal practitioner associate of the respondent law practice. …

4.50 Penalties imposed by the courts or tribunals for misconduct can include any one or more of the following orders:

- striking a practitioner's name of the Supreme Court Roll;

- imposing a fine — in some jurisdictions, up to $100,000;[16]
- canceling or suspending a practising certificate and imposing related conditions as to reapplication;
- imposing conditions on a practitioner's practising certificate — for example, supervision or trust account inspection, medical examinations and medical certificates, and/or

continuing legal education;
- reprimanding the practitioner;
- ordering compensation to be paid to the aggrieved client — for example, in Victoria and New South Wales up to $25,000 under the Legal Profession Uniform Law;[17] or
- ordering the payment or part payment of costs.

4.51 Either a professional body or the government (that is, the Attorney-General) may be unhappy with the penalties imposed by a tribunal. In such an event, the Prothonotary (an officer of the court) can be instructed by the Attorney-General or the Law Society or Bar Association to appeal the decision or penalty to the Supreme Court. It should be noted that the aggrieved party (usually a client) does not have the right to appeal a tribunal decision.

4.52 One of the most famous cases of an appeal concerning the penalty being taken by the Law Society is that of *The Council of the Law Society of New South Wales v Foreman (No 2)* (1994) 34 NSWLR 408 (New South Wales Court of Appeal). In this case, the Tribunal had found Foreman guilty of professional misconduct and unsatisfactory professional conduct for excessively overcharging a client and forging documents. Foreman was fined $20,000 and ordered to pay part of the costs of the Law Society. On appeal, Mahoney JA and Giles AJA had Foreman struck off the Roll. Mahoney JA said he came to this conclusion because the court and other practitioners could not trust Foreman concerning undertakings and assurances. Kirby J dissented and gave a lesser penalty, noting at 411–23:

> … The first alteration of the time sheet [by Foreman], even if an accurate retrospective record of what had actually occurred, was an attempt by the solicitor to bolster her claim against her client. It was also an attempt to protect the solicitor in respect of disputes which had occurred within her firm concerning the continuation of the

department of the firm dealing with family law matters. In that dispute, the solicitor had a direct, personal interest which she had the strongest possible personal motive to defend because family law was her specialty.

Had matters rested there, I do not doubt that these proceedings would have had a different outcome. After all, the solicitor's alteration was limited to the internal records of her firm. It recorded her recollection of what had transpired. It did not exceed that recollection (eg by recording receipt of a signed cost agreement form). It memorialised the truth, as the Tribunal was later to find it.

However, unfortunately, the solicitor's deception was compounded. It came to involve employees of the solicitor's firm. It was extended to her partners. It roped in counsel appearing for the firm and other advisers. Most seriously, by a second rewriting of the time

sheets, to be produced on discovery in what was by then a litigated contest between the firm and Ms Weiss …, the deception was extended to Ms Weiss and her new legal representatives. Most importantly of all, it was extended, uncorrected, to the Family Court of Australia by the action of the solicitor in permitting, indeed facilitating, the production to that court of a further copy of the rewritten time sheet. This pretended to be genuine. It was produced at considerable pains to make it appear genuine. It was put forward to practitioners, opponents and the Family Court as genuine. The solicitor knew that it was false.

Clearly, this conduct is capable of amounting to professional misconduct. Its characterisation as such was not disputed in this Court. …

I have read with full understanding the conclusion reached by the other members of the Court that the only appropriate order to be

made is that sought by the Society, viz the removal of the solicitor's entitlement to practise as a legal practitioner. For me, the most telling argument in favour of that course is the one to which Mahoney JA refers when he cites the powerful passage from the judgment of Isaacs J in *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655, 681. It is still true today, as it was in 1909, that high standards are expected of legal practitioners, particularly in their dealings with clients and the courts. This is so that members of the public, litigants, other practitioners and the courts themselves can have confidence in the integrity of those who enjoy special privileges as legal practitioners. …

… [T]his Court must make its own orders in the light of its findings and the impressions it derives from the evidence, including the evidence of the solicitor. I have concluded that an order short of the removal of the name of the solicitor from the Roll is appropriate. I agree that the fine imposed by the order of the Tribunal is not appropriate to the findings of professional misconduct made in the case. It does not conform with the principles established by past authority. In my view it is appropriate to propose an order more salutary than a fine yet less ultimate than striking off. …

The uncontested evidence is that the solicitor is a person of high professional qualifications and attainments. She certainly had a high opinion of her own capacities in the field of family law. I occasionally felt a suggestion that this self-estimation might have attracted disapprobation which a more modest expression of her own abilities might have avoided. But the objective facts indicate that she is a highly talented professional lawyer. She was extremely diligent, working very long hours. She worked on most Sundays applying herself energetically to her clients' causes. Not all of the explanation for such diligence can be laid at the door of the cost requirements of her firm. Astonishingly, the evidence revealed that she and some staff members even slept at the office on occasion after working very late. Many, like the solicitor, were highly stressed by the pressure under which they worked. Part of the stress would appear to have arisen from the obligation to meet budgeted requirements of fee production

established by the firm. … There was no doubt as to her devotion to her clients' interests. Such devotion is, in my respectful opinion, to be applauded. It should be appreciated by the community and the Court, so long as it is accompanied by honesty and appropriate attention to the community's larger interests. So far as honesty is concerned the present case is the only one where dishonesty has been laid at the door of the solicitor. The very fact that she had a high profile within the legal profession and that the present

proceedings gained widespread publicity would suggest that, had there been other cases of dishonesty or misconduct involving clients other than Mrs Avidan, they would have come to light. There is nothing like adversity to attract such cases to notice. Yet none was suggested. This Court must therefore approach the matter on the footing that the solicitor is a person of considerable talent and professional dedication involved in serious misconduct in one case. … It is in the public interest that such a conscientious legal practitioner should remain in practice, so long as this can be achieved consistently with the maintenance of the standards of the legal profession. …

Connected with the last consideration is the work which the solicitor has, in the past, performed for the community and for the legal profession. For example, the evidence discloses her participation in numerous activities of the organised legal profession. She took part in conferences and training sessions of value to other legal practitioners and especially in the field of family law. When this Court comes to the order which it must make in the facts found, the solicitor is entitled to bring to account this service. …

… This is not the case of a solicitor who has committed many unconnected wrongs against many clients and others. This is a case where the solicitor acted wrongly once in relation to one client's affairs. She then became caught up in her deception. She continued to

attempt to sustain it and to cover up the deception. If she had not acted wrongly in the first place, I think it is fair to assume that all that has followed would not have occurred. In a sense, I judge that the solicitor was a victim of her own pride. Her pride did not permit her to do what her professional duty and moral responsibility should have dictated. …

For her wrong, the solicitor has undoubtedly suffered greatly. In part, because of her former high standing and public position in the legal profession and the community, she has suffered greater humiliation than most as a result of these proceedings and the media publicity which has surrounded them. She was effectively dismissed from the partnership of her firm. The publicity which has surrounded the proceedings before the Tribunal and this Court have inevitably affected her and her family. She suffered considerable shame as a result of the proceedings before, and orders of, the Tribunal. That shame would necessarily have been increased by the further proceedings in this Court and the publicity which they attracted. These considerations are relevant to the evaluation of the risk that this proud and able practitioner would ever offend again — exposing herself to like humiliation. I judge that risk to be negligible, even far-fetched. The solicitor is most unlikely to re-offend. The circumstances which gave rise to her wrong-doing in the present case, or like circumstances, are unlikely ever to repeat themselves. She has been submitted to a scarifying experience of instruction. …

What to do? … [T]he Court may make the orders which, under the Act … the Tribunal may make. However, the list of orders do not appear, standing alone, to be entirely apt to, or at least sufficient for, resolution of the present appeal. Even if the fine imposed upon the solicitor were set at the maximum of $50,000 [now $100,000] provided by … the Act and even if that fine were combined with public reprimand …, an order restricting the solicitor's practice … and an order for costs, I do not believe that the resulting orders would be appropriate to the findings of misconduct made.

In the end, I have concluded that it is appropriate to use the facility of a suspended order provided by … the Act in combination with an exercise of the Court's inherent power to fashion a more specific order, appropriate to the circumstances of the case. I have in mind that it is more useful to the community, the solicitor, the solicitor's family, the profession's reputation and the potential clients of a person so talented and experienced that she should have an opportunity to secure and continue employment within the profession. But in a part of the profession where the financial rewards are not so great but the social utility of the work is great indeed. I refer to the professional work which is performed by legal professional bodies acting on behalf of disadvantaged persons in our community who could rarely.

I realise that, in the present case, the solicitor might not be willing to perform work of the kind proposed. I also realise that (almost certainly) it would be outside the field of her immediate specialty of family law. I realise further that it would involve a significant drop in her income. I realise as well that, in current economic circumstances, such work might be difficult to obtain. I would contemplate that it should last for no more than four years. But I believe that such an order would have greater utility in the circumstances of this case. It would be more just and appropriate to the misconduct found, than removal of the solicitor from the legal profession. In matters of this kind, courts should be more creative than they have been in the past. They should fashion orders apt to the misconduct found. The inherent jurisdiction of this Court, preserved by the Act, allows this Court to do this. …

I cannot leave this appeal without saying something concerning … 'gross over-charging'. The particulars were that the solicitor had charged legal costs relating to the main proceedings involving Mrs Avidan (Ms Weiss) in a total sum of $335,174.99. It was alleged that such costs were paid by, or on behalf of, Ms Weiss and that the sum charged was 'grossly in excess of a sum for legal costs which would be

charged by solicitors of good repute and competency'. It was contended that, to charge such a sum, constituted professional misconduct.

The Tribunal dismissed that charge. … No appeal was brought by the Society to this Court against the order of dismissal in this regard. What happened seems to have occurred with the concurrence of the Society.

It is important, in those circumstances, that this Court should not take into account, as adverse to the solicitor (or indeed to her former firm which is not represented in these proceedings), conclusions of its own about the costs charged. Explanations were given before the Tribunal concerning the large team of solicitors and para-legals who were deployed for many hours on Mrs Avidan's case and charged for accordingly.

… Yet it seems virtually impossible to credit that legal costs in a dispute between a married couple for the most part over their matrimonial property could properly run up legal costs in the figures that are mentioned here. To those costs have to be added others which take the true aggregate of costs of the case closer to half a million dollars.

Little wonder that the legal profession, and its methods of charging, are coming under close Parliamentary, media and public scrutiny. Something appears to be seriously wrong in the organisation of the provision of legal services in this community when charges of this

order can be contemplated, still less made. Of course, those charges were rendered not by Ms Foreman alone but by her then firm. That firm has not been heard, in the nature of these proceedings, to defend its charges before this Court. I have considered whether, out of the Court's inherent power, we should not order an investigation into

how such an apparently enormous sum was charged to an individual litigant. To me, it appears astonishing and *prima facie* appalling. Indeed, it seems a matter for the Court's concern. But the Law Society did not wish to prosecute the solicitor on this complaint. It has done nothing of which the Court is aware in relation to the firm. That may, or may not, be understandable. I cannot say. The evidence certainly discloses that the solicitor's charging strategy was, to say the least, influenced by a system of time charging and by budget requirements within the firm which were not of her individual making. There was some evidence, untested, that the costs levied were considered reasonable by other legal practitioners. I am not satisfied that this matter has been as fully and properly investigated as it should have been.

Although the Court cannot do anything in these proceedings (and no further action is called for against the solicitor) the Court can, and in my view should, request the Law Society to investigate this matter further. If such costs, in what was substantially a single matrimonial property case between a married couple, are truly regarded as reasonable, there may be something seriously wrong in the assessment of reasonableness within the legal profession which this Court should resolutely correct.

Litigants look to this Court, ultimately, to protect them from over-charging by legal practitioners where this is so high as to constitute professional wrong-doing. The courts of other Australian jurisdictions have begun to deal determinedly with gross over-charging by legal practitioners where this is proved to amount to professional misconduct. See eg *Cornall v AB (a Solicitor)*, Supreme Court of Victoria (Appeal Division), unreported, 24 June 1994; [1994] VJB 50. No amount of costs agreements, pamphlets and discussion with vulnerable clients can excuse unnecessary over-servicing, excessive time charges and over-charging where it goes beyond the bounds of professional propriety. Time charges have a distinct potential to result in overcharging. Cf *New South Wales Crime Commission v Fleming & Heal* (1991) 24 NSWLR 116 (CA), 126–7. I depart from this case with a real sense of disquiet that what may arguably be the most serious

> issue revealed by it may not have been fully considered in a way protective of the true standards of the legal profession and the legitimate expectations of the community. The alteration by an individual solicitor of documents governing charges represents a serious professional wrong. But what lay behind it? The defence of charges which are by any account enormous and tend to put the courts and their constitutional function beyond the reach of ordinary citizens. The judges should not put on blinkers when a fundamental problem is disclosed. As it is, in my view, by this phenomenon in this case.

4.53 The legal fees in defending these actions in the *Foreman* case were so high that Foreman could not pay them. She eventually declared bankruptcy. Practitioners have to be careful about the costs involved. In a Victorian disciplinary matter, a solicitor, Antony John McDermott Macken, was found guilty of misconduct for charging grossly excessive fees. The order of the registrar was that a fine of $600 be imposed and that the solicitor pay the Law Institute's costs of $50,000. The solicitor appealed to the Solicitors' Board, which agreed with the finding

of misconduct and confirmed the earlier order, plus additional costs of $100,000 of the Law Institute for the appeal, plus the cost of $19,377.60 of providing a transcript. These costs do not include the solicitor's own costs.[18]

4.54 Costs can also be a consideration of a professional association in not bringing an action, if the case against a practitioner is finely balanced between winning and losing. Should the legal profession refrain from bringing such cases for fear of

costs being awarded against them?

4.55 The courts have recognised that investigative costs by legal services commissioners should also be considered in determining whether an investigation should be undertaken. In *Re N (A solicitor)* [2010] QSC 267, Fryberg J found a breach of duty by a young solicitor in a criminal matter for his failure to properly prepare a case for hearing. Fryberg J said that the breach of duty probably amounted to unsatisfactory conduct under the Legal Profession Act 2007 (Qld), but did not refer the matter to the Legal Service Commission for investigation. The judge said that it was in the public interest not to request such an investigation, as the Commission has limited resources. Furthermore, the solicitor was young with limited experience in criminal matters, was unlikely to repeat this conduct, and did not bear sole responsibility for the omission. Therefore the court felt that the need for general deterrence was adequately served merely by publishing the reasons for the decision.

4.56 Even if a legal practitioner is successful in their appeal, a court will still require the practitioner to pay the costs of the Law Society if there is nothing unreasonable about a law society's or commissioner's conduct in bringing the action. Hidden J in *Mavrakis v Law Society of New South Wales* [2008] NSWSC 816, stated at [14]:

> The usual approach, whereby the successful practitioner still pays the costs of the professional body, could be productive of significant hardship. That may well be true in the present case. Nevertheless, the public policy behind the usual approach is clear and I see no good reason to depart from it. I order the plaintiff to pay the Law Society's costs.

4.57 Do you think it is fair to follow the usual public policy,

especially when it can lead to hardship for the legal practitioner?

4.58 Do you believe that practitioners who grossly overcharge should be struck off the Roll of practitioners? What reasons could be given for such a serious sanction? What has the legal profession done to control some of the problems in relation to overcharging?

4.59 *Veghelyi v Law Society of New South Wales* (SC(NSW), Full Court, No 40257/91, 6 October 1995, unreported) is an example of a case dealing with the vexing problem of overcharging and appropriating funds without the authority to do so.

4.60 The then President of the New South Wales Bar Association, David Bennett QC, commented as follows on fees:[19]

> The first rule is that there are no rules. Fees are entirely a matter for negotiation between individual barristers and their solicitors (or occasionally lay clients). … The second rule is that the basis of charging needs to be disclosed in advance. … The third and most controversial aspect of fees concerns so called 'cancellation fees'. … Here again, one may bargain any reasonable cancellation fee so long as one does so in advance. … The fourth aspect of fees is that they must not be unreasonably large. … [O]ne needs to take into account the fees normally charged by the barrister and his or her seniority and eminence. It is difficult to see how excessive fees can amount to professional misconduct or unsatisfactory professional conduct where they have been fully negotiated at arm's length with a solicitor or sophisticated client but the theoretical possibility is there. In practice it is only likely to be a problem where there is an unsophisticated client and no solicitor.

4.61 Do you believe clients are properly protected from

excessive barristers' fees when their solicitors negotiate the appropriate fee? How would you protect clients in this situation?

4.62 In a curious decision in *Nikolaidis v Legal Services Commission* [2007] NSWCA 130, the New South Wales Court of Appeal by a 2:1 decision reversed the Legal Services Tribunal's finding that the appellant had deliberately charged grossly excessive costs. The court accepted Nikolaidis' argument that he had not prepared the bill of costs, and that it was done by an employee. Therefore he had not deliberately overcharged. The Commissioner had not charged Nikolaidis with recklessness or lack of supervision, and his appeal was successful. The Court of Appeal said that, at common law, the 'Commissioner would have had to prove that the appellant knew, or was recklessly careless, as to whether the charges were excessive'. Nikolaidis was later struck off for other activities.[20]

4.63 In light of this decision, is it now possible for legal practitioners in grossly overcharging matters to argue that a clerk prepared the bill of costs? What if it is usually the case that clerks prepare bills of costs? According to Steve Mark, the NSW Legal Services Commissioner, with the establishment of a National Legal Services Ombudsman and national rules, it may not be necessary to legislate to rectify the *Nikolaidis* decision.

4.64 In another case of gross overcharging, *Quinn v Law Institute of Victoria* [2007] VSCA 122, a Victorian practitioner was successful in his appeal against a 12 month suspension. It was argued successfully on appeal that the misconduct had resulted from depression caused by personal and family strains. Furthermore, Quinn's overcharging was not that of falsely claiming for work not done, but because excessive work had been done. Quinn had offered the tribunal an undertaking to have his bills of costs independently assessed. The Court of Appeal held that

compliance with the undertaking would ensure that there was no recurrence of the overcharging. Furthermore, suspension was unnecessary for the protection of the public, given that the overcharging was not the result of concoction or deception, but was the consequence of 'personal failings of a man who was honest, not lacking in probity nor being in the least furtive in his activities'.

4.65 Australia is a multi-religious society. Is the use of the Christian bible still appropriate for taking an oath? Can another sacred text be used? Should we deal with oaths only by way of an

affirmation? *Re Saeed Asif Mirza* (SC(SA), Full Court, No SCGRG 2225/96; S5577, 8 May 1996, unreported) concerned circumstances where the lawyer allowed his client (as was his usual practice) to swear answers to interrogatories on a dictionary, instead of on a Bible as prescribed by law. As a result of this action, the client had a good defence to a charge of perjury subsequently laid against him by reason of false answers that he had given on that occasion. Cox J noted:

> … The applicant is 60 years of age. He holds a Master of Laws degree from the University of London and was called to the English Bar in 1963. He was enrolled as an advocate in the High Court of West Pakistan in 1964. He was admitted to practice as a barrister and solicitor in South Australia in 1977. … The applicant gave evidence before the Tribunal but the Tribunal was satisfied that certain of his evidence was false and recently invented for the purpose of avoiding the charge. It found that he prevaricated and lied. The Tribunal found the charge proved. It found the appellant guilty of unprofessional conduct as alleged in the particulars and it recommended that

disciplinary proceedings be commenced against him in the Supreme Court.

It is noteworthy that, on one occasion during the course of the proceedings before the Tribunal, the applicant failed to attend on an adjourned hearing date because he had simply left the country without giving notice of his intention to either the Tribunal or the Law Society. The applicant was unable to explain such failure satisfactorily to the Tribunal.

… On 4 December 1991 the Law Society's application to have the applicant's name struck from the roll of practitioners came on for hearing before the Full Court. The applicant did not attend the hearing, either personally or by counsel, and an order was made against him in his absence. The Court noted that the applicant was then residing in Pakistan and that he had left South Australia after the finding of the Tribunal was published when he was well aware that disciplinary proceedings against him were in progress. The Court found that the Law Society had done all that could reasonably be done to bring its application to the notice of the applicant.

On 15 December 1995 the applicant gave notice of his intention to apply for readmission as a practitioner of this Court. He filed an affidavit explaining that he had been in Pakistan from September 1991. He said that he had left Adelaide because he was led to believe that the Law Society had abandoned further proceedings in the matter. He explained that on 27 November 1991 he had received a telegram in a remote part of Pakistan that told him of the forthcoming Full Court hearing but it was not possible for him to return to Adelaide in time or even to get a message to the Law Society. He put forward a mitigatory version of the matters into which the Tribunal had enquired and he enclosed documents relating to his health and his employment in Pakistan. Later he filed another affidavit which described the circumstances in some detail and offered an explanation for what had happened.

This was the state of the matter when the application for readmission duly came on for hearing in the Full Court on April 9. The applicant

represented himself and Mr Poison appeared for the Law Society. However, at the outset the applicant made it very clear that the only order he was seeking was an order setting aside the Full Court's order of 4 December 1991. He was not pursuing, even as an alternative, his application for readmission.

We listened to the applicant's oral submission and we have before us the documents on which he relies. In my opinion, the difficulties he faces are insuperable. The Tribunal found

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him guilty of the unprofessional conduct alleged against him and it also found that he had deliberately lied and prevaricated in the evidence that he gave to the Tribunal. The Tribunal gave substantial and careful reasons for its decision and plainly, on the face of it, the appellant was not a fit and proper person to remain on the roll of practitioners. It was open to the applicant to appeal against the Tribunal's decision under s 86 of the Legal Practitioners Act but he did not institute an appeal. He was aware that the Tribunal had recommended that the disciplinary proceedings be commenced against him in the Supreme Court, yet he left the country before those proceedings were heard and without instructing anyone to act on his behalf. His explanation for doing so is unpersuasive. Thereafter he either knew or had the opportunity of discovering that he had been struck off the roll but he allowed the matter to remain dormant for four years. …

In my opinion, there are no proper grounds upon which the Full Court's order could be set aside.

The application should therefore be dismissed.

4.66 It was obvious that this practitioner who let his client use a dictionary felt that he was just carrying out a formality. Do you

think he should have been penalised, even if he did not intentionally seek to breach the law?

CONDUCT OUTSIDE PROFESSIONAL PRACTICE

4.67 Conduct of practitioners outside professional practice can affect their fitness to practise, under common law and by statute. Certain violations of the law will be deemed to be serious enough to have the practitioner struck off the Roll.

4.68 In *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 (High Court of Australia), Ziems, a barrister, was found guilty of involuntary manslaughter and sentenced to two years' gaol. He had killed a motorcyclist while driving under the influence of alcohol. The Full Supreme Court declined to investigate the merits of the charge, look at the transcript of the trial, or go into the details of the evidence, either at the trial or at the inquest. The court held that it was incongruous and impossible that the status of a barrister should be held by a person serving a sentence for such an offence, and ordered Ziems to be struck off the Roll. Fullagar J noted at 288–90:

> In a case of this kind it is essential, in my opinion, to begin by defining the ground on which an order of disbarment is to be made. It is stated in general terms by saying that the person in question is not a fit and proper person to be permitted to practise at the Bar. The next question is — at which facts is it proper to look in order to see whether that conclusion is established? The answer must surely be that we must look at every fact which can throw any light on that question. …
>
> The conviction is not irrelevant. It is admissible prima facie evidence bearing on the ultimate issue, and may be regarded as carrying a degree of disgrace itself. But, in the first place, its weight may be

seriously affected by circumstances attending it, and it must be permissible to look at the conduct of the trial. And, in the second place, it is on what the man did that

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the case must ultimately be decided, and we are bound to ascertain, so far as we can on the material available, the real facts of the case. It is only when we have done this that we can be in a position to characterise the conduct in question, and to see whether we are really justified in saying that a man is disqualified from practising his profession. …

[The court below] said that: 'The personal and the professional sides of his life cannot be dissociated'. If this is read literally, it goes, in my opinion, much too far. Personal misconduct, as distinct from professional misconduct, may no doubt be a ground for disbarring, because it may show that the person guilty of it is not a fit and proper person to practise as a barrister: see for example, *Re Davis*. But the whole approach of a court to a case of personal misconduct must surely be very different from its approach to a case of professional misconduct. Generally speaking, the latter must have a much more direct bearing on the question of a man's fitness to practise than the former.

4.69 Fullagar J then examined the manslaughter trial in detail, and decided that the defendant had been placed at an important disadvantage by the Crown's refusal to call a material witness (a police officer), and by a misdirection to the jury. Thus, he found the conviction to be 'deprived of practical significance'. He said at 296:

Then, when one looks at the evidence apart from the verdict, it seems to me impossible to say that it justifies a finding that the appellant is not a fit and proper person to practise at the Bar. One must be very

sure of the facts before making so serious a finding.

4.70 Kitto J said at 298–300:

> … [A] barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations. If a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of those privileges and in the effective discharge of those responsibilities, he is not a fit and proper person to remain at the Bar.
>
> Yet it cannot be that every proof which he may give of human frailty so disqualifies him. The ends which he has to serve are lofty indeed, but it is with men and not with paragons that he is required to pursue them. It is not difficult to see in some forms of conduct, or in convictions of some kind of offences, instant demonstration of unfitness for the Bar. Conduct may show a defect of character incompatible with membership of a self-respecting profession; or, short of that, it may show unfitness to be joined with the Bench and the Bar in the daily co-operation which the satisfactory working of the courts demand. A conviction may of its own force carry such a stigma that judges and members of the profession may be expected to find it too much for their self respect to share with the person convicted the kind of degree of association which membership of the Bar entails. But it will be generally agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the dividing line is by no means always an easy task.

In the present case it is not for conduct, but because of a conviction, that the appellant has been disbarred. The Supreme Court, in my opinion, was right in refusing to go behind the conviction, since it had not called upon the appellant to show cause in respect of anything else.

If the issue before the court had been whether the appellant's conduct on the occasion to which the conviction related had in fact been such as to disqualify him from continuing as a member of the Bar, that conduct would have had to be proved by admissible evidence. The learned judges of the Full Court were not in a position, and rightly made no attempt, to form any opinion as to the credibility of the witnesses whose depositions were before him, or to come to a conclusion, upon consideration of the proceedings at the trial and the inquest, as to whether the trial might have been more favourable to the appellant than it was if the prosecution had conducted its case differently, or if the trial judge had summed up to the jury more fully or more appropriately than he did. The appellant was being called to answer a case relating, not to his conduct, but to his conviction and sentence. … The conviction is of an offence the seriousness of which no one could doubt. But the reason for regarding it as serious is not, I think, a reason which goes to the propriety of the barrister's continuing as a member of his profession. The conviction relates to an isolated occasion, and, considered by itself as it must be on this appeal, it does not warrant any conclusion as to the man's general behaviour or inherent qualities. True, it is a conviction of a felony; but the fact that as a matter of technical classification it bears so ugly a name, ugly because the most infamous crimes are comprehended by it, ought to be disregarded, lest judgment be coloured and attention diverted from the true nature of the conviction. It is not a conviction of a premeditated crime. It does not indicate a tendency to vice or violence, or any lack of probity. It has neither connection with nor significance for any professional function. Such a conviction is not inconsistent with the previous possession of a deservedly high reputation and, if the assumption be made that hitherto the barrister in question has been acceptable in the profession and of a character

> and conduct satisfying its requirements, I cannot think that, when he has undergone the punishment imposed upon him for the one deplorable lapse of which he has been found guilty, any real difficulty will be felt, by his fellow barristers or by judges, in meeting with him and cooperating with him in the life and work of the Bar.
>
> The assumption on which this is based may, of course, be false in a particular case. But that it must be made in the present case is surely undeniable, since no one has come forward to say a word against the appellant, and he has been called upon to answer nothing but the fact of his conviction.
>
> These considerations have led me to the conclusion that the appellant's conviction was not such as to call for the removal of his name from the roll of barristers. I am fortified in this opinion by the fact that counsel for the Bar Association, who appeared to assist the court both in the Supreme Court and before us, did not support the appellant's disbarment.

4.71 Fullagar, Kitto, and Taylor JJ held that the appellant should be suspended from practice during the term of his imprisonment. Dixon CJ and McTiernan J dissented, upholding the striking off order. Dixon CJ and Taylor J agreed with Fullagar J that it was appropriate to look at the circumstances of the offence and the trial, rather than considering only that there was a conviction.

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4.72 Should a court reopen a criminal conviction in order to determine a proper disciplinary penalty? Do you see problems in adopting this approach?

4.73 The *Ziems* case has been applied in many cases. One such example is *Prothonotary of the Supreme Court of New South Wales*

v Pangallo (1993) 67 A Crim R 77 (New South Wales Court of Appeal). In that case, Pangallo, a solicitor, was convicted of bribing a public officer and sentenced to six months' gaol. The prothonotary sought a declaration that Pangallo was guilty of professional misconduct and that he be struck off the Roll. The solicitor resisted the orders sought, on the basis that he was not guilty of the offence and that he had only pleaded guilty to obviate the risk of a custodial order. Kirby P noted at 78–81:

> … In accordance with the long-established procedure, the Prothonotary has brought the application, telescoping the consideration of the matter by the Disciplinary Tribunal. He has done so upon the footing that the solicitor has been convicted of an offence which, of its nature, warrants and requires the removal of his name from the Roll.
>
> The Court has said in many cases that, in proceedings affecting the discipline of members of the legal profession, the Court should ordinarily state the findings of fact which it makes. This course is adopted in case, in the future, the legal practitioner concerned, after removal of his or her name from the Roll, applies for readmission to practice: see, eg *Bridges v Law Society (NSW)* [1983] 2 NSWLR 361 at 362; see also *Prothonotary of the Supreme Court of New South Wales v Ritchard* (unreported, Court of Appeal, NSW, 31 July 1987). It is for this reason that it is appropriate to go beyond the fact of the conviction which stands against the name of the solicitor and to indicate the rejection of the belatedly innocent explanation of his conduct giving rise to the conviction. … I make full allowance for the solicitor's claimed inexperience in criminal proceedings and his obligation, at relatively short notice, to appear in one such proceeding. I also accept that some of the police questions may have been interpreted by the solicitor as indicating a willingness on the part of police to accept a bribe. However, the fact that the police made special arrangements to be wired for the purpose of recording the conversations with the solicitor and his client indicates, clearly

enough, that something was initially said by the solicitor which caused the police officer concerned (Sgt Newling) to suspect that a bribe was being, or would be, offered to him. Securing the necessary authority to record the conversations is exceptional and deliberately inconvenient: see the Listening Devices Act (NSW). I would infer that it would not have been done if Sgt Newling had not heard the solicitor say something which caused him to believe that a bribe would be offered. …

The fact that the amount then handed over by the solicitor's client was that sum ($500) [he offered to the police on the tape] tends to confirm that the solicitor was engaged, as charged, in bribery of a public official. The explanation belatedly given (viz instalment payments) is completely unconvincing. The plea of guilty, once the damaging tape was admitted at the trial, was fully justified. The solicitor was represented at his trial by competent counsel. On the Crown appeal to the Court of Criminal Appeal he had most experienced senior counsel to represent him. I cannot believe that, if there had been any precipitate plea at the trial, this would not have been discovered and raised in the Court of Criminal Appeal. Yet it was not. …

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In examining the solicitor's case I have assumed that it is open to this Court to permit the solicitor to make a collateral attack upon the conviction which followed his plea of guilty, never to this date withdrawn. There are, however, difficulties in allowing this course. The difficulties derive from the apparent absurdity which would follow if the Court of Criminal Appeal, constituted by judges of the Supreme Court, confirmed the solicitor's conviction and increased his sentence, whilst the Court of Appeal, also constituted by such judges, solemnly determined in these proceedings that he had been wrongly convicted, was innocent, had mistakenly pleaded guilty and had been imprisoned in error.

There is a second difficulty, apart from such appearances, in permitting the course into which the solicitor led the Court. It is that, whilst the solicitor's conviction of bribing a public officer stands, it presents, without anything more, a peculiar problem for his practising as a solicitor — at least until time, intervening activities and redeeming restoration to good character warrant the positive opinion on the part of the Court that he is again fit to be trusted as one of its officers. As the High Court made clear in *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 285–6, it is essential that legal practitioners 'command the confidence and respect of the court of … fellow counsel and … professional and lay clients'. It is extremely difficult to see how this could happen, at least in the immediate aftermath of a guilty plea to such an offence, a conviction and the imprisonment which flowed as a necessary consequence. Fellow members of the legal profession and members of the judiciary would, for those reasons alone, not have the requisite confidence in the solicitor.

… It might even be different if, although relevant to the duties of a legal practitioner, the offence was sufficiently explained, attributable to inexperience and relatively minor: see *Fraser v Council of the Law Society (NSW)* (unreported, Court of Appeal, NSW, Kirby P, Handley and Cripps JJA, 7 August 1992); [1992] NSWJB 89. But where, as here, the offence is self-evidently of great seriousness, requiring a prison term and is one destructive of the very system of justice which a legal practitioner must know that he is obliged to defend, it is difficult, if not impossible, to see how a recent conviction and a return to practice could stand together.

These conclusions would suggest that the Court should have refused the application by the solicitor, in effect, to challenge his conviction for the subject criminal offence. The present proceedings would be categorised as civil in character. They are not for the punishment of the solicitor but, as is often stated, for the protection of society. In England, the House of Lords in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 declared that where a final decision had been made in a criminal court of competent jurisdiction, a general

rule of public policy required that a civil action could not be used to initiate a collateral attack on that decision: see at 540f. This principle does not rest upon notions of issue estoppel: cf *Mills v Cooper* [1967] 2 QB 459 at 468f; *DPP v Humphrys* [1977] AC 1. It rests upon public policy declared by the courts and designed to avoid just the kind of embarrassment which a different outcome of separate proceedings would have caused in the case: cf *Saffron v Commissioner of Taxation (Cth) (No 2)* (1991) 30 FCR 578 at 589. At least where the 'collateral attack' is designed to challenge the foundation of the criminal conviction in the first place, it is an understandable reaction of the court, faced with the subsequent civil hearing, to say to the challenger: You must first by appeal, inquiry or pardon set aside or remove in a

relevant way the conviction which you seek to challenge: cf *General Medical Council v Spackman* [1943] AC 627 at 634.

… The reason which caused me to hold back from so determining in this case — and thus ruling out altogether the collateral challenge to his conviction raised by the solicitor — is to be found in the observation of Mason J in *Weaver v Law Society (NSW)* (1979) 142 CLR 201. In that case (at 207) his Honour said:

> 'Disciplinary proceedings under the Legal Practitioners Act 1898 (NSW) and in the exercise of the Supreme Court's inherent jurisdiction are not criminal proceedings, they are proceedings *sui generis*. When the court is called upon to examine the conduct of solicitors as officers of the court it is as much concerned to protect the public from misconduct on the part of solicitors as it is to ensure that issues already determined are not unnecessarily re-litigated. The court cannot disable itself from hearing and determining the very serious complaint against a solicitor that he has given false

> evidence merely because the complaint may or will involve the relitigation of allegations of earlier misconduct of which the solicitor has previously been found not guilty.'
>
> In a sense, *Weaver* presented the opposite side of the problem which is now before the Court. There the issue was whether a professional investigation could take place in the Court notwithstanding an earlier dismissal of charges of professional misconduct by the Statutory Committee. Here, the issue is whether it can take place notwithstanding a relevant conviction by a court. The cases are not, therefore, exactly analogous. The discharge in earlier proceedings stands as no barrier to the Society's claim for relief, as *Weaver* shows. Upon one view the conviction does stand as a barrier to the solicitor's application to be excused upon the ground that the conviction was wrongly secured.
>
> However, because as Mason J has pointed out, this Court must, in cases such as this, exercise its own independent jurisdiction with an eye to the performance of its duty to protect the public, I was prepared to allow the solicitor's evidence to be given so that such separate jurisdiction could be exercised in an inquiry which went beyond the simple (but ordinarily sufficient) fact of the conviction entered here against the solicitor.
>
> … In the determination of the facts, it is not finally necessary to resolve the scope of the Court's power to permit a legal practitioner which is, in effect, a collateral attack upon a conviction of a serious and relevant criminal offence. But I would not wish the course which was followed in this summons necessarily to indicate that such collateral attacks are available. In an appropriate case, that issue may fall for determination.

The court ordered Pangallo be removed from the Roll.

4.74 In the *Pangallo* case, Kirby P refers to *The Prothonotary of the Supreme Court v Ritchard* (CA(NSW), Full Court, CA 415/86, 31 July 1987, unreported), where the court struck a solicitor who

attempted to unlawfully purchase an outboard motor free of tax, off the Roll. After a police investigation, he gave a false story and continued to repeat it throughout the litigation process until, following a warning by the Court of Appeal and legal advice, he admitted to the fabrication. He then submitted to the court that he was unfit to practise and consented to

his removal from the Roll. The court still examined his actions as a basis for a future possible readmission application.

4.75 *Ziems* was applied in a number of other cases. In *Law Society of New South Wales v McKean* [1999] NSWADT 55, a solicitor who was found guilty of two counts of maliciously inflicting grievous bodily harm with intent, was struck off the Roll of practitioners. He had violated a Domestic Violence Order on a number of occasions and had stabbed his estranged *de facto* wife and one of her children, a five-year-old girl. The solicitor claimed he had been under the influence of alcohol, which had induced non-insane automatism. It was shown that the solicitor had made previous attacks on the *de facto* wife and had made a number of abusive phone calls.

4.76 In *Law Society of South Australia v Le Poidevin* (1998) 201 LSJS 76, a practitioner was struck off the Roll. Several of the charges related to his practice, but one related to his conviction and sentencing to three months in gaol for offences of threatening to endanger life and common assault. He had physically assaulted an auctioneer at an auction and then struggled with a security guard. He then yelled at the assembled people words to the effect: 'I have a

gun in the car. I will shoot anyone who stays on the land and tries to get back on it again.'

4.77 In *New South Wales Bar Association v Hamman* [1999] NSWCA 404, a barrister had been sentenced to 14 months' periodic detention for offences related to understating of income in his tax return. The Court of Appeal (Mason P and Priestley JA) struck him off the Roll. Davies AJA dissented, arguing that a three-year suspension would be the appropriate order because the 'matter is not so serious as to call for Mr Hamman's removal from the Roll'. The *Hamman* case was cited with approval in cases striking off two other barristers who had not paid their taxes.[21] In *New South Wales Bar Association v Somosi* [2001] NSWCA 285, the court rejected the argument that tax violations were not unrelated to the 'fit and proper person' test. Would you agree with Davies AJA that deliberate breaches of the tax law are not 'so serious'?

4.78 In a later case, *Re Barry John* [2007] SASC 263, a barrister who declared bankruptcy because of his inability to pay a tax assessment, petitioned the court to be able to practise. He was allowed to practise, but only as a barrister and with other restrictions. Debelle J found this was an unusual situation because the tax debt was caused by a failed tax avoidance scheme. See also *Legal Services Commissioner v Cain* [2009] LPT 19, where six convictions for tax offences by a practitioner resulted in the Queensland Legal Practice Tribunal only deciding to give the practitioner a reprimand and a prohibition from practising as a principal for three years. The leniency of the penalty was because the Tribunal found that dishonesty was not involved, but that the offences resulted from the practitioner 'being overwhelmed by circumstances'.[22]

4.79 It should be noted that lawyers who act recklessly or

intentionally breach the law by not paying their taxes or for other activities, will usually be struck off. A more recent example of

the latter is *Law Society of Tasmania v Matthews* [2010] TASSC 60, where the practitioner made two false declarations in order for her and her husband to obtain a first home owner's grant.

4.80 The most important case applying *Ziems* is *Council of the Law Society of New South Wales v A Solicitor* [2002] NSWCA 62, which was widely reported in the press. The Court of Appeal heard the case under its inherent jurisdiction because procedural problems barred bringing it before the disciplinary tribunal. The court decided to strike the solicitor off. This decision was based on his conviction on four counts of aggravated indecent assault on two minors, and for lack of candour on not reporting to the Law Society the commencement of a second action for the same charges while he was under investigation. He appealed to the High Court,[23] which noted as follows at [1]–[41] (per Gleeson CJ, McHugh, Gummow, Kirby, and Callinan JJ):

> [1] This is an appeal by a solicitor against decision of the Court of Appeal of New South Wales [striking him off for not being a fit and proper person]. … The appellant's name, and the names of members of his family, were not stated in the reasons for judgment of the Court of Appeal to ensure compliance with s 11 of the Children (Criminal Proceedings) Act 1987 (NSW). This requirement arises from the nature of the offences referred to in the declarations, and the ages of the victims.
>
> …

[6] By the time the matter came before the Court of Appeal, the convictions referred to in declaration 1(b) [the second charges against him that had not been reported] had been quashed as a result of a successful appeal, but, as the form of the declaration indicates, the essence of that aspect of the complaint of professional misconduct was failure to disclose, rather than the conduct giving rise to the convictions.

…

[The court then discusses procedural issues, and its inherent power to discipline solicitors, quotes from the Legal Profession Act the definitions of professional misconduct and unsatisfactory professional conduct and discusses the historical development of the definitions in statute and case law. The court points out that a finding of professional misconduct does not necessarily lead to a striking off of the solicitor.]

[16] Where a practitioner appeals to this Court from an order of the Supreme Court removing him or her from the roll of practitioners, two potentially countervailing considerations arise. They were referred to by Fullagar J in *Ziems v The Prothonotary of the Supreme Court of NSW* who said:

> '[T]he appellant challenges what is not merely an exercise of discretion by the Supreme Court, but an exercise of discretion in a matter which is in a special sense the province of the Supreme Court as the highest court of New South Wales. It relates to the right of a man to practise in that court and in other courts of New South Wales over which that court exercises a supervisory jurisdiction in certain ways. On the other hand, the possibly disastrous consequences of disbarment to the individual

> concerned [are such that] a court to which an appeal comes as of right is bound to examine the whole position with meticulous care.'

[17] The present appeal required special leave, but the appellant has already obtained that leave. As his counsel pointed out, the Court of Appeal was exercising its jurisdiction at first instance. This is the appellant's one opportunity for appellate review of an adverse decision.

[18] The case of *Ziems* provides an example of the need to examine 'the whole position'. …

[The court then gives the details of this case, which is extracted at **4.68**]

[19] In *Ziems*, the conduct of the practitioner which resulted in his conviction and prison sentence had nothing to do with his practice as a barrister. …

[The court then quotes Fullagar J of the need for 'the whole approach'.]

[20] The present case was conducted on the basis that the definition of 'professional misconduct' in s 127 of the [1987] Act did not apply, because the proceedings were brought in the inherent, not the statutory, jurisdiction. The dividing line between personal misconduct and professional misconduct is often unclear. Professional misconduct does not simply mean misconduct by a professional person. At the same time, even though conduct is not engaged in directly in the course of professional practice, it may be so connected to such practice as to amount to professional misconduct. Furthermore, even where it does not involve professional misconduct, a person's behaviour may demonstrate qualities of a kind that require a conclusion that a person is not a fit and proper person to practise. …

[The court then quotes Kitto J in *Ziems*, which is extracted at **4.68**. The quote ends with:]

> '… But it will be generally agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the dividing line is by no means always an easy task.'

[21] Professional misconduct may not necessarily require a conclusion of unfitness to practise, and removal from the roll. In that regard, it is to be remembered that fitness is to be decided at the time of the hearing. The misconduct, whether or not it amounts to professional misconduct, may have occurred years earlier. At the same time, personal misconduct, even if it does not amount to professional misconduct, may demonstrate unfitness, and require an order of removal. The statutory definition in s 127 involves both concepts, and, where it applies, must be given effect according to its terms. However, when the Supreme Court is exercising its inherent jurisdiction, it has the capacity to determine, and act on the basis of, unfitness, where appropriate, without any need to stretch the concept of professional misconduct beyond conduct having some real and substantial connexion with professional practice. In a statutory context where the power of removal depends upon a finding of professional misconduct, it may be appropriate to give the expression a wider meaning. … There is no such necessity in the present case.

…

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[23] In early 1997, the appellant had been involved for some years in a relationship with a woman, B, to whom he is now married. She had four children, including two daughters aged 12 and 10 respectively. As has been noted, the appellant was admitted as a solicitor in 1987. He also had a promising career with the Australian Army Reserve. In 1990, he was promoted to the rank of Captain. In 1992, he left his

employment as a solicitor, and served with the Royal Marines Reserve in the United Kingdom. He returned to Australia in 1993, and took employment as a solicitor, while continuing his active involvement in the Reserve. In August 1993, he met B. He had regular contact with B's children and often stayed overnight at her home. In 1996, he was graded in the Reserve for promotion to Major. In February 1997, he suffered two major personal setbacks. He and a number of other employees were made redundant by the solicitors for whom they worked. His father was diagnosed with mesothelioma. The appellant suffered depression, and also physical exhaustion resulting from extended hours of work which he took on as an instructor in Army special forces training. This was when he committed the four offences of indecent assault on two of B's daughters. The circumstance of aggravation of the offences was the age of the children. The offences occurred in late April and early May 1997. They involved removing the children's clothing, rubbing on the back, buttocks and stomach, and on one occasion touching a victim on the outside of the vagina.

[24] Complaint about two of the matters was made by the children. The appellant admitted the offences, and also told the police of two other offences involving the same children. He sought professional help from a psychiatrist. In February 1998, the four charges came before a Local Court. The appellant pleaded guilty and was sentenced to three months imprisonment. He appealed to the District Court against the severity of the sentence. In May 1998, Judge Luland allowed the appeal, quashed the sentence, and in lieu deferred passing sentence in each case on condition that the appellant entered into a recognizance to be of good behaviour for three years. The judge said:

> 'The factual circumstances are that he had a relationship with the two victims' mother during the period of the offences and indeed continues to have a relationship with her.
>
> 'At the time of the offences … I accept that his life was greatly disturbed by factors of employment being taken from him, due to a redundancy, and perhaps more stressing

a very difficult period where his father was dying from a very awful disease.

'[The appellant] is 36 years of age and a solicitor by profession. In normal circumstances one would say a person whose character would [be] expected to be exceptionally high, and he would be well aware of the seriousness of conduct such as that which he has committed.

'Now that is easily said of course but one does not know the frailty of human beings, particularly when they go through very stressful periods in their life. This conduct that he engaged in seems quite obviously totally out of character for the appellant.

'The assaults upon the children were not in my view the most serious examples of indecent assaults that one unfortunately sees all too often in these courts. They were in the main incidences [sic] of him pulling the children's pants down when they

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were in their bedroom. With the exception of one offence where he placed his hand on the stomach area of one of the children and his finger touched her vagina.

'To the police he recognised the seriousness of his conduct and readily accepted it. He also, perhaps understandably was unable to understand himself why he did what he did and that again is probably part and parcel of it being so out of character, because all of the evidence before me is that he is otherwise a very reputable person, and has always been considered so by the children's mother, her parents and also her children.

‘The effect of his offending was readily admitted by him and indeed he brought two offences to light himself with the police officers, two of those for which he is now before the Court. He had pleaded guilty, and pleaded guilty from the first opportunity. Those matters in themselves show true contrition but what I believe shows even greater contrition and understanding by him, is his conduct after the events themselves, that is his ready involvement with counselling and assistance from Professor McConaghy [Professor Neil McConaghy, a specialist psychiatrist].

‘He has not denied the matters at any time. He has accepted the matters, and more so he has done all he can to place himself in a position where he ensures it does not happen again, that is to gain an understanding or attempt to gain an understanding of how and why this all happened.

‘He obviously is forgiven by the children’s mother, she is here today in support of him, as is her father. There is material before me where the children themselves seem to have suffered no psychological harm, although one readily says that recognising that sometimes events such as this in children’s lives does have a belated impact upon them in time to come. One never knows what is likely in that regard and one cannot overlook the possibility of it, but on present material before me, the children do not seem to be psychologically disadvantaged as a result of this. In fact they, I’m told and I accept, want the continuance of [the appellant] in their life as the father figure that he was before this all occurred.

‘Everybody seems to be supportive of him. The counsellors are supportive of him, the psychiatrists are supportive of him, and more importantly the family itself, who are after all the victims of this crime, continue to be supportive of him.

‘Those subjective elements of this offence weigh very heavily

in my mind that it is an exceptional case. I do take account of what is said by the Court of Criminal Appeal of course, as I must, that normally offences such as these, would carry and should carry a custodial sentence, but my hands are not completely tied in that regard and I do consider this to be one of those exceptional cases.

'It is not that [the appellant] is going unpunished. I accept that a punishment has already fl owed in the sense that he's lost what was no doubt a very important part of his life, his involvement in the Army Reserve, that he no doubt put a lot of time and effort into to build up a career in that reserve. He has now lost that as a result of this matter.

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'He of course carries the shame of his conduct and he has to carry that shame with him in the eyes of those upon whom he committed the offence. He will have to overcome that as best he can but they want him in their lives, and he wants to be in their lives, but it will be in his mind at all times that he has had to appear before this Court in respect of these matters.

'I do regard the offences as isolated, even though there were four offences. I regard them to be isolated offences, and I accept Professor McConaghy when he suggested there is a great likelihood that such behaviour would never occur again.'

[25] In April 2000, the appellant married B, who has supported him at all stages of the present proceedings.

[26] Before the Court of Appeal, there was evidence of Professor McConaghy who treated the appellant, monthly, from June 1997. He

said the appellant 'has developed full awareness of the situations which led to his inappropriate behaviour and in view of his contrition and the stability of his personality I consider the risk of his re-offending to be minimal'. There was also a report from the founder director of the Child Abuse Protection Centre who said that she regarded the appellant as a man of basically good character who was not a future risk. Three barristers and a solicitor gave character evidence in support of the appellant. One of the referees, who had distinguished service in the Army Reserve, and retired with the rank of Major-General, and who had also worked with the appellant in the legal profession, described him as a person who acted with probity, professionalism and honesty, and said that he would have no hesitation in working with him in the future. None of that evidence was challenged.

[27] In July 1998, the Council of the Law Society resolved to institute disciplinary proceedings. … [T]he Tribunal found that its jurisdiction had not been properly invoked. That happened in October 2000. …

[28] In May 2000, one of the victims of the 1997 offences made further allegations of a similar nature against the appellant, who had recently married her mother. The appellant denied the allegations. The charges against him were heard in a Local Court on 23, 25 and 26 October 2000. On 7 November 2000, he was convicted and sentenced to imprisonment for two years. He appealed to the District Court. His appeal was heard in April 2001. Judge Tupman upheld the appeal. She quashed the convictions and sentences. The appellant has at all times maintained that the charges were false.

[29] … At the time [of the Tribunal's decision], the new indecent assault charges were pending. On the same day, the respondent wrote to the appellant referring to the four convictions for the 1997 offences, indicating that it was considering further action and seeking any submissions he wanted to make. There was an exchange of correspondence. On 7 November, the appellant was convicted on the new charges, and sentenced. He appealed. On 15 November 2000 the respondent wrote to the appellant again indicating that it was

considering further action based on the 1997 conduct. On 17 and 21 November 2000, the appellant wrote to the respondent seeking to convince the respondent that it should not take such action. In that correspondence the appellant did not mention the new charges against him, or his convictions and sentence. On 3 April 2001, the convictions and sentences were quashed. On 24 May 2001, the respondent, still not aware of the

new criminal proceedings, or the successful appeal, commenced proceedings in the Supreme Court under s 171M of the Act alleging that the 1997 conduct was professional misconduct, and seeking the removal of the appellant's name from the roll of legal practitioners. In August 2001, the appellant filed an affidavit in the Supreme Court proceedings in which he referred to the charges of 2000, and the successful appeal. The respondent then added a further charge of professional misconduct, being the failure of the appellant, in the correspondence of October-November 2000, to disclose the further charges and convictions. …

[30] The Court of Appeal found that this further allegation of professional misconduct was made out. That finding was correct, although the consequences that should follow will require further consideration. In October and November 2000, the appellant was engaged in correspondence with the respondent as to the course it should take in relation to his professional status. Although the specific focus of that correspondence was the conduct of the appellant in 1997, and although the respondent, being unaware of the new allegations, did not ask any questions about them, the appellant's professional obligations to the Law Society required him to disclose facts that were material to the respondent's decision as to what, if any, action to take against him. Giles JA was right to observe that the appellant 'succumbed to the temptation of keeping from [the respondent]

something clearly relevant to its decisions because he feared that disclosure would be against his interests'. It is no excuse that he believed in his own innocence, and that his convictions were ultimately quashed. Frankness required the disclosure of the convictions and sentence, even if he regarded them as unjust, and hoped (or even expected) that they would be overturned on appeal. Furthermore, the appellant's duty of candour in his dealings with the Law Society was a professional duty, and its breach was professional misconduct. It was proper that it should be declared to be such. The appeal against declaration 1(b) must fail.

[31] The finding of professional misconduct recorded in declaration 1(a) is, however, open to more serious challenge. In argument in this Court, and, apparently, in the Court of Appeal, it was common ground that the definition of professional misconduct in s 127 of the Act did not directly bear upon the proceedings because it was the inherent jurisdiction of the Supreme Court, not the special statutory scheme for dealing with complaints and discipline, that was invoked. The Court of Appeal did not base its reasoning on the application of s 127. As the Court of Appeal recognised, a finding that the appellant had been guilty of professional misconduct in 1997 did not necessarily require a conclusion that he was unfit to practise in 2002. Nor did a finding that he was unfit to practise, and that his name should be removed from the roll of legal practitioners, necessarily depend upon a characterisation of his conduct in 1997 as professional misconduct. These were related, but distinct, issues, and in considering the application of the respondent for an order that the appellant's name be removed from the roll, the ultimate issue for the Court of Appeal to consider was the appellant's fitness to remain a legal practitioner. Even so, the respondent pressed for a declaration that the appellant's 1997 conduct constituted professional misconduct, and the Court of Appeal addressed that issue.

[32] The conduct of the appellant in committing the acts of indecency towards the two complainants in 1997 did not occur in the course of the practice of his profession, and it had

no connexion with such practice. What it demonstrated as to his fitness to practise law, and to remain a member of the legal profession, was something to be considered in the context of the ultimate issue. However, the Court of Appeal found it to be professional misconduct, and not merely personal misconduct relevant to a decision as to his fitness.

[33] Sheller JA, with whom Mason P and Giles JA agreed, said that professional misconduct 'may extend beyond acts closely connected with actual practice, even though not occurring in the course of such practice, to conduct outside the course of practice which manifests the presence or absence of qualities which are incompatible with, or essential for, the conduct of practice'. … However, as was observed in *Ziems*, there is a real distinction between professional misconduct, and purely personal misconduct on the part of a professional, although there are cases in which the distinction may be difficult to apply.

[34] The particular aspect of the appellant's conduct in 1997 which appeared to Sheller JA to manifest 'qualities of character which were incompatible with the conduct of legal practice' was that 'the conduct constituted a most serious breach of trust on the [appellant's] part given the paternal like role he had with the victims'. It is true that the conduct involved a form of breach of trust, being the trust reposed in the appellant by the mother of the children (who later forgave, and married him) and the children themselves. However, the nature of the trust, and the circumstances of the breach, were so remote from anything to do with professional practice that the characterisation of the appellant's personal misconduct as professional misconduct was erroneous. Declaration 1(a) should be set aside.

[35] That conclusion, however, leaves open the principal question which the Court of Appeal had to consider, which was whether the 1997 misconduct, either alone or in combination with the professional

misconduct the subject of declaration 1(b), demonstrated that, in March 2002 (the date of the Court of Appeal's decision) the appellant was not a fit and proper person to be a legal practitioner. It was declaration 2 that was the foundation of the order for the removal from the roll of the appellant's name. That declaration was expressed to be made 'in the light of declarations 1(a) and (b). A conclusion that declaration 1(a) was made in error requires this Court to reconsider the finding expressed in declaration 2. In that connexion, it is important to note that the Court of Appeal, correctly, had regard to the combined significance of the 1997 misconduct and the October-November 2000 breach of the appellant's duty of candour towards the Law Society. This Court should take the same approach.

[36] The reasons for judgment of Sheller JA set out in full detail the objective and subjective circumstances of the appellant's conduct in 1997 and October–November 2000. … While Sheller JA set out the reasons given by Judge Luland for imposing a non-custodial sentence in respect of the 1997 offences, in one important respect his appreciation of the situation differed from that of the sentencing judge. Judge Luland treated the four offences as 'isolated'. By that, he evidently meant that, although there were four offending acts, they represented one brief and uncharacteristic episode of behaviour, explained by the unusual pressures that bore upon the appellant at the time. Sheller JA said this 'is not the case of an isolated offence followed by the taking of steps to ensure it would not be repeated'.

[37] Of course, the Court of Appeal was not bound by the views of the sentencing judge, but that description of the offences appears unduly severe. Furthermore, it related to a

significant matter, that is to say, the appellant's rehabilitation. That rehabilitation was at the centre of the reasoning of Judge Luland, and was, in turn, important to the question of fitness to practise in 2002.

The subjective evidence as to the appellant's character and rehabilitation, the exceptional circumstances in which the 1997 offences were committed, and the appellant's efforts to obtain professional advice and assistance, formed part of the basis upon which counsel for the appellant sought to distinguish the case from *Law Society of South Australia v Rodda* [(2002) 83 SASR 541], a case in which the Supreme Court of South Australia found unfitness on the part of a solicitor convicted of sexual offences. These cases turn upon a close consideration of their own facts, but the Court of Appeal in the present case appears to have given insufficient weight to the isolated nature of the 1997 offences, and the powerful subjective case made on behalf of the appellant.

[38] The Court of Appeal was right to treat very seriously the breach of the duty of candour involved in the conduct the subject of declaration 1(b). Even so, the circumstances in which it occurred were extraordinary. Making full allowance for the need to consider the combined effect of the 1997 conduct and the conduct the subject of declaration 1(b), it should not be concluded that it had been shown that, at the time of the decision of the Court of Appeal in March 2002, the appellant was unfit to practise. Declaration 2 should be set aside.

[39] In the result, that leaves standing the finding of professional misconduct in declaration 1(b), and the facts of the 1997 conduct. The parties joined in submitting that, if this Court were to disagree in a significant respect with the Court of Appeal, it should not remit the matter to the Court of Appeal, but should, as was done in *Ziems*, form, and give effect to, its own view as to the appellant's present fitness in considering what consequential orders to make.

[40] By reason by the events of 1997, the appellant resigned from the Army Reserve, and has not renewed his practising certificate since the 1998–1999 year. In effect, he has been unable to practise for more than five years. It would have been appropriate for the Court of Appeal to make an order for his suspension, but an appropriate order would not have extended beyond the present time. The Court of Appeal made an order for costs against the appellant, and that should

stand. In those circumstances, no further sanction is required.

[41] The appeal should be allowed in part. Declarations 1(a) and 2 made by the Court of Appeal, and the order that the name of the appellant be removed from the Roll of Legal Practitioners should be set aside. There should be no order as to the costs of this appeal.

4.81 The High Court decision was severely criticised by Richard Ackland,[24] who said 'it is far worse not to be candid with the Law Society, or even not to pay tax, than it is to be overly intimate with children'. Do you agree with this criticism? Even though the statutory definition of professional misconduct did not apply, was the court correct in adopting only the common law definition? Should the common law be affected by modern legislative reforms and changes in ethical values?

4.82 In *Legal Services Board v McGrath* (2010) 29 VR 325, Warren CJ overruled the striking off of a practitioner who had been convicted of child pornography offences, which conviction was being appealed. Warren CJ found serious defects in the presentation by the Board of its case against the practitioner, pointing out that the offences did not occur in relation to his legal practice and that prior to the offences, he had an unblemished record as a legal practitioner. She held that the Board had failed to make a sufficient connection between the practitioner's conduct and his fitness to continue to practise and remain on the Roll. Leave was granted to the Board to apply again. The Board submitted additional evidence and the matter was heard again by Warren CJ, who held as follows at [5]–[27]:

[5] … The evidence now before me contains four additional facts relevant to the present application.

[6] First, I now have before me the affidavit of Peter Butland, the informant in the case against the defendant. … For the purposes of this application, I need not reproduce in specific detail what that material involved. Suffice to say that the defendant had 'well in excess of 5000 photographs' and 'hundreds of movies involving child pornography' on his computer. That summary concludes as follows:

> 'Many of the photographs and movies were of the worst kind imaginable. The photographs and movies of babies, toddlers and small children being raped are horrific. The photographs and movies of young children involved in bondage and beastiality [sic] are horrific. Many of the children in the photographs and movies appeared frightened, distressed and horrified.'

[7] Secondly, the defendant admitted consuming and transmitting child pornography over a not insignificant period of time.

> 'The defendant stated that he regularly used adult chat rooms where he would live out sexual fantasies. He states that he was often sent child pornography while in these chat rooms. He stated that he first became involved with child pornography about 5 years earlier when he was acting in a trial involving incest charges. He claims he became intrigued by the adult/child sexual relationship. He then began to receive child pornography and this interest got 'carried away and snowballed'. …

[8] … [T]hirdly, and of critical importance to this application, the defendant admitted to police that his interest in child pornography began after he was involved in a professional capacity in a case involving child sexual abuse.

[9] Fourthly, the plaintiff has also supplied me with a psychiatric

report commissioned with respect to the defendant after he was charged with the offences in question. That psychiatric report indicates that the defendant was not suffering from a mental disorder at the time when he committed the offences in question, or that such a disorder was responsible for his behaviour. Instead, it indicates the consultant psychiatrist's belief that the defendant exhibited poor judgment and a lack of appreciation of the harm caused by the production of child pornography.

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…

[12] Convictions for, or arising out of, child pornography offences are not prima facie evidence that a person is not a fit and proper person to remain on the roll kept by this Court. The nature of the material involved, the extent and circumstances of the offending in question, its relationship to the offender's professional life, and the behaviour of the offender before, during and after the legal processes which result from that offending will all be relevant to deciding any application to strike that offender from the roll. As the High Court's decision in *A Solicitor v Council of the Law Society of New South Wales* indicates, even an individual convicted for the sexual abuse of minors can, albeit in a very small number of conceivable circumstances, remain a fit and proper person to practise law in this country.

[13] That being said I wish to make three additional points.

[14] First, conviction for any serious breach of the law must call into question a practitioner's willingness and ability to obey the law which is integral to the civic office which they perform and the trust reposed in them to properly perform that function. As Spigelman CJ held in New South Wales Bar Association:

> 'The judiciary must have confidence in those who appear

> before the courts. The public must have confidence in the legal profession by reason of the central role the profession plays in the administration of justice. Many aspects of the administration of justice depend on the trust by the judiciary and/or public in the performance of professional obligations by professional people. … Neither the relationship of trust between a legal practitioner on the one hand, and his or her clients, colleagues and the judiciary on the other hand, nor public confidence in the profession can be established or maintained, without professional regulation and enforcement.'

[15] Secondly, the legal profession is one which demands both empathy and insight into the victims of criminal behaviour if it is to be performed to the standard expected by the courts, fellow practitioners and the general public. Any conviction which appears to show a disdain for such victims will raise a serious concern about a practitioner's professional and moral fitness to remain an officer of the court.

[16] Finally, any suggestion that crimes committed at arm's length, such as those which involve child pornography, can be considered of lesser seriousness in deciding upon an individual's fitness to remain on the roll should be the subject of intense scrutiny. …

[17] Four interconnected circumstances are relevant to deciding the present application.

[18] First, the defendant has been convicted of a number of serious offences involving child pornography. The amount of such material found in his possession was both extensive and of a highly disturbing and serious nature. The defendant was not only involved in criminal use of the internet and his computer, but was vicariously complicit through the consumption and transmission of this pornographic material in the commission of the crimes depicted therein. This consumption and transmission occurred over a not insignificant amount of time. As was observed in *Clyne v New South Wales Bar*

Association, a single act that would not of itself warrant striking out, may do so if it is 'shown to be part of a deliberate and persistent system of

conduct'. It is also clear on the evidence before me that the defendant, whilst he did not commit the offences in the course of his professional duties, admitted that he was prompted to access and distribute the material in question after acting in a case involving incest and becoming intrigued by sexual relations between adults and children. This, in and of itself, raises serious concerns about the fashion in which the defendant has approached his professional obligations over the course of his career. It indicates a serious lack of understanding and judgment with regard to his professional role. The defendant was engaged in both the consumption and the transmission of pornographic material, the later, admittedly, not for pecuniary gain. Finally, the defendant's offending was not the result of a mental disorder. He committed it with full knowledge of what he was doing and its criminal character.

[19] Secondly, since that conviction, the defendant has been convicted of another set of child pornography offences. He has appealed that second set of convictions, but did not inform the plaintiff of that fact or the charges which gave rise to it. The plaintiff has not relied upon those convictions in making its application. However, in deciding what orders to make in the matter I may also act pursuant to the court's inherent jurisdiction to discipline the lawyers under its supervision and am not constrained by the plaintiff 's submissions. As set out in my previous decision in this matter, the evidentiary value of those convictions prior to that appeal being decided is limited. However, it is admissible to prove a breach of the defendant's continuing obligation to disclose to the plaintiff facts that were material to the plaintiff 's decision as to what action to take against

him and I will treat it as such.

[20] Thirdly, and significantly, the defendant has not appeared at this hearing or any previous disciplinary hearing arising out of his offences nor has he provided the court with any reasons for his failure to appear. …

[21] … At the very least, it bespeaks a disturbing degree of indifference to the seriousness of the application which I am required to decide upon. It suggests that that individual does not properly understand or take seriously their obligations of candour to the court, or value sufficiently the benefits and trust conferred on them by being placed on the roll, to overcome whatever reluctance they may feel to appear before the bench, brief another practitioner to make submissions on their behalf, or at least contact the court to explain their decision not to appear in any capacity.

[22] Finally, although serious it must be said in the defendant's favour that his legal career until the circumstances giving rise to this application occurred was unblemished.

…

[Referring to the case of *R v Booth* [2009] NSWCA 89 and the observation of Simpson J, with McCelland CJ at CL and Hawie J concurring:]

[24] …

> 'Possession of child pornography is a callous and predatory crime.
>
> 'In sentencing for such a crime, it is well to bear firmly in mind that the material in question cannot come into existence without exploitation and abuse of children somewhere in the world. Often this is in underdeveloped or disadvantaged

> countries that lack the resources to provide adequate child protection mechanisms. The damage done to the children may be, and undoubtedly often is, profound. Those who make use of the product feed upon that exploitation and abuse, and upon the poverty of the children the subject of the material.
>
> 'What makes the crime callous is not just that it exploits and abuses children; it is callous because, each time the material is viewed, the offender is reminded of and confronted with obvious pictorial evidence of that exploitation and abuse, and the degradation it causes.
>
> 'And every occasion on which an internet child pornography site is accessed (or when such material is accessed by any means at all) provides further encouragement to expand their activities to those who create and purvey the material.'

[25] I am satisfied on the facts of the present application that at the time at which the offences of which the defendant has been convicted occurred he was not a fit and proper person to be on the roll. …

[26] The defendant's convictions and their attendant circumstances raise a presumption that the defendant is not a fit and proper person to remain on the roll. However, those offences took place more than two years ago. … [T]o make the orders sought by the plaintiff, the court must be:

> 'satisfied at the time of the hearing that the practitioner in question is shown "not to be a fit and proper person to be a legal practitioner" … and will likely remain so for the indefinite future.'

[27] The defendant has displayed a continuing lack of candour to both this court and the plaintiff. He has failed to involve himself in these proceedings in even the most minimal fashion. The presumption of his unfitness having been raised by his conduct, only his appearance

> before this Court to explain that conduct and his behaviour since it occurred could preclude me from regarding him as presently and indefinitely unfit to remain on the roll. His unwillingness or inability to do so indicates a fatal lack of understanding or capacity to fulfil his obligations towards this court, the profession and the general public as a legal practitioner and as an officer of the court.

4.83 Do you think that convictions for serious child pornography offences, such as in the *McGrath* case, should be enough by itself to render a practitioner 'not fit' for legal practice?

4.84 The profession seeks to control the personal behaviour of practitioners when it affects their professional work, for example, in the case of substance abuse, and/or brings the profession into disrepute. Can the profession prevent practitioners from driving a taxi or working for Uber? What other work may bring the profession into disrepute? A Western Australian disciplinary proceeding seems to contain both of these elements. The majority of the tribunal found a practitioner guilty of unprofessional conduct for being involved in an organisation and deriving financial benefit from its activities — it ran 'various parties known as rave parties'. The main concern of the tribunal was that 'a significant number (or, to use the practitioner's words, up to 40 per cent) of people attending such parties used illegal drugs in connection with their

attendance'. The majority concluded that '[f]or a legal practitioner to organise for financial gain an activity which is, to a substantial degree, associated with drug use is not conduct in which a legal practitioner ought to partake'. The practitioner's activities were

found to 'bring the legal profession into disrepute'. The dissenting minority said that any prior taking of drugs before the parties was 'something which the practitioner had no involvement with', nor did he give it any encouragement. In fact, he took various measures to stop the use of drugs and alcohol at the parties. The practitioner was fined $2000 and had to pay the law complaints officer's costs and disbursements of $3741.[25]

4.85 It should be noted that lawyers must watch what they say on the internet. For example, a Florida lawyer faced disciplinary charges for describing a judge on a blog as an 'evil, unfair witch', among other inappropriate comments, while a New York lawyer is facing discipline for posting an article criticising a judge's handling of a family law case.[26]

4.86 One of the most publicised cases of criminal behaviour was the perjury committed by former Justice, Marcus Einfeld, which received extensive press coverage from 2006–2009. Einfeld was a prominent QC, who had returned to practise at the Bar, when he was found to have lied in court concerning the payment of a $77 speeding ticket. He was found to have filed a false statutory declaration by alleging someone else was driving his car. He compounded his action by committing perjury in court in relation to charges concerning this false declaration. He eventually confessed to committing perjury and was sentenced to two years in jail.[27]

4.87 *Coe v New South Wales Bar Association* [2000] NSWCA 13 (29 February 2000) highlighted the issue of their being so few Aboriginal practitioners, and whether, in light of their different values, they should be treated by a more lenient standard. In this case, a barrister of Aboriginal descent was struck off the Roll by the Legal Services Tribunal for filing a 'substantially false' affidavit in

the Family Court concerning his financial position. On appeal to the Court of Appeal, Coe made certain arguments seeking leniency because of his community role. Mason P noted at [4]–[11]:

> [4] On the barrister's own admission in the Tribunal below, the affidavit was misleading; the barrister had failed to take due care to ensure that it was as accurate as possible in the circumstances; the barrister knew at the time of the swearing of the affidavit, in general terms, the extent of his income and expenses; the true position as represented in a later-filed tax return was that the income was in excess of $150,000; and the barrister's conduct in regard to the swearing of the affidavit was negligent. There was nothing to suggest that the barrister was under time pressure that might have prevented him from giving proper consideration to the matter, or at least flagging that the particular 'estimate' was grossly defective. The Tribunal was, in my view, clearly entitled to conclude that the affidavit had been sworn falsely and knowingly so. Given that the barrister did not give evidence before the Tribunal, despite the most explicit warning of the risk he was taking, the conclusion was well-nigh inevitable. …

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> [8] In reaching my conclusion that the appeal should be dismissed I have considered afresh the question of sanction. …
>
> [9] Like the Tribunal, I would give the barrister full credit for the major role played by the barrister in advancing the interests of members of the Aboriginal community. Nor have I overlooked the affidavit evidence tendered provisionally on appeal on the alternative basis that it would become relevant in the event that the Court of Appeal found error in the Tribunal's reasoning as to 'penalty'. That evidence was that the barrister has not practised law since his disbarment; that he has worked in a voluntary capacity with the

Aboriginal Children's Service and lectured on issues affecting aboriginal people; that he deeply regrets the disgrace his disbarment has brought; and that he will never fall short of appropriate standards in the future.

[10] If (which I doubt) there are exceptional cases where a practitioner who knowingly swears a false affidavit that is filed in court could be regarded as fit to practice, this is not one of them. The underlying purpose of the disciplinary jurisdiction over practitioners is discussed in this Court's recent decision in *New South Wales Bar Association v Hamman* [1999] NSWCA 404.

[11] In *Re B* [1981] 2 NSWLR 372 at 382 Moffitt P said: 'It is of the utmost importance that this Court can order its procedures and give its decisions in the confidence that the barristers appearing before it, will not mislead it, will conduct themselves in accordance with the law and discharge their duty even when not subject to scrutiny'. … I would dismiss the appeal with costs.

Priestley JA and Meagher JA also dismissed the appeal.

4.88 Do you believe that the establishment of a Legal Services Commissioner stimulates client complaints to the detriment of the profession? How are these new structures for receiving complaints and assisting in regulating the disciplinary process made accountable for their actions?

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1. Although the House of Lords was speaking about solicitors, these views now also apply to barristers.
2. J Disney et al, *Lawyers*, 2nd ed, Law Book Co, Sydney, 1986, pp 303–4.
3. See *Bar Association of New South Walves v Di Suvero* [2000] NSWADT 194 and 195. For the Appeal Panel, see *Di Suvero v Bar Association of New South Wales* [2001] NSWADTAP 9.
4. See *Di Suvero v Bar Association of New South Wales* [2001] NSWADTAP 9.
5. N Jones, 'Lawyers, Language and Legal Professional Standards: Legal

Services Commissioner v Turley [2008] LPT4' (2009) 28 *University of Queensland LJ* 353.

6. For a discussion of cases and principles on courtesy, see S Mark, 'Civility and Professionalism — Standards of Courtesy', unpublished paper, Office of Legal Services Coordination, 2006, at p 42, see <www.lawlink.nsw.gov.au/lawlink/olsc>.
7. See *New South Wales Bar Association v DCF* [2010] NSWADT 291. See also a similar situation in *Council of the Bar Association of New South Wales v Fitzgibbon* [2010] NSWADT 291 at [50]–[51].
8. See, for example, *New South Wales Bar Association v Samosi* [2001] NSWCA 285; *New South Wales Bar Association v Young* [2003] NSWCA 228; and *New South Wales Bar Association v Cummins* [2001] NSWCA 284.
9. *Sydney Morning Herald*, 23 September 2003, p 12.
10. See J Cooke, 'Barrister Struck Off After Seven Year Delay', *Sydney Morning Herald*, 13 April 2009, p 2.
11. See *Re Jenner* [2007] SASC 263; and *Legal Practitioners Act 1981 (SA); Re Lindquist* [2009] SASC 93.
12. See *Legal Practitioners Conduct Board v Rowe* [2012] SASCFC 144.
13. See also **Chapter 10 — Duties of Fairness and Candour**.
14. Referred to in *Council of the New South Wales Bar Association v Quinlivan* [2015] NSWCATOD 54 (4 June 2015).
15. See *Legal Services Commission v Siew Yin Woo* (Administrative Decision Tribunal, 7 March 2008), discussed in Office of Legal Services Commissioner, 'Legal Services Commissioner v Siew Yin Woo — Breach of Section 660 Notice' (April 2008) 40 *Without Prejudice* 1; and *Legal Services Commission v Maurice John McCarthy* (Administrative Decision Tribunal, No. 082002, 29 March 2007), discussed in Office of Legal Services Commissioner, 'Legal Services Commissioner v Maurice John McCarthy, ADT, No. 082002 — The Gravity of a Solicitor's Undertaking and the Importance of Timely Communication' (June 2008) 41 *Without Prejudice* 1.
16. See, for example, Legal Profession Uniform Law 2015 (NSW) s 302(1).
17. Sections 308–309.
18. See (1997) 71 *Law Institute Journal* 58.

19. D Bennett, (February 1997) 40 *Stop Press* (New South Wales Bar Association monthly newsletter) 1.
20. See *Prothonotary of the Supreme Court of New South Wales v Nikolaidis* [2010] NSWCA 73.
21. See *New South Wales Bar Association v Somosi* [2001] NSWCA 285; *New South Wales Bar Association v Cummins* [2001] NSWCA 284.
22. At [25].
23. *A Solicitor v Council of the Law Society of New South Wales* (2013) 216 CLR 253.
24. R Ackland, 'The High Court and an Indecent Order of Values', *Sydney Morning Herald*, 6 February 2004, p 11.
25. See Law Society of Western Australia, (December 1996) 23 *Brief* 45.
26. See D Karpmen, 'Outside-the-Law Activities Can Be Risky' (April 2009) *California Bar Journal* 17.
27. See *R v Einfeld* [2009] NSWSC 119. Einfeld was stripped of his QC title and was struck off the Roll.

5

THE REPRESENTATION OF CLIENTS

INTRODUCTION

5.1 The lawyer-client relationship is at the centre of a lawyer's ethical framework. In this Chapter we look at the rules, regulations, and cases that define the nature of that relationship and, in particular, the responsibilities of the lawyer, namely:

- to represent;
- to communicate;
- to obey instructions;
- to act competently;
- to maintain confidences; and
- to be loyal.

This Chapter also looks at issues concerning communication and control. Who should be in control in the relationship? Should all instructions between the lawyer and the client be written? Who is really giving the instructions, the client or the lawyer? Does the client have any real power considering the lawyer is the expert? The

ultimate question that needs to be examined is who is really in control?

5.2 Consider the following story told to you by Jackson, an old law school friend who has a general practice as a solicitor in a Sydney suburb where he works as a sole practitioner — that is, on his own account and with no partner. Jackson related the events to you last night at your home while in a state of great anxiety. He asked if you can give him professional advice as to what he should do. Jackson's story is as follows:

> About nine years ago I defended a young man, Nick, on a number of fraud charges. As it was one of my first cases after leaving law school, I spent a lot of time on it and, in particular, spent a lot of time with Nick. I became friendly with both Nick and his wife Kim, as well as their two young children, then aged one-and-a-half and three years. Unfortunately, I was unsuccessful, and Nick was found guilty and sentenced to seven years' imprisonment with a two-year non-parole period. Even today I am not completely satisfied that Nick actually committed any fraud, but neither am I absolutely sure he was innocent. I think that the fraud was probably committed by one of Nick's friends who was never charged, and Nick was trying to protect him.

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> My present problem, in some ways, is related to this old case. A few months ago, Kim came to see me about divorcing Nick and her wanting sole custody of the children. I explained that, under changes to the Family Law Act 1975, she could obtain the right to have the children live with her the majority of the time as their 'primary residence', but that Nick would have the right to shared responsibility and to have them some of the time. At the time, I was not sure that

Nick would even contest Kim's application, but I did have some misgivings about acting for Kim.

During Nick's criminal trial, I had a number of friendly chats with Nick, Kim, and the children, and was slightly envious of the good relationship and love within their family, especially since I had just been divorced. However, when I told Nick my view of his family, he told me that he was very concerned about the possibility of going to jail. He said his worry was that Kim was inclined to 'go on the bottle' if she became depressed, and at those times she often became violent and would hit the children. Purely out of friendship to Nick after the trial, I made an arrangement with Kim whereby she would ring me if she felt depressed. I thus went to her home several times and chatted after work. I should have known better, but the visits turned into a desultory sexual relationship which lasted for about six months. We ended it by mutual agreement about two years before Kim came to see me about the divorce. I don't think Nick knows anything about my relationship with his wife. I have not had any communication with Nick for about three years.

It is for all these reasons that I had great qualms about taking on the divorce and primary residence application. However, Kim begged me to act for her, as she had very little money and 'had a thing about accepting charity'. 'Charity' in her eyes included legal aid. In any event, she offered me a token amount of $500. I foolishly agreed to take the case.

The proceedings were instituted and Nick decided to contest the primary residence application. I was informed by Nick's solicitor that Nick intended to testify that Kim used to bash the children. I have never witnessed any violence towards the children and, in fact, have seen Kim being a loving mother. I have tried on several occasions to question Kim about the alleged violence and she has vehemently denied it. When I learned of Nick's probable evidence, I again questioned Kim about her treatment of the children, but she again denied it. Kim also pointed out that I should have no difficulty discrediting Nick's allegations by cross-examining him about his

fraud conviction. It was at this point that I realised what Kim, like any client, would expect me to do and that I would have to so act.

I was still suspicious of Kim's possible violence and asked her if she had ever seen a doctor for her depression. She told me that she had a doctor who was a strict practising Catholic, just like Nick, and that the doctor would be prejudiced against her for instituting divorce proceedings. Thus, Kim did not want me to contact her. I still was able to find out the name and address of the doctor from Kim, so as to be prepared if Nick called her as a witness. Kim made me promise that I would not talk to the doctor about her. However, I felt that, in order to serve my client properly, I had to call

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the doctor. I rang her and asked her if she had ever treated the children. She said she had, and that she had treated them for injuries which she suspected were the result of domestic violence. Although she did not know who was responsible for the injuries, she said she had always suspected it was Kim, because the injuries invariably coincided with Kim's depressed states.

The application for primary residence is due to be heard tomorrow. I know I am in a serious predicament and I strongly feel I made a mistake in helping Kim. However, I feel that I must follow through with helping her, but I do not know how I should conduct the proceedings in relation to the disputed primary residence application.

5.3 Consider the following questions in relation to the above problem:

- Do you think Jackson should initially have acted for Kim?
- At what point would it have been wise for Jackson to have withdrawn?
- Do you think Jackson can, or should, now withdraw?

- What other ethical issues do you find in this problem?
- Reread the problem after you complete reading this chapter. Do you still agree with your original answers?

DUTY TO ACCEPT WORK

5.4 Although anyone can do their own legal work, the nature of the work is usually so complicated that it is essential that the public has access to competent legal advice and representation. In terms of the duty on the part of the lawyer to accept work, this depends upon whether the lawyer is practising as a solicitor or a barrister. Under the Australian Solicitors' Conduct Rules there is no obligation on solicitors to accept a client's instructions.

5.5 Unlike solicitors, barristers are required by the Rules to accept a brief from a solicitor to appear before a court in a field in which the barrister practises or professes to practise, although there are exceptions.[1]

5.6 The following extract regarding barristers' duty to accept work as well as briefs that must be refused or returned or briefs that may be refused or returned, is from the New South Wales Legal Profession Uniform Conduct (Barristers) Rules 2015,[2] which are similar to those rules in force in Victoria,[3] South Australia,[4] Queensland,[5]

Western Australia,[6] Tasmania,[7] the Northern Territory,[8] and the Australian Capital Territory:[9]

Cab-Rank Principle

17. A barrister must accept a brief from a solicitor to appear before a court in a field in which the barrister practises or professes to practise if:
    (a) the brief is within the barrister's capacity, skill and experience,
    (b) the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may, as a real possibility, prevent the barrister from being able to advance a client's interests to the best of the barrister's skill and diligence,
    (c) the fee offered on the brief is acceptable to the barrister, and
    (d) the barrister is not obliged or permitted to refuse the brief under rule 101, 103, 104 or 105. [see below]
18. A barrister must not set the level of an acceptable fee, for the purposes of rule 17(c), higher than the barrister would otherwise set if the barrister were willing to accept the brief, with the intent that the solicitor may be deterred from continuing to offer the brief to the barrister.
19. A barrister must not require that any other particular legal practitioner be instructed or briefed so as in any way to impose that requirement as a condition of the barrister accepting any brief or instructions.
20. A barrister must not make or have any arrangement with any person in connection with any aspect of the barrister's practice which imposes any obligation on the barrister of such a kind as may prevent the barrister from:

    (a) accepting any brief to appear for reasons other than those

provided by the exceptions to the cab-rank principle in rule 101, 103, 104 or 105, or

(b) competing with any other legal practitioner for the work offered by any brief for reasons other than those referred to in rule 101, 103, 104 or 105. [In SA 'referred to in Rules: 95 and 97–99'.]

21. Nothing in these Rules shall be taken to oblige a barrister to accept instructions directly from a person who is not a solicitor.

22. A barrister who proposes to accept instructions directly from a person who is not a solicitor must:

(a) inform the prospective client in writing of:

(i) the effect of rules 11 and 13, [work of barristers]

(ii) the fact that circumstances may require the client to retain an instructing solicitor at short notice, and possibly during the performance of the work,

(iii) any other disadvantage which the barrister believes on reasonable grounds may, as a real possibility, be suffered by the client if the client does not retain an instructing solicitor,

(iv) the relative capacity of the barrister in performing barristers' work to supply the requested facilities or services to the client compared to the capacity of the barrister together with an instructing solicitor to supply them, and

(v) a fair description of the advocacy experience of the barrister, and

(b) obtain a written acknowledgement, signed by the prospective client, that he or she has been informed of the matters in (a) above.

…

Briefs which must be refused or must be returned

101. A barrister must refuse to accept or retain a brief or instructions to appear before a court if:

(a) the barrister has information which is confidential to any

other person in the case other than the prospective client, and:

(i) the information may, as a real possibility, be material to the prospective client's case, and

(ii) the person entitled to the confidentiality has not consented to the barrister using the information as the barrister thinks fit in the case,

(b) the client's interest in the matter is or would be in conflict with the barrister's own interest or the interest of an associate,

(c) the barrister has a general or special retainer which gives, and gives only, a right of first refusal of the barrister's services to another party in the case and the barrister is offered a brief to appear in the case for the other party within the terms of the retainer,

(d) the barrister has reasonable grounds to believe that the barrister may, as a real possibility, be a witness in the case,

(e) the brief is to appear on an appeal and the barrister was a witness in the case at first instance,

(f) the barrister has reasonable grounds to believe that the barrister's own personal or professional conduct may be attacked in the case,

(g) the barrister has a material financial or property interest in the outcome of the case, apart from the prospect of a fee,

(h) the brief is on the assessment of costs which include a dispute as to the propriety of the fee paid or payable to the barrister, or is for the recovery from a former client of costs in relation to a case in which the barrister appeared for the client,

(i) the brief is for a party to an arbitration in connection with the arbitration and the barrister has previously advised or

appeared for the arbitrator in connection with the arbitration,

(j) the brief is to appear in a contested or ex parte hearing before the barrister's parent, sibling, spouse or child or a member of the barrister's household, or before a bench of which such a person is a member, unless the hearing is before the High Court of Australia sitting all available judges,

(k) there are reasonable grounds for the barrister to believe that the failure of the client to retain an instructing solicitor would, as a real possibility, seriously prejudice the barrister's ability to advance and protect the client's interests in accordance with the law including these Rules,

(l) the barrister has already advised or drawn pleadings for another party to the matter,

(m) the barrister has already discussed in any detail (even on an informal basis) with another party with an adverse interest in the matter the facts out of which the matter arises, or

(n) the brief is to appear before a court of which the barrister was formerly a member or judicial registrar, or before a court from which appeals lay to a court of which the barrister was formerly a member (except the Federal Court of Australia in case of appeals from the Supreme Court of any State or Territory), and the appearance would occur within 5 years after the barrister ceased to be a member of the court in question where the barrister ceased to be a judge or judicial registrar after the commencement date of this Rule.

102. A barrister need not refuse or return a brief, notwithstanding the application of rule 101(f) if the barrister believes on reasonable grounds that:

(a) allegations involving the barrister in such a way as to apply one of those rules have been raised in order to prevent the barrister from accepting the brief, and

(b) those allegations can be met without materially diminishing

the barrister's disinterestedness.

103. A barrister must refuse a brief to advise if the barrister has information which is confidential to any person with different interests from those of the prospective client if:
    (a) the information may, as a real possibility, affect the prospective client's interests in the matter on which advice is sought or may be detrimental to the interests of the first person, and
    (b) the person entitled to the confidentiality has not consented beforehand to the barrister using the information as the barrister thinks fit in giving advice.

104. A barrister must not accept a brief to appear on a day when the barrister is already committed to appear or is reasonably likely to be required to appear on another brief if by appearing on one of the briefs the barrister would not in the normal course of events be able to appear on the other brief or briefs.

Briefs which may be refused or returned

105. A barrister may refuse or return a brief to appear before a court:
    (a) if the brief is not offered by a solicitor,
    (b) if the barrister considers on reasonable grounds that the time or effort required for the brief threatens to prejudice the barrister's practice or other professional or personal engagements,
    (c) if the instructing solicitor does not agree to be responsible for the payment of the barrister's fee,
    (d) if the barrister has reasonable grounds to doubt that the fee will be paid reasonably promptly or in accordance with the costs agreement,
    (e) if the brief may, as a real possibility, require the barrister to

cross-examine or criticise a friend or relative,

(f) if the solicitor does not comply with a request by the barrister for appropriate attendances by the instructing solicitor, solicitor's clerk or client representative for the purposes of:
  (i) ensuring that the barrister is provided with adequate instructions to permit the barrister properly to carry out the work or appearance required by the brief,
  (ii) ensuring that the client adequately understands the barrister's advice,
  (iii) avoiding any delay in the conduct of any hearing, and
  (iv) protecting the client or the barrister from any disadvantage or inconvenience which may, as a real possibility, otherwise be caused,

(g) if the barrister's advice as to the preparation or conduct of the case, not including its compromise, has been rejected or ignored by the instructing solicitor or the client, as the case may be,

(h) if the prospective client is also the prospective instructing solicitor, or a partner, employer or employee of the prospective instructing solicitor, and has refused the barrister's request to be instructed by a solicitor independent of the prospective client and the prospective client's firm,

(i) if the barrister, being a Senior Counsel, considers on reasonable grounds that the brief does not require the services of a Senior Counsel,

(j) if the barrister, being a Senior Counsel, considers on reasonable grounds that the brief also requires the services of a junior counsel and none has been briefed,

(k) where there is a personal or business relationship between the barrister and the client or another party, a witness, or another legal practitioner representing a party,

(l) where the brief is to appear before a judge whose personal or business relationship with the barrister is such as to give

rise to the apprehension that there may not be a fair hearing, or

(m) in accordance with the terms of a costs agreement which provide for return of a brief.

106. A barrister may return a brief accepted under a conditional costs agreement if the barrister considers on reasonable grounds that the client has unreasonably rejected a reasonable offer to compromise contrary to the barrister's advice.

107. A barrister must not return under rule 105 a brief to defend a charge of a serious criminal offence unless:
    (a) the barrister believes on reasonable grounds that:
        (i) the circumstances are exceptional and compelling, and
        (ii) there is enough time for another legal practitioner to take over the case properly before the hearing, or
    (b) the client has consented after the barrister has clearly informed the client of the circumstances in which the barrister wishes to return the brief and of the terms of this rule.

108. A barrister must not return a brief to appear in order to accept another brief to appear unless the instructing solicitor or the client in the first brief has permitted the barrister to do so beforehand, after the barrister has clearly informed the instructing solicitor or the client of the circumstances in which the barrister wishes to return the brief and of the terms of this rule and rule 110.

109. A barrister must not return a brief to appear on a particular date in order to attend a social occasion unless the instructing solicitor or the client has expressly permitted the barrister to do so.

110. A barrister who wishes to return a brief which the barrister is permitted to return must do so in enough time to give another

legal practitioner a proper opportunity to take over the case.

111. A barrister must promptly inform the instructing solicitor or the client as soon as the barrister has reasonable grounds to believe that there is a real possibility that the barrister will be unable to appear or to do the work required by the brief in the time stipulated by the brief or within a reasonable time if no time has been stipulated.
112. A barrister must not hand over a brief to another barrister to conduct the case, or any court appearance within the case, unless the instructing solicitor has consented to that course.

…

5.7 What do you think is meant by the 'cab-rank principle'? As you have seen, there are many exceptions to this principle. Do you believe that barristers will perform work for solicitors they do not trust?

5.8 Lord Steyn in *Arthur JS Hall & Co (a Firm) v Simons* [2000] 3 All ER 673, says the rule is:

> … a valuable professional rule. But its impact on the administration of justice in England is not great. In real life a barrister has a clerk whose enthusiasm for the unwanted brief

> may not be great, and he is free to raise the fee within limits. It is not likely that the rule often obliges barristers to undertake work which they would not otherwise accept. When it does occur, and vexatious claims result, it will usually be possible to dispose of such claims summarily.

5.9 Sol Linowitz, a famous American lawyer, in his book with Mayer, *The Betrayed Profession: Lawyering at the End of the*

Twentieth Century,[10] says:

> If you have the client simply because you were next on the cab rank, you can be truly convinced of the justice of his cause (and thus the injustice of his antagonist's cause) only by autohypnosis, which is not the mark of professionalism. And the best lawyers, the ones we should wish to regard as our models, have in the end accepted clients very largely through judgments as to whether or not they were willing to be associated with this person's cause.

5.10 Bagaric and Dimopoulos[11] state that the cab-rank rule violates a barrister's 'freedom of association, which stems from the wider virtue of liberty'. They say: 'Individuals are permitted to choose the company they wish to keep, whether in a public or professional setting. Why should getting a law degree curtail the scope of this right?' They state there is no need to force this rule on barristers so that defendants will be represented. They point out that even though there is no such rule for solicitors, there is 'no shortage of solicitors willing to act for clients of questionable moral character'.

5.11 Do you find any justification for asking barristers, or any lawyers; to do work they really do not want to do? Can you accept the proposition that 'everyone is entitled to a lawyer' and still not want to be that lawyer? Are any other occupations obliged to supply their services to any person? What about the oath taken by medical doctors?

5.12 The Commonwealth Racial Discrimination Act 1975 declares it to be unlawful to refuse service to any person 'by reason of race, colour or national or ethnic origin'. There are similar provisions in state jurisdictions, some of which are broader, including the prohibition of discrimination on the basis of sex, marital status, or age — for example, the Equal Opportunity Act

1977 (Vic) and the Anti-Discrimination Act 1977 (NSW). Rule 42.1 of the Australian Solicitors Conduct Rules prohibits a solicitor, in the course of practice, from engaging in conduct which constitutes discrimination,[12] sexual harassment,[13] or workplace bullying.[14]

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5.13 One of the characteristics of the legal profession has been its commitment to engage in *pro bono* work — that is, the taking-on of cases and clients in the public interest, without charging professional fees. Bagaric and Dimopoulos[15] state:

> While there is no basis for imposing an obligation on lawyers to perform pro bono work, it may yet be in their self-interest to provide free legal services. … A large volume of pro bono work projects a positive image of public service and simultaneously provides both an asset for recruitment for young lawyers and regular opportunities for development of professional skills such as trial advocacy.

5.14 They point out that the large firms are more equipped to do *pro bono* work and, by doing so, obtain a favourable public image that can lead to new clients. They then argue that it is not for the legal profession to provide access to legal representation, but the government, stating: 'The government caused the problem by creating complex laws which are poorly publicized. Secondly, they have more resources than lawyers combined.' They see the solution in the adoption of a 'Legicare' system (like the Medicare system) funded by taxpayers. Do you think a Legicare system can be adopted in Australia?

REPUGNANT AND/OR UNPOPULAR CLIENTS

5.15 The Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) and (Vic) state:[16]

> **4 Principles**
>
> These Rules are made in the belief that:
>
> …
>
> (f) the provision of advocates for those who need legal representation is better secured if there is a Bar whose members:
>
> (i) must accept briefs to appear regardless of their personal beliefs,
>
> (ii) must not refuse briefs to appear except on proper professional grounds, and
>
> (iii) compete as specialist advocates with each other and with other legal practitioners as widely and as often as practicable.
>
> …
>
> **35 Duty to the client**
>
> A barrister must promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence, and do so without

> regard to his or her own interest or to any consequences to the barrister or to any other person.
>
> …

5.16 Up to 1994, the old New South Wales Barristers' Rules contained r 2(o), which allowed refusal to act if a barrister held 'a conscientious belief which on reasonable grounds he considers

would preclude him from fairly presenting his client's case'.

5.17 Can lawyers allow their personal beliefs to preclude representation? What if a lawyer states that they cannot represent Aborigines because 'I do not understand them or their culture, and thus I will not be able to do a proper job'? What if you are a fundamentalist Christian who believes lesbian and homosexual relationships are prohibited by the Bible, and you state: 'I can't represent these gay men and women. I would be denying one of my fundamental beliefs'? What if your client is accused of terrorism and you do not want to be identified with 'these types of people'? If you are a female criminal lawyer and you believe there is no such thing as 'consensual rape', would you therefore adopt a policy of refusing to represent any man accused of rape?

5.18 Do you think all lawyers should be under an obligation to take any client who seeks assistance? If not, are there certain kinds of clients who should always be offered representation? How would you guarantee that these clients receive competent and adequate representation?

5.19 In the area of criminal law there are very few legal practitioners in Australia willing to defend alleged terrorists. There are strict requirements for those who are willing to do so. They need to pass a security clearance before they can take up the representation. Would you be willing to have the government make such a security check on you?

5.20 The Australian David Hicks' defence to terrorist charges in the United States caused serious problems for his original Australian lawyer, Stephen Kenny (who was later replaced). He had never met Hicks, nor was he allowed to visit him. His instructions did not come directly from Hicks, but from Hicks' father.[17] What

problems do you see in representing someone whom you have never met?

5.21 In 2006 a famous radical lawyer in the United States, Lynne Stewart, was sentenced to 28 months in jail for helping her terrorist client. She acted as a 'go between' for her client, passing on information to his supporters and the press. The prosecution had sought a 30-year jail sentence. The judge's reasons for imposing a much lesser sentence were that Stewart had a long career of representing unpopular clients and thus had 'performed a public service, not only to her clients, but to the nation'. In November 2009, the federal appeal court said the original sentence did not reflect the seriousness of her actions. The matter was sent back to the trial judge, who on 15 July 2010 increased her sentence to 10 years, stating:[18]

> The comments that the defendant made immediately after the sentence indicate that the defendant did indeed view the sentence as a trivial sentence. A 'trivial sentence' would not promote or reflect a just punishment.

5.22 In family law cases, judges can appoint separate representation when the judge deems the child or children ought to have such representation under s 68L of the Family Law Act 1975 (Cth). Who should pay for these lawyers? What if the Legal Aid Commission normally provides funds, but refuses to pay because of cutbacks in legal aid funding? Should the judge be able to order them to pay? Can the judge declare an unfair trial if funds are not made available to provide representation?[19] The High Court in *Re*

JJT; *Ex parte Victoria Legal Aid* (1998) 23 Fam LR 1, found that an order requiring future funding by Victoria Legal Aid for separate representation was invalid. The court did state that interim property and maintenance orders could be used to enable a child to be properly represented where public funding was not available. Would this approach solve the funding problem in providing separate representation? In Western Australia, providing legal aid funding for separate representation of children has been given a high priority.[20]

REPRESENTATION FOR SERIOUS CRIMINAL CHARGES

5.23 An important issue regarding representation is whether legal representation should be guaranteed for those facing serious criminal charges. The matter was considered in *Dietrich v R* (1992) 177 CLR 292; 109 ALR 385 (High Court of Australia). Dietrich was charged with importing a quantity of heroin. He was unrepresented at all stages of the trial. He sought to have representation at numerous times, but his request was denied by the trial judge. His request for the appointment of a 'McKenzie friend'[21] was also refused. Moreover, prior to trial there was a serious question of whether Dietrich was fit to plead. The High Court found that Dietrich appeared at times to be emotionally and psychologically overwhelmed by the prospect of going to trial unrepresented. There was evidence for Dietrich from a clinical psychologist that he was an excitable, volatile person who would have great difficulty withstanding the demands of a trial, although another psychiatrist, who did not give evidence, was of the opinion that he was fit to plead. The High Court said that it appeared that the undue length of the trial may have been caused by Dietrich's 'irregular outbursts

of volatile behaviour'. Dietrich's appeal was allowed by majority of 5:2, the conviction quashed, and an order made that there be a new trial.

5.24 Mason CJ and McHugh J held at CLR 299–315; ALR 387–400:

> …
>
> ***Right to a fair trial***
>
> The right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system *(Jago v District Court (NSW)* (1989) 168 CLR 23, per Mason CJ at 29; Deane J at 56; Toohey J at 72; Gaudron J at 75). As Deane J correctly pointed out in *Jago*

> *v District Court (NSW)* (ibid at 56–57), the accused's right to a fair trial is more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial, for no person can enforce a right to be tried by the State; however, it is convenient, and not unduly misleading, to refer to an accused's positive right to a fair trial. The right is manifested in rules of law and of practice designed to regulate the course of the trial *(Bunning v Cross* (1978) 141 CLR 54; *Reg v Sang* [1980] AC 402, both referred to in *Jago* (1989) 168 CLR at 29). However, the inherent jurisdiction of courts extends to a power to stay proceedings in order 'to prevent an abuse of process or the prosecution of a criminal proceeding … which will result in a trial which is unfair' *(Barton v The Queen* (1980) 147 CLR 75 at 95–96; *Williams v Spautz* (1992) 66 ALJR 585; 107 ALR 635). …
>
> ***The argument of the applicant***

The primary argument of the applicant relies in part on the explications of the right to a fair trial in the instruments to which we have referred. The argument is that, at least in any indictable matter to be tried before a judge with or without a jury that may result in imprisonment upon conviction, the interests of justice require that an indigent accused who wishes to have legal representation be provided with such representation at public expense. The central proposition in this submission is that the absence of representation for an accused who cannot afford to engage counsel necessarily means that the trial is unfair and that any conviction should be quashed. …

The advantages of representation by counsel are even more clear today than they were in the nineteenth century. It is in the best interests not only of the accused but also of the administration of justice that an accused be so represented, particularly when the offence charged is serious *(McInnis v The Queen* (1979) 143 CLR 575, per Barwick CJ at 579; see also *Galos Hired v The King* [1944] AC 149 at 155 and *Foster v The Queen* (1982) 38 ALR 599 at 600). Lord Devlin stressed the importance of representation by counsel when he wrote *(The Judge*, (1979), p 67):

> 'Indeed, where there is no legal representation, and save in the exceptional case of the skilled litigant, the adversary system, whether or not it remains in theory, in practice breaks down.'

An unrepresented accused is disadvantaged, not merely because almost always he or she has insufficient legal knowledge and skills, but also because an accused in such a position is unable dispassionately to assess and present his or her case in the same manner as counsel for the Crown *(McInnis* (1979) 143 CLR, per Murphy J at 590). The hallowed response (see the reference to Coke's opinion in *Powell v Alabama* 287 US 45 at 61 (1932)) that, in cases where the accused is unrepresented, the judge becomes counsel for him or her, extending a 'helping hand' to guide the accused throughout the trial so as to ensure that any defence is effectively presented to the jury, is

inadequate for the same reason that self-representation is generally inadequate: a trial judge and a defence counsel have such different functions that any attempt by the judge to fulfil the role of the latter is bound to cause problems (see *Foster* (1982) 38 ALR at 600). As Sutherland J stated in *Powell*

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v Alabama, when delivering the judgment of the United States Supreme Court (287 US at 61 (1932)):

> 'But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.'

… Standing in the path of the applicant's argument are certain statements in the judgments in *McInnis v The Queen* to the effect that the common law does not recognize the right of an accused to be provided with counsel at public expense. Barwick CJ stated ((1979) 143 CLR at 579):

> 'It is proper to observe that an accused does not have a right to be provided with counsel at public expense. He has, of course, a right to be represented by counsel at his own or someone else's expense.'

… On the other hand, Murphy J, in his dissenting judgment, stated ((1979) 143 CLR at 592):

> 'If a person on a serious charge, who desires legal assistance but is unable to afford it, is refused legal aid, a judge should not force him to undergo trial without counsel. If necessary, the trial should be postponed until legal assistance is provided.'

It is important to appreciate that these statements in *McInnis* were made in the absence of any argument directed to the existence of a right to be provided with counsel. The issue in *McInnis* was whether, on the particular facts of the case, there had been a miscarriage of justice by virtue of the trial judge's refusal of an adjournment sought by the unrepresented accused. That issue was resolved in the negative but, in our opinion, the actual decision in the case did not depend upon an acceptance of the proposition, after consideration of argument, that an indigent accused does not have a right to be provided with counsel at public expense and, therefore, the applicant need not seek to convince this Court that the decision should be reconsidered. The most that can be said against the applicant is that *McInnis* assumed the correctness of that proposition. In these circumstances, there is no strong reason why the Court should not reconsider the statements made in that case.

[The Court then discussed Australia's international obligations, particularly as embodied in the ICCPR[22] to which Australia is a party.] …

Assuming, without deciding, that Australian courts should adopt a similar, common-sense approach, this nevertheless does not assist the applicant in this case where we are being asked not to resolve uncertainty or ambiguity in domestic law but to declare that a right which has hitherto never been recognized should now be taken to exist. …

The third suggested foundation for the absolute right draws upon analogies with the domestic law of other jurisdictions, in particular, Canada and the United States. These analogies do not support the applicant's argument. …

In addition, recognition of an absolute right to counsel provided at public expense would create its own problems. First, the court would logically be driven to decide whether such a right to counsel entails the right to the 'effective assistance' of counsel, as it is called in the United States (see *Cuyler v Sullivan* 446 US 335 (1980); *Evitts v Lucey* 469 US 387 (1985)). That is, if an accused has a right to counsel, does he or she have a right to demand counsel of a particular degree of experience and who can conduct the defence 'effectively'? How could such a right be monitored properly by the trial judge?

Secondly, if one of the conditions for appointment of counsel for the accused at public expense is the impecuniosity of the accused, will it be the responsibility of the trial judge to assess this? Clearly, if proper guidelines were formulated and all the relevant material put before a trial judge, it would be possible for him or her to decide the matter, but the ad hoc development of such a procedure is unwise and undesirable.

Thirdly, recognition of the right to counsel provided at public expense would necessarily entail, and indeed be founded upon, the principle that absence of representation necessarily means that a criminal trial is unfair. However, appellate courts in this country do not interfere with convictions entered at trial purely on the basis that there was unfairness to the accused in the conduct of the trial (cf *McInnis* (1979) 143 CLR, per Murphy J at 591). The appellate jurisdiction in criminal matters depends upon a conclusion that there was a 'miscarriage of justice' (eg, Crimes Act 1958 (Vic) s 568(i)) such that the applicant 'has thereby lost a chance which was fairly open to him of being acquitted' (*Mraz v The Queen* (1955) 93 CLR 493, per Fullagar J at 514) … or 'a real chance of acquittal' (*Reg v Storey* (1978) 140 CLR 364, per Barwick CJ at 376), to repeat the expression used by Brennan, Dawson and Toohey JJ in *Wilde v The Queen* ((1988) 164 CLR 365 at

371–372). Unless the recognition of the absolute right sought by the applicant entails the consequence that want of representation necessarily means that a trial has miscarried, the absolute right would lack an adequate sanction. The right would thus appear to be rather hollow.

The position in Australia

For the foregoing reasons, it should be accepted that Australian law does not recognize that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial. Such a finding is, however, inextricably linked to the facts of the case and the background of the accused.

A trial judge faced with an application for an adjournment or a stay by an unrepresented accused is therefore not bound to accede to the application in order that representation can be secured; a fortiori, the judge is not required to appoint counsel. The decision whether to grant an adjournment or a stay is to be made in the exercise of the trial judge's discretion, by

asking whether the trial is likely to be unfair if the accused is forced on unrepresented. For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only. …

Did the applicant's trial miscarry?

The alternative argument of the applicant was that the trial judge

erred in the exercise of his discretion in refusing an application by the applicant for an adjournment. This argument was not developed fully in submissions, principally because the applicant's case was founded upon the existence of the alleged absolute right. However, it is clear that the issue is before the Court in the alternative form.

In approaching this argument, the question before this Court is not merely whether or not an adjournment should have been granted but whether the applicant's conviction should be set aside 'on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice', provided that the conviction will stand if 'no substantial miscarriage of justice has actually occurred' (Crimes Act s 568(l); *McInnis* (1979) 143 CLR, per Mason J at 581–582). …

On numerous occasions, the trial judge reiterated his lack of power to appoint counsel to represent the applicant, but on no other occasion did he appear to give any consideration to exercising his discretion to adjourn the matter on the ground that there was a real likelihood that the applicant would not receive a fair trial. In fact, the trial judge did not seem to be aware of the discretionary power he enjoyed; rather than just failing to take into account some material consideration or giving undue weight to one or another factor, his Honour virtually overlooked the possibility of adjourning the matter on the basis suggested. The trial judge erred in this respect.

In our view, the trial judge's failure to adjourn the trial resulted in an unfair trial and deprived the applicant of a real chance of acquittal. Central to this conclusion is the not guilty verdict returned by the jury on count four. The evidence against the applicant appears strong on all counts but, in circumstances where the jury found him not guilty on one count, how can this Court conclude that, even with the benefit of counsel, the applicant did not have any prospect of acquittal on count one, of which he was then deprived by being forced to trial unrepresented (cf *McInnis* (1979) 143 CLR, per Mason J at 583)? It is impossible to know the basis on which the jury found for the applicant on count four; the possibility exists that the jury found credible the alternative explanation of events given by the applicant

which involved allegations of impropriety by the police. Judging by the question asked of the trial judge by the jury foreman during deliberations, the jury may also have doubted whether the first count could be made out against the applicant in relation to the heroin found in the hospital ward. If such doubts were present in the jury's mind, how can it be said that competent counsel appearing on behalf of the applicant may not have found further weaknesses in the prosecution case? On the material before this Court, it appears that the applicant's defence was so disorganized and haphazard as to lack cogency. In these circumstances, the conclusion that the applicant may have lost a real chance of acquittal is compelling.

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In view of the differences in the reasoning of the members of the Court constituting the majority in the present case, it is desirable that, at the risk of some repetition, we identify what the majority considers to be the approach which should be adopted by a trial judge who is faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault on his or her part, is unable to obtain legal representation. In that situation, in the absence of exceptional circumstances, the trial in such a case should be adjourned, postponed or stayed until legal representation is available. If, in those circumstances, an application that the trial be delayed is refused and, by reason of the lack of representation of the accused, the resulting trial is not a fair one, any conviction of the accused must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial.

In the result, we would grant special leave to appeal, allow the appeal, set aside the conviction and order a new trial.

5.25 Brennan J dismissed the appeal and held as follows at CLR

316–17, 325–6; ALR 400–1, 407–8:

> … It cannot be doubted that a criminal trial is most fairly conducted when both prosecution and defence are represented by competent counsel (as each of Barwick CJ, Mason and Murphy JJ so forcefully acknowledged in *McInnis v The Queen* (1979) 143 CLR 575: see 579, 582, 586, 588, 590). What, then, should a court do when an accused person, charged with a serious offence and having insufficient resources to retain legal representation at his trial, wishes to be legally represented at his trial and no counsel is provided? One answer is that the court should adjourn the trial until legal representation is available, at public expense if necessary, and, if it is not made available, the court should adjourn the trial indefinitely. The other answer is that, once every reasonable prospect of obtaining legal representation has been exhausted, the trial must proceed. Neither answer is wholly satisfactory. The first answer sacrifices both the interests of the public and the interests of the victim, if any, in seeing that an alleged offender is brought to justice. The second answer sacrifices the interests of the accused and the interests of the public in the even-handed administration of justice. The problem can be resolved only by providing counsel to represent a person charged with a serious offence and, if he cannot afford to retain counsel himself, to provide counsel at public expense. The entitlement of a person charged with a serious offence to be represented by counsel at public expense if he cannot afford to retain counsel himself (hereafter 'an entitlement to legal aid') would be an important safeguard of fairness in the administration of criminal justice. A society which secures its peace and good order by the administration of criminal justice should accept, as one of the costs of providing a civilized system of justice, the cost of providing legal representation where it is needed to guarantee the fairness of a criminal trial. I respectfully agree with the observations made in other judgments in this case and in *McInnis v The Queen* (supra) as to the desirability of competent legal representation for an accused person in a criminal trial (the dangers of incompetent legal representation to an accused are sadly familiar to judges in the criminal jurisdiction). Although the desirability of

according an entitlement to legal aid is manifest, the critical legal question in this appeal is whether this Court can and should translate the desirability into a rule of law or, if there be

any difference, into a rule of practice governing the conduct of criminal proceedings. In my respectful opinion, this Court cannot properly create such a rule.

The common law has never recognized such a rule. Indeed, in England a person accused of felony had no right to be represented by counsel at his trial (Stephen, *A History of the Criminal Law of England*, (1883) vol 1, 424–425) until 1836 when, for the first time, such an accused was given the right to be represented by counsel (6 and 7 Wm IV, c 114, s 1). In this country, no common law entitlement to legal aid has been recognized. In this respect, our constitutional law differs from the constitutional law of some of the great common law countries which, by incorporating a Bill of Rights in their Constitutions, have empowered their Courts to construe broadly expressed guarantees of individual rights to include a right to counsel. Having no comparable constitutional foundation, the Courts of this country cannot translate the rights declared by the Courts of those other countries into the municipal law of Australia. …

In the present case, the application for special leave to appeal was founded on the submission that the applicant, who did not have the means of retaining counsel at his own expense, was denied a legal entitlement to counsel at public expense. That argument fails. There was no miscarriage of justice arising simply from the fact that the applicant was not legally represented. Whether there was any miscarriage in the particular circumstances of this case arising from the trial judge's refusal of an adjournment to allow the applicant to renew his application for legal aid is a question that might have been, but was not, argued before the Court of Criminal Appeal. The

> applicant's argument before the Court of Criminal Appeal that an adjournment should have been granted was not founded on the possibility of his obtaining legal representation in the circumstances of his case; it was founded on his supposed right to be provided with counsel. As the Court of Criminal Appeal was not invited to consider whether an adjournment should have been granted because the applicant might have obtained legal representation in the circumstances actually existing at the time of his trial, it would not be right to grant special leave to raise that question here on the materials available.
>
> I would grant special leave to appeal to raise the question of a general entitlement to legal aid but I would dismiss the appeal.

Deane, Toohey, and Gaudron JJ allowed the appeal, while Dawson J, like Brennan J, dismissed the appeal.

5.26 An important problem is determining what constitutes a serious offence. Deane J in *Dietrich v R* (1992) 177 CLR 292 at 335–6; 109 ALR 385 at 416, said a non-serious offence would be when 'there was no real threat of deprivation of personal liberty'.

5.27 McBarnet[23] has pointed out that the legitimacy of our criminal justice system is maintained because the general public knows only the rhetoric of a fair trial. The executive branch of government wants efficiency in processing criminals and to spend the least amount of money, while our courts employ the rhetoric of upholding the rights of the accused to a

fair trial. The *Dietrich* case may be a victory for the rhetoric of a fair trial, but, in reality, very few people have adequate legal representation. The tension between the courts' rhetoric and the

government requirements was highlighted in 1997, over the lack of adequate legal aid to pay lawyers in order to meet the *Dietrich* principle.[24]

5.28 The scope of *Dietrich* has been restricted in other ways. The High Court in *New South Wales v Canellis* (1994) 181 CLR 309; 124 ALR 513 held that *Dietrich* applied only to a fair trial in criminal proceedings, and not to proceedings of a tribunal. In *Fuller v Field and State of South Australia* (1994) 62 SASR 112, a South Australian court interpreted *Dietrich* as not applying to committal proceedings, because being unrepresented was not as serious at this stage of a prosecution. In *Heard v De Laine* (1996) FLC 92-675, the Full Family Law Court decided that *Dietrich* did not apply to family law and denied funding for separate representation for children. In *R v Pirimona* [1998] 250 Tas 2, Slicer J refused to stay proceedings in a case involving serious criminal charges when the accused could not obtain legal representation. Slicer J held that the matter was unlikely to be complex.[25]

5.29 The problem of the level of skill and the adequacy of compensation for unrepresented indigent defendants came up in *Attorney-General for New South Wales v Milat* (1995) 37 NSWLR 370. The Court of Appeal reversed the decision of Hunt J, who had adjourned the case until the Legal Aid Commission had met the demands for higher fees by Milat's lawyers. The Court of Appeal said that the *Dietrich* doctrine did not permit a judge to interfere with the allocation of legal aid funds, which was an administrative decision by the legal aid authorities. According to the *Dietrich* doctrine, legal representation had to be available, but it did not dictate the level of compensation. The court in the *Milat* case pointed out that adequate representation was available when the practitioner regularly practises criminal law. The court found Milat

had proper representation and that the settlement of the fees was to be decided by the Legal Aid Commission in its negotiations with the accused's lawyers.

5.30 The amount offered in the *Milat* case, although below the amount sought by Milat's lawyers, was still considered by the Court of Appeal as adequate compensation. But what if the amount offered is so low for the amount of work that needs to be done, as to jeopardise the continuation of representation? This occurred in *R v Malcolm John Souther* (SC(CA), 22/5/97, unreported), where neither the Legal Services Commission nor the South Australian Government were willing to provide the defendant's legal representative with a suitable fee. Olsson J, following the *Dietrich* case, said:

> The current intransigence of the Government and the Legal Services … is quite unacceptable. It has the practical effect of continuing to deny the accused a fair trial by reason of lack of

> representation. … I therefore propose … a stay until such time as that 'stand-off' situation has been resolved in a fair, satisfactory manner.

5.31 In *Hakimi v Legal Aid Commission (ACT)* [2009] ACTSC 45, Refshauge J at [90] said that 'there is no absolute right for a person legally aided to choose their lawyer'. The judge came to this conclusion after examining the provisions of the Human Rights Act 2004 (ACT) in light of Australian cases, and by looking at provisions of the European Convention on Human Rights and cases under that Convention in the European Commission of Human Rights and the European Court.

5.32 As of April 2016, the problem of adequate funding for legal representation in serious criminal cases has still not been resolved. What if there are inadequate, or no funds available and the matter is complex? Should the accused be set free? What role should the court play in helping the accused? Should an accused have to liquidate all their assets to pay legal fees?[26]

DUTY TO CONTINUE TO ACT

5.33 The Australian jurisdictions have adopted specific rules concerning the termination of the lawyer-client relationship. These are found in the Law Council of Australia Australian Solicitors' Conduct Rules 2011, as adopted in the Legal Profession Uniform Law (New South Wales and Victoria) and in other jurisdictions:[27]

…

13 COMPLETION OR TERMINATION OF ENGAGEMENT

13.1 A solicitor with designated responsibility for a client's matter must ensure completion of the legal services for that matter UNLESS:

13.1.1 the client has otherwise agreed;

13.1.2 the law practice is discharged from the engagement by the client;

13.1.3 the law practice terminates the engagement for just cause and on reasonable notice; or

13.1.4 the engagement comes to an end by operation of law.

13.2 Where a client is required to stand trial for a serious criminal offence, the client's failure to make satisfactory arrangements for the payment of costs will not normally justify termination of the engagement UNLESS the solicitor or law practice has:

13.2.1 served written notice on the client of the solicitor's intention, a reasonable time before the date appointed for commencement of the trial or the commencement of the sittings of the court in which the trial is listed, providing the client at least 7 days to make satisfactory arrangements for payment of the solicitor's costs; and

13.2.2 given appropriate notice to the registrar of the court in which the trial is listed to commence.

13.3 Where a client is legally assisted and the grant of aid is withdrawn or otherwise terminated, a solicitor or law practice may terminate the engagement by giving reasonable notice in writing to the client, such that the client has a reasonable opportunity to make other satisfactory arrangements for payment of costs which would be incurred if the engagement continued.

…

5.34 Determining what is 'just cause' for withdrawing may be difficult. Is it 'just cause' if your client refuses to follow your advice? For example, refuses to accept what you consider to be a reasonable offer, becomes antagonistic towards you, uses foul language, has other personal habits you find distasteful, or falls in love with and pursues you?[28]

5.35 The other part of the rule is the need for 'reasonable notice'. Can a solicitor terminate the retainer if outstanding fees are not paid? It would seem that non-payment would constitute 'just cause', but what kind of notice needs to be given. In *Heslop v Cousins* [2007] 1 NZLR 679, Chisholm J found that a letter from the solicitor that the 'only impediments to settlement are rates and costs', did not constitute reasonable notice. The judge said that to

terminate the retainer, reasonable notice had to be given 'in clear and unequivocal terms'. The solicitor in this case knew that the clients had serious financial problems, but was still willing to represent them. Furthermore, in a letter by the solicitor written later than the original notice to the clients, the solicitor offered to make 'an arrangement' to settle his fee.

5.36 In *R v Woodward* [1944] KB 118, the English Court of Criminal Appeal gave the accused the right to dismiss his counsel. The court said that no accused person can have counsel forced upon them without their permission. In this case, the accused had not even seen the counsel who was going to defend him, and had been denied the right in the lower court to dismiss the counsel and defend himself.

5.37 The practice of 'double briefing' — taking two briefs at the same time — is still present at the bar, especially in New South Wales. Why do you think barristers have to double brief? Often barristers avoid a clash of briefs by asking another barrister, usually from the same chamber, to take over one of the briefs.

5.38 In *Re Glenn Gould* (Legal Services Tribunal, Disciplinary Reports, No 2, 1998, p 2), a barrister who returned a Family Court brief concerning an Apprehended Violence Order three days before the matter was to be heard, was found guilty of professional misconduct. The New South Wales Legal Services Tribunal found that the barrister had not clearly informed

his instructing solicitor of the reasons for the return of the brief, nor informed the solicitor of rr 95 and 97 of the Legal Profession

Uniform Conduct (Barristers) Rules 2015 (now rr 101 and 103). The tribunal further found that the barrister had misled the Bar Association in his response to the allegations. He was reprimanded and had to pay the costs of the Bar Association. Is the penalty in this case enough to stop this practice?

5.39 The case of *R v White* (1995) 77 A Crim R 531 in the Supreme Court of New South Wales highlights some of the issues as to when it is proper to withdraw, when a lawyer is actually dismissed by a client, when a client is incapable of giving instructions, and the application of the old Barristers' Rules (NSW). In that case, counsel for the accused proposed to withdraw during a murder trial estimated to last 10 weeks. His primary reason for the notice of withdrawal was that he had been dismissed by his client and it had become impossible for him to communicate with the accused. He stated that he had therefore been unable to obtain instructions. Further, he requested, and had received, advice from the Bar Council that he should withdraw. Counsel also submitted to the court that he did not require leave to withdraw. Barr AJ held as follows at 532–6:

> Mr Coombs, the counsel who has since the beginning of the trial appeared for the accused, has announced that he proposes to withdraw. It may be put in the alternative that he may be regarded as seeking leave to withdraw. I will make further reference to this dichotomy shortly.
>
> … He gave two reasons as follows:
>
> (1) He was 'diametrically opposed' to the view I had taken concerning the accused's fitness to be tried. Over the last few weeks, the accused had sacked him. In his view, and in the view of his instructing solicitor, they were not in a position to obtain proper instructions. That was also the view of Dr Nielssen, who was currently treating Mr White,

the accused. If the trial were to continue in the present manner, the accused would be 'terribly prejudiced because of his behaviour and the way he presents his thoughts'.

(2) The other reason that was put forward was that there existed a conflict as to who, in effect, represented the accused and had the power to give instructions in the trial. Mr Coombs was unable to conduct the trial for the accused under the present guardianship order if I continued to take the view that the accused was fit to be tried. He had been advised by learned senior counsel, and submitted to me, that the only way the accused could properly be brought to trial was by referring the matter back to the Guardianship Board to have the status of the guardianship order dealt with. The question whether the accused were truly capable of managing his legal affairs could be reconsidered. There was a conflict between the Mental Health (Criminal Procedure) Act 1990 (NSW) and the Guardianship Act 1987 (NSW). The only way that conflict could be resolved would be if the Guardianship Board changed its view, or the conflict of the views were dealt with 'at another place', so that the question of which one took precedence could be determined. …

Mr Coombs also informed me that the ethical position in which he found himself was intolerable and that the advice he had received from the Bar Council was to the effect that he

should withdraw from the trial. He put it to me that he had been told that he had no choice in the matter.

I granted Mr Coombs a short adjournment in which to consider the question of his ethical position on a hypothetical further unfitness to be tried inquiry and to consult senior counsel on that matter and to consider also the question whether any such further inquiry would be

requested. Mr Coombs later informed me that he would have no ethical problem in appearing on a further unfitness to be tried inquiry. However, his instructing attorneys took the view that they would not wish to instruct him in such an inquiry because he would not be available to appear at a subsequent trial if such a trial followed. I then asked him whether there was to be an application for a further inquiry and he said that he himself would not make any such application, though he did not attempt to bind his successors. He said that after he withdrew in due course his solicitor would continue to represent the accused. He also said that he had been in error when he had told me during the morning that the solicitor intended also to withdraw from the matter. The solicitor would make an application to me for a discharge of the jury, for an adjournment of the trial for about four weeks and for a hearing date to be fixed so that other counsel could be obtained and so that the accused's condition might be improved after a period on the medication which Dr Nielssen had only just begun to administer. …

The Bar Rules do not appear to relate directly to the problem which has arisen here. They provide for the circumstances in which a barrister may or may not return a criminal brief shortly before a hearing is due to commence but none relates in its terms to withdrawal during a trial. I accept, of course, that the Bar Council may inform or direct a barrister from time to time what the etiquette of the Bar requires and, in that sense, the Rules which govern the conduct of a barrister are in no way confined to the printed and published Bar Rules.

It seemed to me, quite apart from the rights of the client or the Bar to entertain some expectation of or control over a barrister at a trial, this Court might have the responsibility to decide whether the barrister should be allowed to withdraw. Suppose that counsel, properly instructed and against the views of the accused, announced the intention to withdraw midway through a trial and put forward some spurious reason, such as a desire to do some unimportant personal business. Could the court stop the barrister withdrawing? Counsel were unable to point to any direct authority in New South Wales. I

was referred to *Greer* (1992) 62 A Crim R 442 in which the Court of Criminal Appeal considered inter alia the position in which the appellant had found himself after two successive counsel, having had their instructions withdrawn, withdrew their appearance; but the appeal did not consider whether leave was needed. The judgment of the President (at 446) records that at a certain point of the proceedings, the first counsel 'sought to be excused', implying some recognition, at least in the trial court, of the need for leave. In *Frawley* (1993) 69 A Crim R 208 counsel was said to have told the trial court that, because the appellant kept changing his instructions he, counsel, 'had no alternative but to withdraw from the case': see the judgment of the Chief Justice (at 211). But, like *Greer*, that appeal was really concerned not with the withdrawal of counsel as such but with the question whether the resulting lack of legal representation produced an unfair trial for the appellant. I do not think that either of these cases assists in resolving the present problem. From the limited research I was able to carry out, however,

it would appear well recognised in other jurisdictions that trial courts exercise a discretion when counsel wish to withdraw. …

Although it has been submitted generally that the discretion does not exist in New South Wales and that any practice of counsel to 'seek leave' to withdraw when the circumstances warrant it is an erroneous one, perhaps ill-born out of excessive courtesy, I think that the discretion does exist. However, it has its limits or at least there are limits to its exercise.

My attention has been directed to *Shaw* (1980) 70 Cr App R 313, a decision of the English Court of Appeal. The appellant absconded during his trial. His counsel remained and asked the court to discharge the jury and order a new trial. The trial judge refused and directed the trial to continue. His Honour went on to pronounce that,

as the appellant had voluntarily absented himself, he must be taken to have withdrawn the instructions he had given to his solicitor and counsel. His Honour therefore refused to allow counsel to take further part in the proceedings in spite of the fact that counsel wished to do so and considered himself instructed sufficiently for the purpose.

In the view of the Court of Appeal, it was not within the province of the judge, during a criminal trial, to dismiss a counsel or solicitor or to order them to remain if counsel were required by the etiquette of the Bar to do otherwise. Here Mr Coombs, as I accept, has sought the advice of the Bar Council and other senior counsel and tells me that etiquette requires him to withdraw. *Shaw* is not binding on this Court but it is a strong judgment in point and I see no reason not to follow it.

It seems to me that, although this Court may have a general discretion, it may not extend to a case like the present one where counsel is obliged, as a matter of professional etiquette, to withdraw. Alternatively, the matter may be that, although a discretion exists, it ought not to be exercised against a grant of leave in those circumstances. The difference between these alternative ways of putting the matter seems to be of little consequence.

If the better way is to approach the matter on the basis that there is no discretion in the court in the circumstances, it would be appropriate for the court merely to say that Mr Coombs' withdrawal is noted. If this be wrong, the discretion should be exercised in favour of a grant of leave and I would exercise it accordingly. …

5.40 Why would Mr Coombs have ethical problems concerning an inquiry by the court into the accused's unfitness to be tried? Do you think Barr AJ was correct in believing that, if there are professional etiquette obligations of a barrister obliging them to withdraw, a bar ruling or custom should prevail over the discretion of a court to deny such withdrawal?

COMMUNICATION AND CONTROL

5.41 Who should be in control in the lawyer-client relationship? Should all instructions between the lawyer and the client be written? Who is really giving the instructions — the client or the lawyer? Does the client have any real power, considering the lawyer is the expert? The ultimate question which needs to be examined is: who is really in control?

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5.42 Ross, in *Ethics in Law: Lawyers' Responsibility and Accountability in Australia*,[29] notes:

> **9.1 There are three models of control:**
>
> - the lawyer-control model;
> - the client-control model; and
> - the cooperative model.
>
> It should be noted that Basten's [and Redmond's] three-model theory was created in 1981. Parker and Evans more recently have adopted a four-model approach. The models are:
>
> 1. Adversarial advocate — advancing their client's interests with the maximum vigour which is allowed by the law.
> 2. Responsible lawyer — shows autonomy from clients and private interests, approach governed by the role of facilitating justice in the public interest.
> 3. Moral activist — use of public interest lawyering to improve access to justice and change the law.
> 4. Relational lawyer (ethics of care) — taking responsibility for people, communities and relationships. Serving the interests of a client in a way that includes the moral and emotional aspects of a problem and developing strategies reflecting this.

This new approach is based on ethical considerations and gives only some insight into who is in control of the relationship. Only the fourth approach appears to fit into the cooperative model of Basten's [and Redmond's] control theory. This new approach is still useful for discussion of the lawyer's role in dealing with clients.

9.2 In the lawyer-control model the lawyer is in control because of his or her expertise. It assumes that because of lawyers' training they know the best approach to clients' legal problems; and that lawyers, by being detached and objective, will be able to handle the problem more clearly than clients who are emotionally involved with the situation. The attitude is that clients are in a weak position and have to place their trust in and be dependent upon lawyers. This model predominates in lawyer–client relationships and is preferred by the profession. One Melbourne practitioner alleges that lawyers give advice with the expectation that it will be followed. If it is not, the lawyer expects the client to find another lawyer. If the client remains, the lawyer may 'treat the client with contempt by not answering telephone calls and by briefing barristers at the last possible minute'. This model is probably even more prevalent when the client is poor and uneducated. Lawyers frequently believe that these clients seek dependency and are inferior. Even if they treat such clients differently, especially in certain neighborhood legal aid centres, they may use:

> '… the client dependency as a strategically necessary construction required to gain sympathy from adjudicators and to minimize client participation in case management,

> thus speeding the favorable disposition of a mass caseload. Whether his [or her] motivation flows from formal belief or instrumental knowledge, a poverty lawyer plans and manages the advocacy process — interviewing, counselling,

> negotiation, discovery, trial and motion practice — in a manner that restricts his [or her] client's opportunity to speak. …'

9.3 In the client-control model clients make the important decisions based on the technical information given to them by the lawyer. The lawyer has to carry out the client's decisions as long as he or she is not required to do something that is unethical or illegal. This model is usually present when the client is powerful because of position or wealth. Today many more lawyers are being intimidated by not only wealthy clients but also by the demands made by large multinational corporations. These clients may be unreasonable and even make unethical demands on their lawyers. … This model does not deny that the lawyer has special skills and knowledge, or that the lawyer is better able than the client to conduct the client's legal affairs. It stops the lawyer from being overbearing and paternalistic to the client, and allows the client to make the important decisions on the goals the client seeks to achieve. This may mean placing the legal problem in a far broader framework, for example perhaps political, rather than the narrow confines of the legal context. The context of lawyers' advice during the Bush presidency, concerning waterboarding and other torture techniques, is a good example of legal advice given in a political context. In dealing with civil disobedience clients, one lawyer states:

> '… the clients bear the consequences of their decisions and are in the best position to understand the full non-legal as well as legal significance of their choices. Accordingly, lawyers counsel clients best by helping them to explore all of the possible consequences of their actions so that the clients can make decisions that best suit their needs.'

The author [Polikoff] calls this form of lawyering 'client-centered counselling'. Other scholars argue that 'progressive lawyering' should involve lawyers helping to empower rather than seeking to control their clients. The client-control model sometimes results when

lawyers are intimidated either by dangerous criminal organisations behind their clients or by clients who are psychologically disturbed. Furthermore, there is an increasing number of clients who make numerous demands from their lawyers. The lawyer can, as the Court of Appeal in *Wentworth v Rogers* [[1999] NSWCA 403] stated, become the client's 'lackey' by doing her bidding and basically letting her run the case. It should be noted that Wentworth's lawyer was acting pro bono.

9.4 The cooperative model (also known as the 'care' model) is one where the lawyer and client learn as much as they can about each other's attitudes and goals, and seek to come to a common solution to the problem. There is open discussion and the parties are on an equal footing: 'Action will only be taken which is morally acceptable to both lawyer and client.' In this relationship there is what Shaffer calls a moral dialogue — not only an exchange of information but also of moral views. … [T]he advantage of the cooperative model is in overcoming the moral isolation faced by most lawyers. We can add two other advantages:

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> '[I]t preserves the autonomy, responsibility and dignity of both parties … and while the model sacrifices the alleged advantages of the lawyer's emotional detachment … it substitutes the possibility of more informed, comprehensible and relevant advice based on a fuller understanding of the client's position.

9.5 The cooperative model can vary according to the clientele. For example, Aboriginal lawyers working for Aboriginal clients, … have far more extensive obligations than other lawyers. They are more likely to 'be involved in matters involving family or friends, particularly because of the altruistic objective and the cultural duty

associated with the "extended family" concept'. Dolman says that the nature of Aboriginal culture causes the Aboriginal lawyer to 'desire to act "altruistically", that is, to make a contribution to the community'. Acting 'altruistically', that is, becoming part of the community, expands the scope of the traditional cooperative or care model. In contrast, non-indigenous lawyers may have difficulty using the cooperative model because they do not understand the cultural requirements. In the United States it has been pointed out that the ABA Model Rules:

> … are inadequate to resolve the problems created by cultural differences between non-Indian attorneys and their tribal clients, the increased propensity for paternalism in tribal representation, and conflicts of interest in tribal representation.

9.6 On the other hand, the cooperative model can lack moral content when both clients and lawyers cooperate to structure arrangements or activities that are illegal or close to being illegal or silently agree to turn a blind eye to illegal activities. This type of cooperative model would not fall within the ethical models set up by Parker and Evans in **9.1**. … A good example was the advice and conduct of some of the lawyers for James Hardie Industries concerning the asbestos cases and claims. It was not only large law firms, but also large accounting firms, which were involved in some questionable ethical practices. This included, among other things, devising a settlement fund from which they then separated Hardie Industries by switching its domicile to the Netherlands.

9.7 A fourth model can be suggested to exist when an employer or government agency would say to a person: 'We will provide you with a lawyer, but only if that lawyer does what we say is appropriate.' In that situation we would have what Basten [and Redmond state] … is 'a system that is foreign to certain basic values of our criminal justice system'. What usually happens is that the third party, for example a legal aid authority, lays down general guidelines, for example to

control costs, and the lawyer (who is technically still in control) must restrict his or her legal work to meet these demands. There may also be a requirement that the client needs to cooperate with the appointed lawyer, and failure to do so would result in the lawyer withdrawing. A similar situation can happen when the client is a member of a political group and the group decides how a case should be run. This would constitute influencing the client within the client-control model. … Finally, there is a hybrid representation in the family law area, where the lawyer is an independent child's representative. In this model the lawyer does not get instructions from the child and is in the role of seeking out information concerning the 'best interests' of the child. Thus this lawyer is in the role more of a friend of the court — helping to clarify the issues concerning the child for the court. [footnotes omitted]

5.43 The Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW and Vic),[30] which are identical to the Australian Solicitors' Conduct Rules 2011, state:

> 8.1 A *solicitor* must follow a *client's* lawful, proper and competent instructions. [emphasis added]

INFORMATION AND ADVICE

5.44 The profession generally considers lack of communication by lawyers not to be serious breaches of their professional duties, but there is now recognition that something has to be done to remedy the more serious cases and to improve the professional image of lawyers in this area. Many of these consumer complaints can be, and are, resolved by mediation, but there still is a need to

prevent the problem occurring by having practitioners developing and using more efficient office management skills.

5.45 Lack of communication can at times be a serious breach of a lawyer's professional duties. In *R v Szabo* [2000] QCA 194, the client discovered that his defence counsel had been in a *de facto* relationship with the Crown Prosecutor. This information had not been provided to the client and even though the relationship was in an interrupted phase, the Court of Appeal ordered a new trial because a miscarriage of justice had occurred.

5.46 The Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW and Vic) r 7 states:[31]

> 7. COMMUNICATION OF ADVICE
> 7.1 A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement.
> 7.2 A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client,

> unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the matter.

5.47 The Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW and Vic), which are based on the Australian Bar Association Barristers' Conduct Rules 2010, provide in rr 36 and 37:

36 A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

37 A barrister must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, sufficiently to permit the client to give proper instructions, including instructions in connection with any compromise of the case.

OFFERS OF SETTLEMENT

5.48 A lawyer has a duty to provide the client with all the necessary information to make an informed decision about settlement of the case. The client should be the one in control of the settlement process. Many lawyers forget this duty to communicate, which can create problems so far as offers of settlement are concerned.

5.49 One example of this is *Dominion Metals Pty Ltd v Shemmessian* (SC of WA, Nicholson J, 1990/92, 16 December 1993, unreported). In that case, the plaintiff and the defendant had a dispute over applications for a prospecting licence. The applications and objections were listed for hearing before a mining warden for 13 August 1992. In July 1992, the defendant retained a solicitor, who had acted for him for a long time in other matters. The defendant told his solicitor that he was about to go to the bush for a while, and that his son could be used as a contact. The defendant's solicitor was not called to give evidence. The father was not contactable, and the son, without permission, instructed the solicitor that the defendant's application and objection should be

cancelled on the basis that each party paid their own costs. An agreement between the solicitors for both parties, based on this premise, was reached on 11 August. The plaintiff 's solicitor then advised the warden's mining court by telephone and fax that the matter had been settled. On 12 August, the defendant arrived in Perth and was informed by his solicitor that the matter had been settled. The defendant dismissed the solicitor and denied that the solicitor had had authority to act as he did. The defendant then tried to cancel the agreement. At the 13 August hearing, the mining warden adjourned proceedings to determine if an agreement existed. Nicholson J held as follows:

> …
>
> ***Express actual authority***
>
> … It is the fact that the defendant did not expressly himself instruct his solicitor to compromise the action. It is also the fact that the defendant's son instructed the defendant's

> solicitor to do so. In doing so he told the solicitor that he had not been able to contact his father. It is further the fact that the defendant's son had not been expressly instructed by the defendant to compromise the action. (In reaching this latter finding I place no reliance on the answer given by the defendant in examination in chief in which he denied giving his son 'authority' to settle the case.)
>
> … The plaintiff submits that the facts as they should be found establish that there was a holding out by the defendant of his son as his agent having authority to act in the matter.
>
> The plaintiff additionally relies upon the failure of the defendant to call his solicitor. … [T]hat inference can extend only to matters of fact

and not to matters of law. It would be taking the permissible inference too far to accept the plaintiff 's contention that the failure of the defendant to call his solicitor gives rise to an inference that his evidence would not have assisted the defendant to prove that his solicitor did not have actual authority to enter into the agreement. …

The question therefore becomes whether the plaintiff 's case establishes as more probable than not that the defendant placed his son ostensibly in the position of being his agent. … I am not satisfied that such a case is made out. … [The] evidence [of the defendant] shows that the authority given by the defendant to his son was to act as the conduit between himself and his solicitor. The failure to call the solicitor does not entitle me to conclude that he would have given evidence of unfavourable facts. Although the evidence in relation to this particular instruction must be considered against the background of the defendant's long relationship with his solicitor and the fact that the defendant's son had with his consent given the solicitor instructions from time to time, I do not consider that can properly lead to a different view of the evidence. … Actual express authority is not, in my view, made out.

Implied actual authority

An agent has implied actual authority to do all acts necessary ordinarily incidental to the exercise of the agent's express authority: *Halsbury's Laws of Australia* vol 1, para l5-90; GHL Fridman, *Law of Agency* (6th ed, 1990) at 59. A solicitor as agent of his client is authorised to compromise proceedings and as between himself and his client he has implied authority to compromise without reference to his client provided that the compromise does not involve matter 'collateral to the action': *Waugh v H B Clifford and Sons* [1982] 1 Ch 374 at 387; *Cordery's Law relating to Solicitors* (8th ed, 1988) at 80. No contention is made here on behalf of the defendants that the agreement deals with a matter collateral to the action and, in any event, a matter will not be regarded as 'collateral' unless it really involves extraneous subject matter: *Waugh* (supra) at 388. The question is whether in all the circumstances implied authority arose.

…

In my opinion there is nothing in the facts as found which makes inappropriate the implication of authority in the defendant's solicitor to compromise the defendant's application and objection if the rule referred to is applicable to such proceedings. This is not a case where the

solicitor was fixed with any knowledge which would have made it unreasonable for him to do so: cf *Waugh* (supra) at 387.

… A solicitor although retained to bring an action cannot without express authority compromise it before the writ or other originating process is issued: *Macaulay v Polley* [1897] 2 QB 122; *Cordery on Solicitors*, op cit, at 80. There is no requirement for lodgment of a formal notice of appointment of a solicitor in relation to applications and objections under the Mining Act. … [A] solicitor acting for a party in an action or matter may give notice in writing to the other party, or his solicitor, that he is so acting. … No such notice was given by the defendant's solicitor to the plaintiff 's solicitor.

… For the plaintiff it is submitted that the requirement for the solicitor to be 'on the record' … (D Foskett, *The Law and Practice of Compromise* (Sweet and Maxwell, 1991) at 168-9) is an unnecessary gloss on the decision in *Welsh* (supra) and that it is the retainer which gives rise to the necessary authority.

Here the solicitor was not on the record but the defendant's application and objection were on foot. The absence of a record and the absence of any written notice from the defendant's solicitor to the plaintiff 's solicitor are points of distinction between the circumstances pertaining in the instant case and those pertaining in the authorities relied upon by the plaintiff. …

Ostensible authority

The plaintiff next relies upon the defendant's solicitor having had ostensible authority to enter into the agreement. The usual rule is that recognised in *Waugh* (supra). In that case the issue was whether solicitors for builders had ostensible authority to bind their clients to terms of compromise of an action brought against the builders by buyers, the terms being that the builders would repurchase the allegedly defective dwelling-houses at a valuation, although the compromise had been entered into mistakenly and contrary to instructions. The other members of the Court agreed with the reasoning of Brightman LJ. At 383 he said:

> 'In approaching this appeal it is, in my opinion, necessary to bear in mind the distinction between on the one hand the implied authority of a solicitor to compromise an action without prior reference to his client for consent, and on the other hand the ostensible or apparent authority of a solicitor to compromise an action on behalf of his client without the opposing litigant being required for his own protection either (1) to scrutinise the authority of the solicitor of the other party, or (2) to demand that the other party (if an individual) himself signs the terms of compromise or (if a corporation) affixes its seal … '.

After reviewing the authorities he said at 387:

> 'The law thus became well established that the solicitor or counsel retained in an action has an implied authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve

> matter 'collateral to the action'; and ostensible authority, as between himself and the opposing litigant, to compromise the suit without actual proof of authority, subject to the same limitation. …
>
> '[It follows] … a solicitor (or counsel) may in a particular case have ostensible authority vis-a-vis the opposing litigant where he has no implied authority vis-a-vis his client. … The magnitude of the compromise, or the burden which its terms impose on the other party, is irrelevant. …'

In the course of his reasons in *Waugh* (supra) Brightman LJ said at 389: 'of course I agree that a solicitor in a non-contentious matter does not have such ostensible authority.' In my view this makes it clear that the law as expounded by him relates only to a solicitor who is retained in an action, the usual consequence of which is that the solicitor is therefore on the record. It is not simply the retainer which gives rise to the ostensible authority but the retainer 'in an action' with the consequence that the solicitor is on the record and his authority is evident. In other words, the ratio decidendi of *Waugh* (supra) is that the consequence of instructing a solicitor to conduct an action and so place his or her name on the record is that it follows that such solicitor is known to have ostensible authority to compromise the action in the absence of the expression of any limitation on that authority by one party to another before the settlement is reached. …

An 'action' is defined by s 4 of the Supreme Court Act 1935 to mean a civil proceeding commenced by writ or in such other manner as may be prescribed by Rules of Court, but does not include any criminal proceeding by the Crown. It is in this sense that I understand Brightman LJ to refer to an action with the consequence that when he referred to non-contentious matters not attracting the application of that law he was necessarily referring to those matters not having the character of an action as so understood. In *Kontvanis v O'Brien (No 2)* [1958] NZLR 516 at 517 F B Adams J said:

> … I incline to the view that … it is not essential, in order

> that a solicitor may possess such ostensible authority, that his name should actually be on the record. No argument was addressed to me on this topic, and I am aware of no authority. … I am disposed to think that, on principle, the ostensible authority would vest in any solicitor who is for the time being, after the suit has been commenced, in fact retained to conduct it. …

The novel circumstances raised by the present case are that the compromise was not reached in the course of 'an action' but in the course of applications to a Mining Warden. … There was as a consequence and as a matter of law, no requirement for either solicitor to be on the record and, as a matter of fact, neither solicitor had given notice to the other that they were acting. … This was not a case where there was a solicitor on the record who thereby was shown to the world to be in charge of litigation: In *Re Creehouse* [1983] 1 WLR 77.

… There was no 'action' on foot. … [T]he mere oral assertion of authority is not, on the decided cases as I read them, and particularly in the instant circumstances, sufficient

to give rise to it. … I have not had cited to me any authority to support the application of the principles in *Waugh* (supra) outside an action instituted with a solicitor on the record. As I read that and preceding decisions, it is the retainer on the record of an action which evidences the requisite authority and, in the absence of those ingredients, the question of authority becomes one of evidence of express authority: cf: *Macaulay* (supra) at 123 per Chitty LJ. That is the position as stated in *Halsbury* (4th ed) and *Cordery on Solicitors.*

It follows that the conditions were not present in which implied or ostensible authority could have arisen in the defendant's solicitor to

compromise the applications and objections. The consequence is that I do not consider the defendant can be held to the agreement reached by his solicitor.

5.50 In *Waugh v H B Clifford & Sons Ltd* [1982] 1 Ch 374 (Court of Appeal, England), Brightman LJ at 387 also said:

> Suppose that a defamation action is on foot; the terms of compromise are discussed; and that the defendant's solicitor writes to the plaintiff 's solicitor offering to compromise at a figure of £100,000 which the plaintiff desires to accept. It would in my view be officious on the part of the plaintiff 's solicitor to demand to be satisfied as to the authority of the defendant's solicitor to make the offer. It is perfectly clear that the defendant's solicitor has ostensible authority to compromise on behalf of his client, notwithstanding the large sum involved. …
>
> But it does not follow that the defendant's solicitor would have implied authority to agree damages on that scale without the agreement of his client. In the light of the solicitor's knowledge of his client's cash position it might be quite unreasonable and indeed grossly negligent for the solicitor to commit his client to such a burden without first inquiring if it were acceptable. But that does not affect the ostensible authority of the solicitor to compromise, so as to place the plaintiff at risk if he fails to satisfy himself that the defendant's solicitor has sought the agreement of his client. Such a limitation on the ostensible authority of the solicitor would be unworkable. How is the opposing litigant to estimate on which side of the line a particular case falls?

5.51 In *Thompson v Howley* [1977] 1 NZLR 16 (Supreme Court of New Zealand), the plaintiffs sought damages from their solicitor for settling litigation by the plaintiffs over a sale of property. Somers J said:

> It is, I think, clear that a solicitor is liable to his client if he compromises an action contrary to the instruction of his client. That includes cases of compromise in the face of prohibition and I think

includes cases of compromise on terms different from those expressly authorised. In the latter case express authority to settle on particular terms will usually imply a prohibition of compromise on other terms.

5.52 See also *Carr v Fisher* [2006] NSWCA 313 concerning the duties under a retainer in relation to a settlement.

5.53 Section 177 of the Legal Profession Uniform Law 2015 (NSW and Vic) states:[32]

> **177 Disclosure obligations regarding settlement of litigious matters**
>
> (1) If a law practice negotiates the settlement of a litigious matter on behalf of a client, the law practice must disclose to the client, before the settlement is executed:
>
> (a) a reasonable estimate of the amount of legal costs payable by the client if the matter is settled (including any legal costs of another party that the client is to pay), and
>
> (b) a reasonable estimate of any contributions towards those costs likely to be received from another party.
>
> …

5.54 Rule 22 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW and Vic) states, inter alia:[33]

> **22 Communication with opponents**
>
> 22.1 A solicitor must not knowingly make a false statement to an opponent in relation to the case (including its compromise).
>
> 22.2 A solicitor must take all necessary steps to correct any false statement in relation to the case made by the solicitor to an opponent as soon as possible after the solicitor becomes aware that the statement was false.

22.3 A solicitor will not have made a false statement to an opponent simply by failing to correct an error on any matter stated to the solicitor by the opponent.

…

5.55 In *Re Andrew Charles Lauchland* (Solicitors Complaints Tribunal, 13 July 1999, SCT/16, Annual Report of Disciplinary Action, No 5, Supplement to *Proctor*, December 1999), a Queensland solicitor, who settled his client's claim by discontinuing the action without any instructions from the client, was struck off the roll for making false communications concerning

the instructions. In *Law Society of New South Wales v Hampton* [2001] NSWADT 31, the solicitor signed a settlement for terms that were not within his instructions, which constituted one of the grounds for being struck off. See also *Young v King* [2004] NSWLEC 93, where solicitors failed to tell their clients of the opposition's offer to mediate, which was found to be a breach of their duties to their clients.

5.56 In *Dominion Metals Pty Ltd v Shemmessian* (SC of WA, Nicholson J, 1990/92, 16 December 1993, unreported),[34] the court discussed the difference between 'express', 'implied', and 'ostensible' authority. Can you explain, by way of example, the difference between these types of authority?

5.57 For a case where reliance made the agreement binding and the lawyers only had 'apparent authority', see *International Telemeter Corp v Teleprompter Corp* 592 F2d 49 (2nd Cir 1979). For the opposite approach to this case, see *Morgan v South Bend*

Community School Corp 797 F2d 471 (7th Cir 1986). If a client is held to be liable to an agreement entered into by their lawyer in circumstances where the client has not authorised or approved the agreement, what action, if any, might the client and the relevant regulatory authority, be able to take against the lawyer?

5.58 Is there any time at which practitioners should be allowed to make an out-of-court settlement without the client's express specific authority? Suppose that a lawyer has no authority to settle a case for the client, however, when the matter goes to court, the lawyer enters into an agreement that is then accepted by the court. The client is not present and does not want to abide by this settlement. Is the client bound by this agreement? What if this agreement made by the client's lawyer leads to an injustice to their client. Does a court have power to set aside the agreement, even though the other party had no knowledge of the lawyer's lack of authority? Is an injustice to a client by the actions of the lawyer in itself a sufficient reason to set aside an agreement, or is it necessary to have a 'serious injustice' to do so?[35]

5.59 What if there is a typing mistake in the terms of an agreed compromise? Should the settlement be set aside? Would it make a difference if the mistake leads to an unjust result?[36]

5.60 What if the solicitor has authority to bind the client to a settlement, but the client now wants to modify the settlement?

5.61 A more recent case on ostensible authority is *Zhang v VP302 SPV* [2009] NSWSC73. The case involved an exchange of contracts where the purchasers signed an executed contract that was then slightly amended by the vendors. The purchasers' solicitors did not inform their clients of the new changes. Instead they just used the last page of the previous contract, already signed

by their clients, and attached it to the new contract with the changes. White J held that a binding contract had come into existence. He said that the vendors 'were entitled to assume

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that the purchasers assented to all of the terms in the document so forwarded' because the purchasers by their actions had held out that their solicitors 'would act for them in effecting an exchange of contracts'.

5.62 Is this decision consistent with previous decisions? Are the purchasers entitled to bring an action against their solicitors? For a different result in an ostensible authority case, see the more recent decision in *Broadbent v Medical Board of Queensland* [2010] QCA 352.

DUTIES IN RELATION TO CLIENT INSTRUCTIONS

5.63 Lawyers are under a duty to obey clients' instructions. This duty is directly related to the duty to communicate, and the two sometimes overlap. For example, if your client wants you to carry out a transaction which involves the arranging of inflated prices on overseas purchases to gain a larger tax deduction (directly violating the tax law), what should you do? If the client does not accept your advice, can you withdraw?[37]

5.64 If the solicitor fails to obey a client's lawful, proper, and competent instructions, a breach of duty will take place. The solicitor can then be sued for negligence.[38]

5.65 The NSW Office of Legal Services Commission in its *2009–10 Report* at p 13 states:

> There has been a small but perhaps significant jump in the number and proportion (from 3.9% to 7.1%) of complaints about lawyers not following the instructions of their clients. These complaints arise chiefly in situations where lawyers don't listen to their clients, where clients fail to clearly explain their intentions or where administrative failures within a firm lead to correspondence or phone calls being ignored. …
>
> Many of these complaints are dismissed because there is no clear proof the client ever gave the solicitor instructions to, for example, do a further search in a conveyance.

5.66 Lawyers carry out their obligation to inform clients and follow clients' instructions in two basic roles: as an advocate; and as an adviser. In this regard, Wolf[39] said:

> As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. … As advocate, an attorney focuses on past conduct, and may assert any favourable interpretation of the law,

> regardless of her opinion as to the likelihood that the interpretation will prevail. As advisor, on the other hand, the focus is on future conduct, and any professional opinion as to the likely success of a given interpretation should be conveyed to the client. These distinctions seem to imply that, in the adversary role, an attorney is less concerned with her own opinion than in the advisor role, and more concerned with advancing the expressed goals of the client by

any means possible. Attorneys adopting the advisor role, therefore, have more leeway in attempting to advance their own judgments about a case, but ultimately are still under an ethical obligation to act in accordance with the client's desires.

5.67 Consider the two scenarios set out below, which focus on the question of 'following a client's instructions' and 'acting in the best interests of the client'. Your response to both questions should include a reference to any relevant statutory provisions, conduct rules, and case law.

5.68 Scenario 1: Your client has been married for 25 years. There is one child from the marriage, who is 24 and happily married. Your client is now 43, and feels that she has missed out on all the fun of adventure and travel. She has just left her husband, and intends to live a 'simple life' for several years in places like Indonesia, India, and Nepal. She hopes to 'find herself '. Her husband has been very willing to support her new life, as long as she signs a property settlement that leaves him the family home (worth $2,000,000) and all other assets and investments (worth $900,000), and promises not to make any future claim over his superannuation. He is a professor of law and will retire in about five years. He has offered her a settlement of $500,000 cash. Your client feels guilty about leaving, and believes that $500,000 could last her for the several years in which she wants to wander and 'find herself ' by living in meditation centres. She feels she would also have enough money left over to start her 'new life' when she returns. However, she would be entitled to a substantial property settlement, including a share in her husband's superannuation. When she and her husband married, she became pregnant and decided not to pursue any studies. She focused her life on bringing up their child and supporting her husband's career. Thus, she has not worked throughout the marriage and, because she has no

credentials, she has no future prospects for decent and financially rewarding employment. She has instructed you not to ask for too much more than the offer of $200,000 because (in her words): 'I know if anything happens to me, he'll always provide for me. If I ask for too much money, he may get upset and I will lose his good will in the future.' What advice can you give?

5.69 Scenario 2: Mr Jones is 48 and has instituted a $2 million lawsuit, approximately half of the value of the relevant estate, contesting his father's will. Jones was born out of wedlock, and his father knew about him throughout Jones's life, but refused to have anything to do with him or his mother, who died 10 years ago. He did acknowledge that Jones was his son. There are no other surviving children, but there are three surviving nieces, who were close to the deceased throughout his life. The will, which was drawn up just before the father died, only leaves Jones $200,000, and the rest is left to the nieces. Jones feels that the nieces unfairly influenced his father, and that he was confused about the will's contents when he signed it. Jones is very bitter about his life, and currently lives wherever he can. He is on welfare and has

no real skills; basically, it can be said that he has no home, no furniture, no family, no friends, and no job. Jones feels that his father 'owes him', and that contesting the will is the only way out of his poverty. The executor, with the agreement of the nieces, has offered Jones $350,000 in settlement. You believe that if you go to trial there is only about a 20 per cent chance of having the will set aside. Therefore, in all likelihood, Jones will lose. Every time you attempt to explain your professional evaluation of the case, Jones

refuses to listen. He is only concerned with what his father 'owes him'. On this issue, he is very emotional, saying that 'the bastard ruined my life, and my mother's'. What should you do? What if you go to court and lose, and Jones has to pay out the $120,000 from the will in court costs, plus $50,000 for your fees? He refuses to pay, and has lodged a complaint with your professional association that you wrongly advised him in not 'making him take' the $350,000 offer. What would be your response?

DUTIES IN RELATION TO ADVOCACY

5.70 Rules 42 and 43 of the Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) state:

> 42 A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's wishes where practicable.
>
> 43 A barrister will not have breached the barrister's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's wishes, simply by choosing, contrary to those wishes, to exercise the forensic judgments called for during the case so as to:
>
> (a) confine any hearing to those issues which the barrister believes to be the real issues,
>
> (b) present the client's case as quickly and simply as may be consistent with its robust advancement, or
>
> (c) inform the court of any persuasive authority against the client's case.

5.71 The above Rules make it clear that counsel have a duty to the court, which requires them to exercise professional judgment so far as the conduct of a case is concerned.[40] However this does not

excuse incompetence on the part of counsel which, in some cases, can give rise to a miscarriage of justice. *R v Birks* (1990) 19 NSWLR 677 is an example of this, which is summarised as follows by Ross:[41] The accused was indicted for maliciously inflicting bodily harm with the intent to have sexual intercourse and having sexual intercourse without consent. The defendant's inexperienced counsel failed to ask the complainant during his cross-examination about the fact that no anal intercourse had taken place and that her physical

injuries were not intentionally caused by the defendant's conduct. The defendant had asked his counsel to ask these questions. The failure of counsel to ask the two questions became the basis of a vigorous attack on the validity of the defendant's testimony. This was because the defendant gave a different version of the events than the complainant. Counsel still had an opportunity to bring evidence to show that he had been instructed by his client that no anal intercourse had taken place and that the physical injuries were unintentional. Counsel only brought this evidence to the attention of the court after the jury had retired to consider their verdict.

5.72 On appeal, Gleeson CJ (NSW) followed a decision of the Court of Appeal in England, *R v Ensor* [1989] 1 WLR 497. In that case, a leading counsel, defending his client on two charges of rape, refused to follow his client's instructions to make an application to sever the indictment, which would normally have been accepted. Lord Lane said that not following this instruction, even if erroneous, could not possibly be described as incompetent.

Mistakes or unwise decisions made by counsel during a trial by itself are not sufficient grounds for an appeal. Lord Parker went onto say (in *R v Ensor* at 502):

> … if the court had any lurking doubt that the appellant might have suffered some injustice as a result of flagrantly incompetent advocacy by his advocate, then it would quash the convictions. …

5.73 Gleeson CJ at 685 summarised the relevant principles to be followed:

1. A Court of Criminal Appeal has a power and a duty to intervene in the case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to be considered in the light of the way in which the system of criminal justice operates.
2. As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even of negligence.
3. However, there may arise cases where something occurred in the running of a trial, perhaps as the result of 'flagrant incompetence' of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention. Gleeson CJ found that the inexperience of counsel resulted in a number of mistakes which gave rise to a miscarriage of justice. He therefore upheld the appeal. The High Court has held that incompetence of counsel in a criminal case is not separate ground for an appeal. The appellant has to show that there was a miscarriage of justice because of the incompetence. It should be noted that Birks was an unusual case. The assumption in criminal cases is that defendants are bound by the decisions

> and actions of their lawyers unless it can be shown that the lawyer's conduct resulted in a miscarriage of justice.

5.74 For examples of other cases where there was obvious incompetence by counsel resulting in a miscarriage of justice, see *R v Hamilton* (1993) 68 A Crim R 298, *R v Kina* (CA(Qld), 29 November 1993, unreported), and *R v Blobel* [2000] SASC 322. In a more recent case, *TKWJ v R* (2002) 212 CLR 124, counsel refused to raise the issue of the accused's good character, nor

to seek an advanced ruling of the judge concerning the adducement of evidence of the accused's good character. The High Court found that the judge did not have the power to make such an advanced ruling. Furthermore, the court said that counsel had made a tactical decision, that such decision did not lead to an unfair trial, and thus did not produce a miscarriage of justice.

5.75 Chief Justice Gleeson, when he was on the High Court, emphasised that the *Birks* case was an unusual case, stating:

> It is the fairness of the process that is in question: not the wisdom of counsel. As a general rule counsel's decisions bind the client. If it were otherwise, the adversarial system could not function. The fairness of the process is to be judged in that light. *Nudd v R* [2006] HCA 9 at para 9.

Is this view consistent with the barristers' rules?

5.76 What if your client wanted you to vigorously cross-examine an important witness, a police detective, who testifies that your client bribed him to avoid being arrested for possession of stolen goods? Your client says that she is innocent and did not know that

the goods were stolen. In reality, the detective was bribed by X, who sold your client the goods. X is also a witness for the prosecution and has been offered immunity for his testimony. You listen to your client, but during the trial decide to be lenient with the detective because you believe it is in your client's interest. Your client is convicted and is angry with you for not following her advice. The truth is later revealed and your client, using a different counsel, wins on appeal on the grounds of miscarriage of justice. She has now complained to the disciplinary authorities.

5.77 Do you think that an accused facing severe criminal penalties should have the right to make their own choices, even if they differ from the views of a reasonable and prudent criminal defence lawyer? Should the lawyer be the mere mouthpiece of the client? What if the client insists on you arguing a particular proposition or defence that in your view has no merit?

5.78 Traditionally, the general rule is that the accused has the right to decide whether to plead guilty or not guilty. It is unclear in Australia what other rights an accused has in the conduct of their case.

5.79 With regard to criminal pleas, the Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW and Vic) state:[42]

> …
>
> 39 It is the duty of a barrister representing a person charged with a criminal offence:
>
> (a) to advise the client generally about any plea to the charge, and

(b) to make clear that the client has the responsibility for and complete freedom of choosing the pleas to be entered.

40 For the purpose of fulfilling the duty in rule 39, a barrister may, in an appropriate case, advise the client in strong terms that the client is unlikely to escape conviction and that a plea of guilty is generally regarded by the court as a mitigating factor to the extent that the client is viewed by the court as co-operating in the criminal justice process.

…

5.80 Jane Jones is a bank manager who loves nude bathing. You are her solicitor. Last month, she and a couple of her friends were arrested and charged for nude bathing on a public beach. Jane was wearing a hat at the time, and you have advised her that she may be able to win the case on a technicality — that is, that she was not completely nude. You feel that there is a 40–50 per cent chance that the magistrate will accept the argument. Jane feels that she has done nothing wrong and is not 'really guilty' of anything. She feels a sense of outrage that what she was doing in all innocence may result in a criminal conviction with a large fine. Thus, she feels strongly that she should fight the charge.

5.81 You warn Jane about the legal costs, saying that you will have to brief counsel and that the total legal costs could be about $20,000. On the other hand, you point out that if she pleads guilty, she could make a deal with the Crown Prosecutor to reduce the charge and she may be released on her own recognisance with no fine or a very small fine. She would probably be placed under a good behaviour order for two to three years, requiring her to stop nude bathing on public beaches. This result will alleviate her concerns that if she fights the case, it may affect her position at work (although such a minor conviction would not result in the loss of her job) and her image in the banking community. She

knows that, if she does not fight the charge, her days of nude bathing are over. You need to make some money, so you support Jane's view that she has done nothing wrong and that she should plead not guilty. In relation to this problem, consider the following:

- What if Jane decides to plead not guilty and loses the case? Can she argue that you interfered with her independence regarding how she was to plead?
- What if she pleads guilty after listening to all your reasons, but in 'her heart' knows she is innocent? Have you acted unethically?

5.82 In *R v Turner* [1970] 2 QB 321, Turner was convicted of theft after he had changed his plea to guilty. He argued that he was pressured by his barrister to change his plea. Lord Parker CJ held at 324–6:

> … [At the trial] the time had come when the police were going to give evidence. The appellant was represented by Mr Ronald Grey of counsel, and he very rightly was worried in the matter, because he had instructions not merely to challenge the police and suggest that they had misunderstood the appellant's answers or had failed to remember what he had said, or anything of that sort, but his direct instructions were to attack the police, accusing them of complete fabrication in conjunction with the two Browns. Naturally he was faced with this,

> that if he observed those instructions it would be almost certain that the jury would have put before them the appellant's previous convictions.
>
> Accordingly he did what it is the duty of every counsel to do, to give the best legal advice he can in the interests of the accused. Having

explained the legal position how this could amount to a theft assuming that the lien was proved, he went on to ask the appellant seriously to consider changing his plea to one of guilty. He did that quite openly in the presence of Mr Laity, the solicitor, and he went on, on more than one occasion, putting it in strong words, that on a plea of guilty it might well be a non-custodial sentence, but if he went on and these convictions came out, the appellant ran the risk of going to prison.

There were long discussions beginning at about 1.50 pm in the interview room in the courts, and they went on to something like 3.30 pm. Part of the time Miss Nelson, with whom the appellant lived, was there, and part of the time his sister, a Mrs Crowe, was there. There was also the solicitor, Mr Laity, and his clerk, Mr Blake, and of course Mr Grey of counsel. But quite clearly none of those persons, except the appellant, was there for all the time. In particular Mr Grey was not there all the time. The time came when he said that he wanted to discuss the matter with the deputy chairman [the trial judge]. He went, and when he came back he gave what the court accepts was his own personal opinion. His own personal opinion in the matter, and I take this from the evidence of Mr Laity who appeared before us, was this:

> 'There is a very real possibility that if you are convicted by the jury and an attack has been made on the police officers, with your 16 previous convictions, you may receive a sentence of imprisonment. If at this stage you plead guilty, you must take my word for it, you will receive a fine or some other sentence which will not involve imprisonment.'

Those were Mr Grey's views, and as I have said the court accepts that he was passing on his own views.

The interview continued and, throughout, the appellant adhered to his view that he was going to fight, he was not going to retract his plea of not guilty. By about 3.30 pm it was intimated to the court that it would continue to be a fight, and Mr Grey and the appellant left the

interview room to go back into court. A further interview took place, as to what happened at that there is some dispute, in the cell adjoining or below the dock. It was only for a minute or two, but at the end of that discussion the appellant said that he was going to retract his plea, and accordingly when everybody assembled in court the indictment was put to him again, he pleaded guilty, and the formal verdict of the jury was taken.

The first point taken … is that Mr Grey exercised such pressure on the appellant, undue pressure, something beyond the bounds of his duty as counsel, so as to make the appellant feel that he must retract his plea, that he had no free choice in the matter. The court would like to say that it is a very extravagant proposition, and one which would only be acceded to in a very extreme case. The court would like to say, with emphasis, that they can find no evidence here that Mr Grey exceeded his duty in the way he presented advice to the appellant. He did it in strong terms. It is perfectly right that counsel should be able to do it in strong terms, provided always that it is made clear that the ultimate choice and a free choice

is in the accused person. The one thing that is clear here from all the evidence is that at every stage of these proceedings, certainly up to the interview in the cell, it was impressed upon the appellant by Mr Grey, by Mr Laity, by Miss Nelson herself, that the choice was open to him, and in so far as it rests upon undue influence by counsel, the court is quite satisfied it wholly fails.

The matter, however, does not end there, because albeit it may be sufficient in the majority of cases if it is made clear to a prisoner that the final decision is his, however forcibly counsel may put it, the position is different if the advice is conveyed as the advice of someone who has seen the judge, and has given the impression that he is repeating the judge's views in the matter. As I have said, the court is

quite satisfied Mr Grey was giving his own views and not the judge's at all. But it had been conveyed to the appellant that Mr Grey had just returned from seeing the deputy chairman. What was said gave Mr Laity the impression that those were the judge's views, and Mr Grey very frankly said that in the circumstances the appellant might well have got the impression that they were the judge's views. Accordingly one asks: was he ever disabused of that, did anything happen to show that these were not the judge's view on the case? …

True, as I have said, he was warned that the choice was his, but once he felt that this was an intimation emanating from the judge, it is really idle in the opinion of this court to think that he really had a free choice in the matter. Accordingly, though not without some doubt, the court feels that his appeal must succeed. …

Before leaving this case, which has brought out into the open the vexed question of so-called 'plea-bargaining', the court would like to make some observation which may be of help to judges and to counsel and, indeed, solicitors. They are these:

1. Counsel must be completely free to do what is his duty, namely to give the accused the best advice he can and if need be advice in strong terms. This will often include advice that a plea of guilty, showing an element of remorse, is a mitigating factor which may well enable the court to give a lesser sentence than would otherwise be the case. Counsel of course will emphasise that the accused must not plead guilty unless he has committed the acts constituting the offence charged.
2. The accused, having considered counsel's advice, must have a complete freedom of choice whether to plead guilty or not guilty.

The court ordered a new trial.

5.83 The *Turner* case emphasises the need for complete freedom of choice in making a plea of guilty.

5.84 In *R v D'Orta-Ekenaike* [1998] 2 VR 140, the accused at all times maintained his innocence to a charge of rape. Counsel

advised him that he had no legal defence. He told him that if he pleaded guilty, he would only get either a suspended sentence or receive a custodial penalty. Under the pressure from his lawyers, he pleaded guilty at the committal hearing. Later at the trial, under advice of new counsel, he withdrew the guilty plea. The plea of guilty at the committal hearing was admitted into evidence, but on appeal he was given a new trial because of improper instructions by the trial judge. On retrial the original guilty plea was not allowed

into evidence and he was acquitted. Have the original lawyers breached their ethical duties? D'Orta-Ekenaike later sued counsel for negligence and the action became a test case on the issue of barrister immunity.

5.85 The *Turner* case has not been followed in Australia in relation to plea bargaining.[43] The United States Supreme Court in *Boykin v Alabama* 395 US 238, 89 S Ct 1709 (1969), has set aside a guilty plea made by a lawyer without the client's consent. This court has also said that an accused does not have a constitutional right to have their lawyer raise on appeal every non-frivolous issue requested by them. The majority of the Supreme Court in *Jones v Barnes* 436 US 745, 103 S Ct 3308 (1983) emphasised that professional advocates should be the ones to determine what issues should be pressed on appeal.

5.86 In *Meissner v R* (1995) 184 CLR 132; 130 ALR 547, Brennan, Toohey, and McHugh JJ said at CLR 143; ALR 553–4:

> Any conduct designed to intimidate an accused person to plead guilty is improper conduct and necessarily constitutes an attempt to pervert

the course of justice even if the intimidator believes that the accused is guilty of the offence with which he or she is charged. A plea made as the result of intimidation has not been made freely and voluntarily, and the court that acts on the plea has been misled and its proceedings have been rendered abortive, whether or not it ever becomes aware of the impropriety. …

It will often be difficult to determine whether conduct that falls short of intimidation but which has the tendency to induce an accused to plead guilty is improper conduct that interferes with the accused's free choice to plead guilty or not guilty. Argument or advice that merely seeks to persuade the accused to plead guilty is not improper conduct for this purpose, no matter how strongly the argument or advice is put. Reasoned argument or advice does not involve the use of improper means and does not have the tendency to prevent the accused from making a free and voluntary choice concerning his or her plea to the charge. As long as the argument or advice does not constitute harassment or other improper pressure and leaves the accused free to make the choice, no interference with the administration of justice occurs.

5.87 Rule 41 of the Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW and Vic) states:[44]

> **41** Where a barrister is informed that the client denies committing the offence charged but insists on pleading guilty to the charge, the barrister:
>
> (a) must advise the client to the effect that by pleading guilty, the client will be admitting guilt to all the world in respect of all the elements of the charge,

> (b) must advise the client that matters submitted in mitigation after a plea of guilty must be consistent with admitting guilt

in respect of all of the elements of the offence,

(c) must be satisfied that after receiving proper advice the client is making a free and informed choice to plead guilty, and

(d) may otherwise continue to represent the client.

5.88 What if you are a legal aid lawyer working with limited funds, and you feel almost certain that your client is guilty? Should you convince them to plead guilty? Would it make a difference if they confess their guilt and tell you: 'I want a jury trial. If I have to go to gaol, I want it to cost them'?

PARTICULAR ASPECTS — CHILDREN AND CLIENTS WITH DISABILITIES

5.89 There are unique problems for lawyers concerning the duty to obey when they have to take instructions from children in family law matters, and from clients with disabilities. The former arises, for example, under s 68LA of the Family Law Act 1975 (Cth), where the court can order separate representation by an independent children's lawyer to protect the welfare of the children. However, the Act under s 68L originally did not give any guidance to lawyers as to how to conduct this representation. This was remedied by case law and also by amendments to the Act in 2006 by the adoption of the new s 68LA.[45]

5.90 According to the report of the Australian Law Reform Commission (ALRC) titled *Seen and Heard: Priority for Children in the Legal Process*,[46] the standards should require:

> In all cases where representation is appointed and the child is able and willing to express views or provide instructions, the representative should allow the child to direct the litigation as an adult client would. In determining the basis of representation, the child's willingness to participate and ability to communicate should guide the

representative rather than any assessment of the 'good judgment' or level of maturity of the child.

The approach by the ALRC is a shift from seeking the 'best interests' of the child, to encouraging the 'expressed interests'.

5.91 We now look at the issue of clients with disabilities, and the role of the separate representative for clients with disabilities and also for children.

5.92 In the situation where lawyers are acting for clients with disabilities, the lawyer must decide whether the clients have capacity to enter into certain agreements. In relation to children, they have to determine the 'best interests' of the child. As for clients with disabilities, they also have to decide whether to follow the views of the clients' guardians. Finally, in certain situations, such as the sterilisation cases, the separate representative for the young girl must not follow the instructions of the guardian or parents, nor can they receive proper instructions from the client.

5.93 The case of *Cockburn v GIO Finance Ltd* (CA(NSW), Priestley JA, No 40580/94, 2 February 1996, unreported) shows that lack of capacity can also include undue influence having been placed on a client because of their disability.

Priestley JA

In 1993 Michael McNally (the plaintiff) brought proceedings against three defendants in the Equity Division of the Supreme Court.

The first defendant was GIO Finance Ltd (GIO). The second defendants were the members of a firm of solicitors trading as

Coleman and Greig (Colemans). The third defendants were the members of a firm of solicitors trading as Verekers (Verekers). [This firm was held not to be involved in the appeal.]

The plaintiff had in 1991 signed a Mortgage and a Deed of Guarantee and Indemnity in favour of GIO. The mortgage was of two properties — one the plaintiff 's residence at 57 Brucedale Drive, Baulkham Hills — the other an investment property in Windsor Road, Baulkham Hills. The plaintiff 's claim against GIO was for orders that the Mortgage and Deed of Guarantee and Indemnity be set aside, and for consequential relief.

Against Colemans, who had advised the plaintiff concerning the transactions implemented by the documents, he claimed damages, interest and consequential relief. …

The transactions in respect of which the plaintiff sought relief in the proceedings heard by Cohen J [lower court] were some only of a number of transactions carried out by the plaintiff 's father, Mr Robert McNally.

The father was in effect managing the plaintiff 's affairs because in 1987 when the plaintiff was fifteen he was made a quadriplegic as a result of being knocked down by a car. He has since been confined to a wheelchair. In December 1988 proceedings for damages in respect of the accident were settled for $1.49 million. These moneys were held in trust until he was eighteen. When he himself became directly entitled to the moneys, he accepted his father as his sole adviser and manager of his affairs.

…

The plaintiff was to a large extent physically dependent on his father.

His parents had separated, apparently not long after his accident. He trusted and relied upon his father.

Most unfortunately for all concerned, the result of the father's handling of the plaintiff 's moneys was that, subject only to the outcome of the proceedings now under appeal, the whole amount was

lost. …

Cohen J found Mr Cockburn [from Colemans] made three visits in relation to the transaction with GIO. … Mr Cockburn gave more detailed evidence about what was said at the 4 July meeting than the plaintiff, whose evidence was rather vague. Mr Cockburn said he had described the loan facility to the plaintiff. He went through the letter of offer and explained the contents. He said he told the plaintiff that the properties which would be the security

for the loan were his properties and were at risk if anything went wrong in which case the plaintiff would have to rely upon his father. He said the plaintiff had said he understood that. He explained further what was involved in the giving of the mortgage and obtained the plaintiff 's signature on each page of a copy of the letter of offer and other documents which GIO wanted signed. He then asked the plaintiff if he was still sure he wanted to go ahead and the plaintiff said he did. …

Liability of solicitors

… [Cohen J] said there was nothing to suggest Mr Cockburn was not a careful solicitor in his general activities, but he thought that in the present case he failed to draw the plaintiff 's attention to matters having a vital effect on whether or not he would execute ie [sic] mortgage. Cohen J was of the opinion that a solicitor in the circumstances of this case would be deficient if he did not ensure that undue influence which he was aware was a significant factor was adequately guarded against in the decision of the client to execute security documents.

Mr Cockburn had agreed in evidence that he thought in July 1991 that the plaintiff was under the influence of his father, not free of his father's control, and under a disability or disadvantage. Mr Cockburn

also acknowledged that he had been placed in a situation of conflict of interest. Colemans were advising the father in regard to the management of ie [sic] video rental business and as well were the solicitors for the plaintiff. …

[Cohen J said:]

Despite his knowledge of these matters, Mr Cockburn made no mention of the large amount being claimed against the plaintiff … he asked no questions as to the plaintiff 's general financial position and he made no enquiries as to the circumstances of the money being due to the State Bank. Indeed, his main questions to the plaintiff were, after explaining various documents, whether the plaintiff understood to which he received affirmative answers. There can be no criticism of a solicitor for going through a document such as a mortgage and explaining its terms. Whether it is sufficient at the end of that explanation to ask whether the document or the explanation were understood will depend very much on the circumstances of the particular client. …

In this case I consider that Mr Cockburn's duty went beyond what his evidence shows that he did. He should have made enquiries which would have satisfied himself as to the plaintiff 's independence from his father or as the authorities put it that the plaintiff was emancipated from his father's influence. As in fact he was of the view that the plaintiff was under that influence he had a duty to require some investigation of matters such as the reason for the loan, how the money would be used and how repayments would be made so as to ensure that his client, the plaintiff, was entering into an appropriate transaction with adequate protection and was not merely doing something which was for his father's benefit. If adequate enquiries had been made Mr Cockburn would have been able to draw to the plaintiff 's attention the obviously deteriorating financial position of the business which Robert McNally conducted and the inherent unsoundness of executing a mortgage. The advice that he should not sign if he did not want to go ahead, given to a young man of the plaintiff 's background might in the circumstances have little

significance. Advice was really required that the financial situation

should be investigated because a mortgage of his home could prove disastrous if the loan was merely going to prop up an ailing business bearing in mind that all that the plaintiff would be likely to have for the whole of his life was whatever was left of the amount of his damages. If the plaintiff had been asked what the loan was for and why moneys were needed in the business he could not have answered, but that question was never put nor was that matter investigated. …

On this basis Cohen J was of opinion that Colemans had failed to exercise necessary skill and care in advising the plaintiff and in allowing the documents to be executed. …

Were Colemans in negligent breach of their retainer?

… For Colemans it was submitted in this court that Mr Cockburn had done everything that could reasonably be expected of him in discharge of the duties of his retainer; to go as far as Cohen J had gone was to impose an unrealistically high standard on the solicitor in the light of what his retainer required him to do. …

The carrying out of the solicitor's retainer meant getting all documentation ready for settlement which involved preparation and completion of documents and getting instructions about them from the client and others and advising the client about their completion and effect.

… It seems to me that the solicitor's retainer required him to take reasonable care. … [H]ad the father been reasonably pressed for detail, facts may well have begun to emerge which would have caused the solicitor to realise that the transaction was unwise in the general sense of which he told the plaintiff, but extremely unwise in the particular circumstances of his own case, and advised him

> accordingly; still more would this have been likely if he had taken the question up with the plaintiff. … [T]his meant that the solicitor himself had to understand the current financial position of the plaintiff. This the solicitor plainly did not. Had he done so he would have been bound to advise the plaintiff in much stronger terms than he did that it would be the height of folly to mortgage his home. Had the plaintiff 's actual financial position been ascertained by the solicitor, and independently brought home to the plaintiff, it is hard to imagine that he would have gone on with the transaction. …
>
> Here I need say no more than that I agree with what Cohen J … concluding the solicitor was negligent in carrying out the contractual retainer. … [The plaintiff] … is entitled to a common law judgment against Colemans for the damages recoverable by reason of Colemans' breach of contractual retainer.

The GIO was also held liable.

5.94 What do you think Cockburn would have had to do in order to have provided the plaintiff with the means to give him independent instructions?

5.95 In family situations where there is a disabled person, is it ever possible for a lawyer to act for other members of this family and also for the disabled person? The case of *P and P and Legal Aid Commission of New South Wales; Human Rights and Equal Opportunity Commission (Intervener)* (1995) 19 Fam LR 1 (Full Family Court) concerns who has the right to speak for

a disabled client where that client has little or no capacity to give instructions. In this case, the court issued guidelines and describes the role of the separate representative.

Nicholson CJ, Fogarty and Finn JJ

This is an appeal against a decision of Moore J on 23 September 1994 in which she dismissed an application for medical treatment in relation to a child referred to as Lessli (not her real name) by her Honour and in the course of these reasons for judgment. …

Lessli is the youngest of 3 children of the marriage between Mr and Mrs P having been born on 27 July 1977. On 25 June 1993, Mrs P filed an application seeking, inter alia —

… That the Applicant Wife and Respondent Husband be directed to do all such acts and things and sign all and any documents/authorisations/consents necessary to cause the child (Lessli) [not her real name] … to obtain medical treatment such that:

(i) she thereafter ceases to menstruate; and
(ii) she is permanently prevented from becoming pregnant.

… It was common ground that Lessli has an intellectual disability of such a magnitude that she would be unable to give informed consent to the procedure, either now, or in the foreseeable future. …

Lessli was separately represented in the proceedings before Moore J and before this Court. Both at trial and on the appeal the separate representative supported the mother's application. …

The Family Court's jurisdiction to make an order of the type sought was confirmed by the decision of the majority of the High Court [Mason CJ, Dawson, Toohey and Gaudron JJ] in *Secretary Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, (1992) FLC 92-293 ('*Marion's* case'); see the discussion in *Re Marion (No 2)* (1994) FLC 92-448 at 80,661-3. Their Honours noted the capacity for potential inconsistency with other State legislation but found it unnecessary to resolve the question in that case.

That issue arose squarely in this case and this was the subject of a case stated to the High Court wherein the majority [Mason CJ, Deane, Toohey, Gaudron and McHugh JJ] confirmed that the Family Court's

jurisdiction to grant or withhold authorisation prevailed over the provisions of the New South Wales Guardianship Act 1987; see *P v P* (1994) 120 ALR 545.

Marion's case decided that parents do not have the right to consent to a sterilisation procedure upon a child who cannot give consent for her or himself. The Court's authorisation is required for such a procedure to be carried out if the child is found as a question of fact to be presently incapable and likely to remain incapable of giving informed consent to the proposed procedure. The jurisdiction is not one of enlarging the capacity of parents to consent, but is an independent jurisdiction of the Court.

In *Marion's* case, the majority judgment of their Honours emphasised that a Court must be satisfied that the child cannot give consent; see CLR at 249.

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Lessli's incapacity to consent was not in issue. …

In March 1991, the school Lessli attends recorded in a letter to Mrs P's solicitors that she was at that time on a very structured program involving a maximum of one to one interaction with a staff member because of the following:

- severe short term memory problems;
- obsessive behaviours, eg collecting items such as money, insects, texts etc;
- wandering away unless constantly observed;
- poor eating habits;
- underdeveloped basic living skills;
- inappropriate behaviours in public, eg on the bus, in shops;
- poor concept of time;
- effects of large doses of medication to control epilepsy;
- lack of social skills and relationship-forming skills;

- poor road safety skills. …

[Her Honour in the lower court rejected the application on the basis that:]

(a) She was not satisfied that Lessli's present or foreseeable circumstances are or will be such as to expose her to a level of risk of sexual attention that would warrant the interference proposed;
(b) Even if there was a real risk of sexual assault and subsequent pregnancy, her continued fertility would play a part in the detection and possible prevention of a future sexual assault;
(c) Sterilisation is the step of last resort and she could not be satisfied that this was appropriate in Lessli's case because of medical evidence that no such procedure would be contemplated for a young woman with epilepsy similar to Lessli, who was not intellectually disabled but who required contraception;
(d) She did not regard Lessli's difficulties with menstruation as justifying the performance of the procedure. …

Her Honour also found that on the completion of her schooling in about 12 months time, Lessli was likely to be in the full time care of her mother where she would be well supervised and also relied upon the fact that her epilepsy required constant supervision, although she contemplated the possibility that Lessli might attend some group activity centre. …

[The Full Court of the Family Court rejected her Honour's conclusions.]

… The evidence before her Honour was to the effect, not only that Lessli might well enjoy sexual intercourse, but that it was highly likely to take place. We think it apparent from this passage that her Honour misunderstood the issue before her. The reality was that her Honour was being asked to sanction a sterilisation that would enable Lessli to engage in sexual activity free of the consequence of pregnancy that might otherwise ensue. We regard the question of whether any sexual activity in which she engages will amount to a sexual assault by the

other party who may be involved in such sexual activity according to the criminal law — as irrelevant for this purpose. …

The present case carries with it the additional complication of Lessli's epilepsy and the problems associated with contraception resulting from it. The other feature is that it is

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difficult to always speak of pregnancy in the context of sexual assault for the reasons already given. There is the further factor of menstrual management, which, taken on its own, may not be sufficient to justify the procedure, but which cannot be ignored in the overall picture. …

In relation to the allegedly protective effect of Lessli retaining her fertility we would add the following considerations:

(a) The fact of her potential fertility did not operate to protect her from assault in the past;
(b) Any deterrent effect would be dependent upon the perpetrator knowing that she was fertile;
(c) In the presence of such knowledge on the part of a perpetrator, she would remain vulnerable to other types of sexual assault such as anal or digital penetration or fellatio etc;
(d) Ordinary sexual intercourse would remain available to a perpetrator using a condom;
(e) There would be no deterrent effect upon another person suffering from a similar disability.

Accordingly, we find that her Honour's discretion miscarried in taking the matter of the risk of pregnancy and sexual abuse into account as a relevant factor against the desirability of performing a hysterectomy. …

[The court considered the problem of having guidelines.]

While we are in broad agreement with the need for guidelines, we

think that care must be taken not to set out too detailed a code and we also think that there are dangers in compartmentalisation as occurred in this case.

We also think that great care must be taken before setting out proscriptive guidelines as was urged upon us by the Commission in this case. Cases of this nature vary widely in their facts and, for example, while in most cases sterilisation would not be authorised purely for the purposes of contraception, there are some cases, and this is one of them, where it looms much more largely than would normally be the situation.

There are some obvious examples of appropriate proscriptive criteria of course, but these are probably best characterised as proscriptive because they are irrelevant or discredited.

As we have pointed out, such a procedure cannot prevent sexual abuse and thus this becomes an irrelevant consideration. Similarly, eugenic considerations are intrinsically offensive and discredited scientifically and are thus also irrelevant. …

Guidelines

… A useful starting point is the broad set of guidelines propounded by Pashman J in *Re Grady* NJ 426A 2(d) 467, adopted by Nicholson CJ in *Re Jane* (1989) FLC 92-007 at 77,252-3:

> ‘1. That it was ultimately the duty of the Court rather than the parents to determine the need for sterilisation. (I shall return to this aspect subsequently.)
> 2. That in every case where application is made for authorisation to sterilise an allegedly incompetent person, the Court should appoint an independent guardian *ad litem* as soon as possible to represent the ward and should receive independent medical and psychological evaluations by qualified professionals.

3. The trial judge must find that the individual lacks capacity to make a decision about sterilisation and that the incapacity is not likely to change in the foreseeable future.
4. The trial court must be persuaded by clear and convincing proof that sterilisation is in the incompetent person's best interests. To determine those interests, the Court should consider at least the following factors:
   (a) the possibility that the incompetent person can in fact become pregnant;
   (b) the possibility that the incompetent person will experience psychological damage if she becomes pregnant or gives birth and conversely the possibility of trauma or psychological damage from the sterilisation operation;
   (c) the likelihood that the individual will voluntarily engage in sexual activity or be exposed to situations where sexual intercourse is imposed upon her;
   (d) the inability of the incompetent person to understand reproduction or contraception and the likely permanence of that inability;
   (e) the feasibility and medical advisability of less drastic means of contraception, both at the present time and under foreseeable future circumstances;
   (f) the advisability of sterilisation at the time of the application rather than in the future;
   (g) the ability of the incompetent person to care for a child or the possibility that the incompetent may at some future date be able to marry and with a spouse care for a child;
   (h) evidence that scientific or medical advances may occur within the foreseeable future which will make possible either improvement of the individual's condition or alternative and less drastic sterilisation procedures;
   (i) a demonstration that the proponents of sterilisation are seeking it in good faith and that their primary concern is for the best interests of the incompetent person rather than their own or the public's convenience.'

…

A useful practical application of those principles was set out by Nicholson CJ in *Re Marion (No 2)* (supra) as follows —

(i) the particular condition of the child which requires the procedure or treatment;
(ii) the nature of the procedure or treatment proposed;
(iii) the reasons for which it is proposed that the procedure or treatment be carried out;
(iv) the alternative courses of treatment that are available in relation to that condition;
(v) the desirability of and effect of authorising the procedure for treatment proposed rather than available alternatives;
(vi) the physical effects on the child and the psychological and social implications for the child of:
    (a) authorising the proposed procedure or treatment
    (b) not authorising the proposed procedure or treatment

(vii) the nature and degree of any risk to the child of:
    (a) authorising the proposed procedure or treatment
    (b) not authorising the proposed procedure or treatment
(viii) the views (if any) expressed by:
    (a) the Guardians of the child;
    (b) a person who is entitled to the custody of the child;
    (c) person who is responsible for the daily care and control of the child;
    (d) the child …

Application of guidelines

Our reasons are apparent from the discussion that has already taken place, but we summarise them as follows:

(a) She was clearly unable to give informed or any consent to such a procedure and there was no reasonable likelihood of her ever being able to do so.
(b) Her present degree of intellectual disability is likely to continue for the rest of her life.
(c) Her epilepsy makes the provision of normal forms of contraception extremely difficult and it is not in her best interests to be subjected to long term contraception.
(d) She has no understanding and never will have any understanding of procreation or parenting and will never have the capacity to care for a child.
(e) She would have great difficulty in coping with a pregnancy that went to full term and her health would be likely to be detrimentally affected by pregnancy or by a termination of it.
(f) She is highly likely to engage in sexual intercourse with the consequent risk of pregnancy during her child bearing years, whether as the result of a sexual assault or otherwise.
(g) She has difficulty coping with menstruation and is distressed by it and it presents significant difficulties for her carers and particularly her mother.

On the evidence, it is apparent that the effects upon the child of authorising the treatment will be transitory so far as the physical effects of the treatment are concerned and the termination of menstruation will be of benefit to both her and her caregivers. One of the principal benefits to her, apart from the obvious removal of an experience which to her is unpleasant, will be its assistance in controlling her fitting. Another obvious physical benefit will be the removal of the possibility of pregnancy.

We think that there will be no negative psychological implications and the social implications for Lessli's quality of life will be beneficial.

On the other hand the physical and social implications of not authorising the proposed treatment will not be beneficial to her for the reasons discussed.

We consider that the nature and degree of risk to the child in

authorising the proposed treatment will be negligible and the risk of not doing so far outweighs any risk involved.

Finally, there is no doubt that the performance of the procedure is strongly supported by both of her guardians, namely her parents and her mother as principal caregiver also

supports it. While not decisive, their views are entitled to weight and, when coupled with the other factors to which we have referred, make approval inevitable. Although the High Court in *Marion's* case, held that parental consent was insufficient to authorise the procedure, the Court clearly regarded the views of the parents as very significant. In this regard we refer to the remarks of the majority at CLR 260, where they said:

> 'In the circumstances with which we are concerned, the best interests of the child will ordinarily coincide with the wishes of the parents. In cases of that kind, all that will be necessary is for the court to declare that the procedure in question is or is not in his or her best interests.'

Procedural safeguards

We now turn to the [Human Rights] Commission's submissions as to procedural safeguards. It submitted that special attention should be given to the following two procedural safeguards in all applications to the Court for the authorisation of a sterilisation procedure: 1. Effective legal representation; and 2. The child's right to be heard. …

We think that it is important to balance the very real and obvious need to protect the child's interests with the need to preserve some sense of proportion about the nature of the proceedings that ensue. In this regard we are mindful of the remarks of the majority in *Marion's* case when they said:

> 'In saying this we acknowledge that it is too costly for most parents to fund court proceedings, that delay is likely to cause painful inconvenience and that the strictly adversarial process of the court is very often unsuitable for arriving at this kind of decision. There are clear indications of the need for legislative reform, since a more appropriate process for decision making can only be introduced in this way (at CLR 253).'

Since that decision, this Court has moved to simplify and streamline its procedures in dealing with these cases (see Order 23B of the Family Law Rules). If the Commission's submissions were to be accepted, each of these cases would turn into a major forensic contest, whatever the justification for the procedure and no matter how strong the case in favour of it was. We do not believe that this represents either what the law requires or what it should require and we do not accept that any of the relevant Conventions require it either.

The Commission's principal submission in this regard was that the best way for the child to have effective robust legal representation is for a next friend to be appointed pursuant to Order 23 rr 3, 13 and 23 of the Family Law Rules. The Commission even went so far as to say that the appointment of a next friend should have been required in *Sarah's* case (supra) apparently because in point of form, the child had been made a party.

In fact, the decision as to whether or not to appoint a next friend is a discretionary one and in the circumstances disclosed by that case, the child's interest were more than adequately guarded by the separate representative.

The Commission's submission is predicated upon the basis that it says that the next friend would be more likely to take on the role of contradictor than would a separate representative.

> We are not satisfied that this is the case and we can see no distinction between the situation of a separate representative and a next friend in this regard. If a next friend was of the view that a procedure was in the best interests of a child then we can see no more reason why he or she would not adopt this approach than would a separate representative.
>
> However, as was pointed out in the submissions on behalf of the separate representative, a next friend, unlike the separate representative, has no obligation to present evidence of the child's wishes, or capacity to consent, or to put before the Court all available evidence, or to cross examine witnesses. The separate representative also argued that the next friend could usurp the role of the Court by consenting to the proposed procedure. However, we doubt that such a consent would be any more effective than that of the parents.
>
> We think that the role of a next friend in the parens patriae should usually be confined to those cases where it is asserted that a child is *Gillick* competent, because in such a case the child should clearly be given an opportunity to present his or her own case to the Court, although we also think that a separate representative should be appointed in such cases, given the limitation on the duties of the next friend that we have discussed.
>
> In cases such as this one, however, we see the appointment of a next friend as doing nothing more than increasing the cost and complexity of this type of case, without advancing the child's interests in any way.
> …

5.96 Do you believe that lawyers are qualified to deal with the problems of understanding the wishes of disabled people and/or children? Can you think of any other occupation, or persons, who could perform this task?

5.97 In 2016, the Law Society of New South Wales issued a publication titled *When a Client's Capacity is in Doubt: A Practical Guide for Solicitors*,[47] which provides practical steps to be taken by solicitors in determining their client's capacity, and states, inter

alia:

> While there is a basic common law presumption that every adult person has mental capacity to make their own decisions, in some cases solicitors may find they have doubts about whether their client does have the required legal level of mental capacity.
>
> This may be for a range of reasons — the client may have an intellectual disability, an acquired brain injury or a mental illness. As the proportion of older people in the community increases,

> so does the likelihood that an older client may have an age related cognitive disability, such as Alzheimer's disease, which impairs their mental capacity to make decisions.
>
> … [A] solicitor can be involved in carrying out a 'legal' assessment of their client's mental capacity which involves:
>
> - Making an preliminary assessment of mental capacity — looking for warning signs or 'red flags' using basic questioning and observation of the client.
> - If doubts arise, seeking a clinical consultation or formal evaluation of the client's mental capacity by a clinician with expertise in cognitive capacity assessment.
> - Making a final legal judgment about mental capacity for the particular decision or transaction.

5.98 The next question posed is whether the solicitor can act without full formal instructions when a relative or friend can assist in clarifying the instructions in the client's best interest. If the capacity of the client is in doubt, it is also important to get the client's consent to have a formal assessment by the relevant qualified professionals. If the client refuses such an assessment,

there are a number of legal options to compel the client to submit to an assessment. Finally, the solicitor may have to consider whether to terminate the retainer and refer the client to other agencies for help.

5.99 In relation to the representation of children, including a child's interests in family law matters, the Law Society of New South Wales has also issued a publication titled *Representation Principles for Children's Lawyers*.[48]

5.100 What special training do you believe lawyers need to have in order to represent their clients properly in this area? In 2013, the Family Court adopted an updated set of *Guidelines for the Independent Children's Lawyer*. The objective still was to achieve the 'best interests' of the child. Under these guidelines, the lawyer normally needed to achieve this aim by enabling the child to become involved in the decision-making process. This approach was changed under the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).[49] There has been some criticism about the role of the legal representative of the child, with Young, Sifris, Carroll, and Monahan[50] stating:

> Early case law reflected controversy as to the role of the [Independent Children's Lawyer] because the requirements of such a legal representative are unconventional from an orthodox legal point of view, in that they do not have a client, as such, from whom they can obtain instructions. While this may present some practical difficulty for lawyers filling this role, the concept of a separate legal representative for children in contested child matters is nevertheless clearly a valuable one, ensuring that in appropriate cases the child's interests are represented independently from the parents. There is also an argument in support of such a

provision based on the requirements of the United Nations Convention on the Rights of the Child 1989. … [footnotes omitted]

5.101 The Family Law Act 1975 (Cth) was amended by the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth). Section 4(1) of the Family Law Act 1975 (Cth) now includes in its definitions the 'independent children's lawyer'. It is defined as 'a lawyer who represents the child's interests in proceedings under an appointment made under a court order'. Thus, the role of the lawyer is not to represent the child, but to represent the 'child's interests'.

5.102 The most important change in 2006 was the addition of a new s 68LA to the Family Law Act 1975 (Cth), entitled 'Role of independent children's lawyer', which provides, inter alia:

…

General nature of role of independent children's lawyer

(2) The independent children's lawyer must:
   (a) form an independent view, based on the evidence available … of what is in the best interests of the child; and
   (b) act in relation to the proceedings in what the independent children's lawyer believes to be the best interests of the child.

(3) The … lawyer must, if satisfied that the adoption of a particular course of action is in the best interests of the child, make a submission to the court suggesting the adoption of that course of action.

(4) The independent children's lawyer:
   (a) is not the child's legal representative; and
   (b) is not obliged to act on the child's instructions in relation to the proceedings.

Specific duties of independent children's lawyer

(5) The independent children's lawyer must:

(a) act impartially in dealings with the parties to the proceedings; and

(b) ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court; and

(c) if a report or other document that relates to the child is to be used in the proceedings:

(i) analyse the report or other document to identify those matters in the report or other document that the independent children's lawyer considers to be the most significant ones for determining what is in the best interests of the child; and

(ii) ensure that those matters are properly drawn to the court's attention; and

(d) endeavour to minimise the trauma to the child associated with the proceedings; and

(e) facilitate an agreed resolution of matters at issue in the proceedings to the extent to which doing so is in the best interests of the child.

…

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5.103 Under subs (5) there are specific duties that the independent children's lawyer must perform. Under subs (6) the lawyer is not under any obligation and cannot be required to disclose to the court 'any information that the child communicates to the independent children's lawyer'. But under subs (7) the lawyer can disclose any communication if they 'consider the disclosure to

be in the best interests of the child'.

5.104 Do these amendments to the Act overcome the criticism of the role of the separate representative?

5.105 What if the independent children's lawyer makes submissions that are adopted by the court in favour of the father, when the mother is not legally represented? Is this a fair situation for the mother?[51]

5.106 The following extract is from the guidelines for family law lawyers prepared by the Family Law Council and Family Law Section of the Law Council of Australia, titled *Best Practice Guidelines for Lawyers Doing Family Law Work*:[52]

> **12 Independent Children's Lawyers**
>
> 12.1 Lawyers should become familiar with the role of the Independent Children's Lawyer and remember to serve court documents on the Independent Children's Lawyer (see guidelines on the National Legal Aid website www.nla.aust.net.au).
>
> 12.2 Lawyers should be aware of and, where appropriate, advise clients of the possibility of applying to have an Independent Children's Lawyer appointed by the court to represent the child or children separately in the proceedings. Lawyers should be familiar with and consider the criteria applied by the court (see *Re K* (1994) FLC 92-461; 17 Fam LR 537) and by the relevant legal aid body in considering such an appointment. In the event that legal aid funding is not granted, the client may have the option of funding their own Independent Children's Lawyer.
>
> 12.3 Where an Independent Children's Lawyer is appointed (either as a result of the client's application or otherwise), the lawyer should explain to clients the role of the Independent Children's Lawyer and the relationship that they can be expected to have with the child. Clients should be informed that any communication between the Independent Children's Lawyer and the client should be undertaken

through the client's lawyer. Clients should also be informed that direct communications with the Independent Children's Lawyer are not privileged. Lawyers should explain to their clients that the Independent Children's Lawyer will need to communicate directly with an unrepresented party, and that the represented party should not feel disadvantaged by the fact that this occurs.

12.4 When an Independent Children's Lawyer is appointed, the lawyer should contact them to provide a summary of the issues and confirm the next court date.

12.5 Lawyers should be aware of the possibility that the relevant legal aid body responsible for funding the Independent Children's Lawyer may request that a party contribute towards their costs, and that the court has the power to order that the parties to the proceedings pay part or all of the Independent Children's Lawyer's costs.

12.6 Parents should be told that they have the right to oppose the appointment of an Independent Children's Lawyer.

13 Children's Views

13.1 Clients should be advised that the court will have regard to the ascertainable views of the child concerned, and consider them in light of that child's age and maturity. The child's views are normally made known to the court through a family report or evidence presented by the Independent Children's Lawyer. Clients should understand the role of the Independent Children's Lawyer.

13.2 When acting for one of the separating couple, lawyers should not interview children unless they have obtained leave of the court to interview a child for the purpose of preparing an affidavit. Lawyers should be aware that such leave is rarely granted and that making an application for leave may have adverse consequences for the client.

13.3 Lawyers should avoid conducting interviews in the presence of their client's children.

14 After the Conclusion of Proceedings

14.1 Lawyers should consider with their clients and with the Independent Children's Lawyer (if there is one) how the child is to be told the outcome of proceedings, particularly when the court has made orders which are inconsistent with views expressed by the child.

14.2 Lawyers should advise the client of options, including the use of alternative dispute resolution techniques, that are available to the client where the other parent fails to comply with an agreement or court orders regarding parenting. Lawyers should explain to their clients the consequences of non-compliance with parenting orders made by the court.

5.107 For an analysis of the role of the independent children's lawyer, see N Ross's inquiry.[53]

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1. Refer to the Rules extracted at **5.6**.
2. Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) rr 17–22, 101–112.
3. Legal Profession Uniform Conduct (Barristers) Rules 2015 (Vic) rr 17–22, 101–112.
4. South Australian Bar Association Inc, Barristers' Conduct Rules 2013 rr 23–24 (the cab-rank principle), rr 95–98 (briefs which must be refused or must be returned), rr 99–106 (briefs which may be refused or returned). The South Australian Barristers' Rules further include an addition to r 96 (which is r 102 under the Uniform Rules), namely, the addition of the words: 'or in such other circumstances as may be permitted by the President or a delegate of the President who is a Senior Counsel'.
5. Bar Association of Queensland, Barristers' Conduct Rules 2011 rr 21–24 (the cab-rank principle), rr 95–98 (briefs which must be refused or must be returned), rr 99–106 (briefs which may be refused or returned).

6. Western Australian Barristers' Rules 2012 rr 21–24 (the cab rank principle), rr 95–98 (briefs which must be refused or must be returned), rr 99–106 (briefs which may be refused or returned). In relation to r 99 (equivalent to rule 102 of the Uniform Rules), Western Australia has an additional clause which allows a brief to be refused or returned: r 99(n) 'In such other circumstances as may be permitted by the President or a delegate of the President who is a Senior Counsel'.

7. Law Society of Tasmania Rules of Practice 1994 Pt 8 (barristers). The Tasmanian Bar proposes to introduce legal profession rules (Legal Profession (Barristers) Rules 2016) under Div 2 of Pt 3.1 of the Legal Profession Act 2007 (Tas), regarding legal practice in Tasmania engaged in by Australian legal practitioners who practise solely as barristers. The object of the proposed rules is to prescribe a range of legal practice matters for Tasmanian barristers, including pupillage requirements, and also to adopt the Australian Bar Association model rules in modified form, and to rescind some redundant rules of practice relating to barristers.

8. Northern Territory Bar Association Inc, Barristers' Conduct Rules 2002 rr 85 and 86 (the cab-rank principle), rr 87–90 (briefs which must be refused), rr 91 and 92 (briefs which may be refused), rr 93–102 (in relation to briefs generally, including the circumstances where a brief to defend a charge of a serious criminal offence can be returned and other general rules relating to the return of briefs).

9. Australian Capital Territory Legal Profession (Barristers) Rules rr 85 and 86 (the cab-rank principle), rr 87–91 (briefs that must be refused), rr 91–92 (briefs which may be refused), r 93 (the return of briefs generally, including the circumstances where a brief to defend a charge of a serious criminal offence can be returned and other general rules relating to the return of briefs).

10. S Linowitz & M Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century*, C Scribner's & Sons, New York, 1994, p 25.

11. M Bagaric & P Dimopoulos, 'Legal Ethics is (Just) Normal Ethics: Towards a Coherent System of Legal Ethics' (2003) 3 *QUTLJ* 21.

12. Rule 42.1.1.

13. Rule 42.1.2.

14. Rule 42.1.2.
15. M Bagaric & P Dimopoulos, 'Legal Ethics is (Just) Normal Ethics: Towards a Coherent System of Legal Ethics' (2003) 3 *QUTLJ* 21.
16. The Legal Profession Uniform Conduct (Barristers) Rules 2015 rr 4 and 35 apply in New South Wales and Victoria. In relation to the equivalent Rules that apply in other jurisdictions, see Northern Territory Bar Association Inc, Barristers' Conduct Rules 2002 rr 6 and 16; the Australian Capital Territory Legal Profession (Barristers) Rules 2015 rr 6 and 16; Bar Association of Queensland, Barristers' Conduct Rules 2011 rr 5(f) and 37; Tasmanian Legal Profession (Barristers' Rules) 2016; South Australian Bar Association Inc, Barristers' Conduct Rules 2013 rr 5(f) and 37; Western Australian Barristers' Rules 2012 rr 5(f) and 37.
17. See J Macken, 'Dealing with the Unknown Client', *Australian Financial Review*, 14 November 2003, p 59.
18. See P Hurtado, 'Lawyer Lynne Stewart Sentenced to 10 Years for Aiding Imprisoned Terrorist', 16 July 2010, <www.bloomberg.com/news/2010-07-15/lawyer-lynne-stewart-sentenced>.
19. See *T and S* [2001] FamCA 1147, per Nicholson CJ.
20. See Legal Aid Western Australia, *Manual of Legal Aid — Chapter 6A: Priority Matter Guidelines for Legal Assistance*, 1 July 2006.
21. A McKenzie friend is a person who attends court to assist a party to proceedings. The trial judge has complete discretion to refuse an accused's request for the assistance of a McKenzie friend: P E Nygh & P Butt (eds), *Butterworths Australian Legal Dictionary*, Butterworths, 1997.
22. International Convention on Civil and Political Rights.
23. D McBarnet, *Conviction*, Macmillan, London, 1981, pp 154–68.
24. For an interesting discussion of *Dietrich*, see G Zdenkowski, 'Defending the Indigent Accused in Serious Cases: A Legal Right to Counsel' (1994) 18 *Crim Law Journal* 135. See also *R v Frawley* (1993) 69 A Crim R 208 (New South Wales Court of Criminal Appeal), where the court noted: 'The fact that the appellant was unrepresented, resulting, as it did, substantially from his own rejection of the legal advice and representation that was provided to him at public expense, does not of itself amount to unfairness.'

25. For a discussion of the cases, see F Gibson, 'Legal Aid: A decade after *Dietrich*' (2003) 41(4) *Law Soc J (NSW)* 52.
26. See *Andrews v Victoria Legal Aid* [1999] VSC 281 and *Graham v Victoria Legal Aid* [2001] VSC 90.
27. For NSW and Victoria, Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 r 13; for Queensland, Australian Solicitors Conduct Rules 2012 r 13; for Tasmania, the Law Society of Tasmania Rules of Practice 1994 do not include a reference to r 13; the South Australian Australian Solicitors' Conduct Rules 2015 r 13; the Western Australian Legal Profession Conduct Rules 2010 r 27 ('Termination of engagement' — this Rule, which differs from r 13, provides a number of grounds under which the practitioner may terminate an engagement and cease to act for a client, including where the client materially misrepresents any material fact relating to the subject matter of the engagement and where the mutual trust and confidence between the practitioner and the client has irretrievably broken down); the Law Society of the Northern Territory, Rules of Professional Conduct and Practice 2005 r 5; for the Australian Capital Territory, Legal Profession (Solicitors) Conduct Rules 2015 r 13.
28. See *R v Promizio* [2004] NSWCCA 75 as an example of failure to follow advice.
29. Y Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia*, 6th ed, LexisNexis Butterworths, Sydney, 2013.
30. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW and Victoria) r 8.1; Law Society of South Australia, Australian Solicitors' Conduct Rules 2015 r 8.1; Law Society of Tasmania, Rules of Practice 1994 r 10.1, which requires that a practitioner 'must do his or her best to complete a client's business in a competent manner and within a reasonable time'; Law Society Northern Territory, Rules of Professional Conduct and Practice 2005 r 1.1, which requires that a practitioner 'must act honestly, fairly and with competence and diligence in the service of a client …'; in Queensland, the Australian Solicitors Conduct Rules 2012 r 8.1; in the Australian Capital Territory, the Legal Profession (Solicitors) Conduct Rules 2015 r 8.1; in Western Australia, the Legal Profession Conduct Rules 2010 rr

7(a) and 10.

31. Several other Australian jurisdictions have similar rules. See the Law Society of South Australia, Australian Solicitors' Conduct Rules r 7.1 and 7.2; the Law Society of Tasmania, Rules of Practice 1994, which do not have a specific rule on this matter, but see r 10.1; the Northern Territory Rules of Professional Conduct and Practice 2005, which do not have a specific rule on this matter, but see r 1.1; for Queensland, see the Australian Solicitors Conduct Rules 2012 r 7.1 and 7.2; for the Australian Capital Territory, see the Legal Profession (Solicitors) Conduct Rules 2015 r 7.1 and 7.2; in Western Australia, see the Legal Profession Conduct Rules 2010 r 10.

32. See also the following provisions in other Australian jurisdictions: Legal Profession Act 2007 (Qld) s 312; Legal Profession Act 2007 (Tas) s 296; Legal Profession Act 2008 (WA) s 264; Legal Profession Act 2006 (ACT) s 273; Legal Practitioners Act 1981 (SA) Sch 3 Pt 10; Legal Profession Act 2005 (NT) s 303(1).

33. See also Law Society of South Australia, Australian Solicitors' Conduct Rules 2015 r 22(1), (2) and (3); in Queensland, the Australian Solicitors Conduct Rules 2012 r 22(1), (2) and (3); in the Australian Capital Territory, the Legal Profession (Solicitors) Conduct Rules 2015 r 22(1), (2) and (3); in Western Australia, the Legal Profession Conduct Rules 2010 r 37(1), (2) and (3). Barristers have identical rules under the Legal Profession Uniform Conduct (Barristers) Rules 2015 rr 49–51, which Rules apply in New South Wales and Victoria. A similar rule exists in Queensland (Bar Association of Queensland, Barristers' Conduct Rules 2011 rr 48–50); South Australia (South Australian Bar Association Inc, Barristers' Conduct Rules rr 48–50); Western Australia (Western Australian Barristers' Rules 2012 rr 48–50); the Australian Capital Territory (the Australian Capital Territory Bar Association, Legal Profession (Barristers) Rules 2015 rr 51–53); the Northern Territory (the Northern Territory Bar Association Inc, Barristers' Conduct Rules 2002 r 17.35–17.37).

34. Extracted at **5.49**.

35. See *Broadbent v Medical Board of Queensland* [2010] QCA 352.

36. See *Bryant (Constructions) Pty Ltd v Daniels* (CA(NSW), 20 March

1996, unreported) at p 8; and *Mohammed v Farah* [2004] NSWSC 482.

37. Refer to the Australian Solicitors' Conduct Rules 2015 (NSW and Vic) r 8.1, set out at **5.43**. See also the Law Society of South Australia, Australian Solicitors' Conduct Rules 2015 r 8.1; the Law Society of Tasmania, Rules of Practice 1994, which do not have a specific rule on this matter, but see r 10.1; the Northern Territory Rules of Professional Conduct and Practice 2005, which do not have a specific rule on this matter, but see r 1.1; for Queensland, the Australian Solicitors Conduct Rules 2012 r 8.1; for the Australian Capital Territory, the Legal Profession (Solicitors) Conduct Rules 2015 r 8.1; in Western Australia, the Legal Profession Conduct Rules 2010 r 7(a).
38. See *Spectrum Ophthalmics Pty Ltd v Ryan* [2010] VSC 19.
39. S Wolf, 'The Ethical Dilemma Faced by Attorneys Representing the Mentally Ill in Civil Commitment Proceedings' (1992) 6 *Georgetown Journal of Legal Ethics* 1637.
40. See the Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW and Vic). See also Northern Territory Bar Association Inc, Barristers' Conduct Rules 2002; the Australian Capital Territory, Legal Profession (Barristers) Rules 2015; Bar Association of Queensland, Barristers' Conduct Rules 2011; in Tasmania, the Legal Profession (Barristers) Rules 2016; South Australian Bar Association Inc, Barristers' Conduct Rules 2013; Western Australian Barristers' Rules 2012.
41. Y Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia*, 6th ed, LexisNexis Butterworths, Sydney, 2013, [9.37].
42. For the Barristers Rules in other jurisdictions see: Northern Territory Bar Association Inc, Barristers' Conduct Rules 2002; the Australian Capital Territory Legal Profession (Barristers) Rules 2015; Bar Association of Queensland, Barristers' Conduct Rules 2011; Tasmanian Legal Profession (Barristers) Rules 2016; South Australian Bar Association Inc, Barristers' Conduct Rules 2013; Western Australian Barristers' Rules 2012.
43. See *R v Marshall* [1981] VR 723 and *Tait v Bartley* (1979) 24 ALR 473.
44. For the Barristers Rules in other jurisdictions, see Northern Territory Bar Association Inc, Barristers' Conduct Rules 2012; the Australian Capital Territory, Legal Profession (Barristers) Rules 2015; Bar

Association of Queensland, Barristers' Conduct Rules 2011; Tasmanian Legal Profession (Barristers) Rules 2016; South Australian Bar Association Inc, Barristers Conduct Rules 2013; Western Australian Barristers' Rules 2012.

45. See **5.102**.

46. Australian Law Reform Commission, *Report No 84 — Seen and Heard: Priority for Children in the Legal Process*, September 1997, Recommendation 70.

47. Law Society of New South Wales, *When a Client's Capacity is in Doubt: A Practical Guide for Solicitors*, 2016, p 4, at https://www.lawsociety.com.au/cs/groups/public/documents/internetcor The Law Institute Victoria has issued a similar publication providing guidelines for solicitors where a client's capacity to give instructions is in doubt: see Law Institute Victoria, *LIV Capacity Guidelines and Toolkit: Taking Instructions When a Client's Capacity is in Doubt*, September 2015, at https://www.liv.asn.au/PDF/For-Lawyers/Submissions-and-LIV-Projects/2054_LPP_CapacityGuidelines_FINAL_WEB. The NSW Attorney-General's Department has also created a *Capacity Toolkit*, which contains information for government and community workers, professionals, families and carers and is available at http://www.justice.nsw.gov.au/diversityservices/Documents/capacity_toc See also N O'Neil & C Peisah, *Capacity and the Law*, Sydney University Press, 2011; and *Szozda v Szozda* [2010] NSWSC 804, where a solicitor failed to properly consider the client's capacity when making a power of attorney.

48. The Law Society of New South Wales, *Representation Principles for Children's Lawyers*, 4th ed, 2014, at https://www.lawsociety.com.au/cs/groups/public/documents/internetcor

49. See ss 4(1) and 68LA of the Family Law Act 1975 (Cth).

50. Young, Sifris, Carroll & Monahan, *Family Law in Australia*, 9th ed, LexisNexis Butterworths, 2016, at [8.78].

51. See *Farmer v Rogers* [2010] FamCAFC 253. See also the National Legal Aid website, at http://www.nationallegalaid.org/assets/Family-Law/ICL-Guidelines-2013.pdf, which provides specific guidance for independent children's lawyers.

52. Family Law Council and Family Law Section of the Law Council of Australia, *Best Practice Guidelines for Lawyers Doing Family Law Work*, 2nd ed, October 2010, at https://www.familylawsection.org.au/resource/BestPracticeGuidelinesv8

53. N Ross, 'Legal Representation of Children', in L Young, M A Kenny & G Monahan (eds), *Children and the Law in Australia*, 2nd ed, LexisNexis Butterworths, 2017, Ch 22.

6

COMPETENCE AND CARE

INTRODUCTION

6.1 Competence and care is probably the most important area of concern for both lawyers and their clients. A lack of competence and care can be the basis for a civil action in tort or contract against the practitioner. It can also be the basis for the initiation of disciplinary proceedings against the practitioner. Statutory provisions regulating the profession include a lack of competence and diligence as a basis for a finding of misconduct. By way of example, s 402 of the Legal Profession Act 2008 (WA) defines unsatisfactory professional conduct as including 'conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner'. Section 403 of the Legal Profession Act 2008 (WA) defines professional misconduct as including 'unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence'.[1]

6.2 The various Professional Rules of Conduct also make reference to the requirement of competence and care on the part of the legal practitioner.[2] Practitioners are cautioned to refrain from acting unless they are competent, and those who fall below the profession's standard of competency can be, and at times are, disciplined. Following from this obligation, the profession also requires practitioners to stay up-to-date by taking continuing professional development units.[3]

6.3 Clients approach the issue of competence quite differently to lawyers. Clients are interested in whether their lawyer has achieved what they (the clients) have sought. The fact that the lawyer carried out the client's instructions with skill may be irrelevant if the client does not achieve the desired outcome. Steve Mark, who previously held the position of Commissioner of the Legal Services Commission (New South Wales), stated on many occasions that probably the most difficult problems to resolve had involved client complaints about situations where lawyers had done nothing wrong by professional standards or in law, but the clients' outcome had not been achieved.

6.4 In this Chapter we look at the ethical rules concerning competence and care and examples of duties owed to the client in terms of competence and care.[4] We examine the standard of care and the scope of representation under the retainer agreement between a lawyer and a client.[5] We consider the extent of liability owed by legal practitioners to non-clients.[6] Finally, we discuss the immunity doctrine and how far it goes in exempting advocates

from liability.[7]

6.5 This Chapter should be read in conjunction with **Chapter 5** 'The Representation of Clients', which considers how a lack of communication with a client can amount to a breach of the lawyers' professional duties, and **Chapter 8** 'Conflicts of Interest'. In *R v Szabo* [2000] QCA 194, the client discovered that his defence counsel had been in a *de facto* relationship with the Crown prosecutor. This information had not been disclosed to the client and, even though the relationship was in an 'interrupted phase', the Court of Appeal ordered a new trial because of the perception of a conflict of interest.

PROFESSIONAL RULES OF CONDUCT

6.6 Extracts of the Rules of Professional Conduct in relation to competence and care are reproduced below.[8]

6.7 The following extract is from the Northern Territory Rules of Professional Conduct and Practice 2015:

> **1. Acceptance of Retainer —**
>
> (Instructions to Act or Provide a Legal Service)
>
> 1.1 A practitioner must act honestly, fairly, and with competence and diligence in the service of a client, and should accept instructions, and a retainer to act for a client, only when the practitioner can reasonably expect to serve the client in that manner and attend to the work required with reasonable promptness.

…

5. Termination of Retainer

5.1 A practitioner must complete the work or legal service required by the practitioner's retainer unless —

5.1.1 the practitioner and the practitioner's client have otherwise agreed;

5.1.2 the practitioner is discharged from the retainer by the client; or

5.1.3 the practitioner terminates the retainer for just cause, and on reasonable notice to the client.

…

10A Diligence and Efficiency

10A.1 A practitioner must keep the client informed at regular intervals, or upon request of the progress or lack of progress toward resolution of the client's matter.

10A.2 A practitioner should ensure that the practitioner does the work they were retained to do, in sufficient time to enable compliance with orders, directions, rules or practice notes of the court.

10A.3 A practitioner must inform and advise the client about the alternatives to fully contested adjudication of the case which are reasonable available to the client (unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives) to permit the client to make decisions about the client's best interests in relation to the litigation.

10A.4 A practitioner must inform and advise the client of any offers to compromise the client's case and always endeavor to achieve an appropriate resolution of the case at the earliest opportunity.

10A.5 A practitioner must seek to ensure that work in relation to a case is done so as to:

(a) confine the case to identified issues which are

genuinely in dispute;

(b) have the case ready to be heard as soon as practicable;

(c) present the identified issues in dispute clearly and succinctly;

(d) limit evidence including cross examination, to that which is reasonably necessary to protect the clients' interests which are at stake in the case; and

(e) occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case.

…

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6.8 The following extract is from the Queensland Australian Solicitors Conduct Rules 2012, which is mirrored for New South Wales,[9] South Australia,[10] Victoria,[11] and the Australian Capital Territory:[12]

4. Other fundamental ethical duties

4.1 A solicitor must also:

4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;

4.1.2 be honest and courteous in all dealings in the course of legal practice;

4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;

4.4.4 avoid any compromise to their integrity and professional independence; and

4.1.5 comply with these Rules and the law.

…

7. Communication of advice

7.1 A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement.

7.2 A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the 'litigation' [Qld] 'matter' [NSW, Vic, SA, ACT].

8 Client instructions

8.1 A solicitor must follow a client's lawful, proper and competent instructions.

…

13. Completion or termination of engagement

13.1 A solicitor with designated responsibility for a client's matter must ensure completion of the legal services for that matter UNLESS:

13.1.1 the client has otherwise agreed;

13.1.2 the law practice is discharged from the engagement by the client;

13.1.3 the law practice terminates the engagement for just cause and on reasonable notice; or

13.1.4 the engagement comes to an end by operation of law.

…

6.9 The following extract is from the Tasmanian Rules of Practice 1994:[13]

10. Conduct of business

(1) A practitioner must do his or her best to complete a client's business —

(a) in a competent manner; and

(b) within a reasonable time.

(2) A practitioner must inform a client of all significant developments in that client's matter unless the client has instructed otherwise.

…

14. Advice on settlement

Before settlement of a litigious matter negotiated by a practitioner, the practitioner must advise the client of the likely amount that the client will receive if —

(a) the matter is settled in accordance with the proposed settlement; and

(b) the payments due from the settlement are no more than those of which the practitioner is reasonably aware at the time of settlement.

15. Eligibility for legal aid

A practitioner must inform a client of any entitlement to apply for legal aid.

…

6.10 The following extract is from the Western Australian Legal Profession Conduct Rules 2010:

6. Other fundamental ethical obligations

(1) A practitioner must —

(a) act in the best interests of a client in any matter where the practitioner acts for the client; and

(b) be honest and courteous in all dealings with clients, other practitioners and other persons involved in a matter where the par actioner acts for a client; and
(c) deliver legal services competently and diligently; and
(d) avoid any compromise to the practitioner's integrity and professional independence; and
(e) comply with these rules and the law.

…

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7. Client instructions

A practitioner must —

(a) follow a client's lawful, proper and competent instructions; and
(b) treat the client fairly and in good faith, giving due regard to the client's position of dependence, the practitioner's special training and experience and the high degree of trust the client is entitled to place in the practitioner; and
(c) be completely frank and open with the client; and
(d) act in the best interests of a client in any matter where the practitioner acts for the client; and
(e) perform the work required on behalf of the client diligently; and
(f) not accept an engagement which is beyond the practitioner's competence; and
(g) not accept an engagement unless the practitioner is in a position to carry out and complete the engagement diligently; and
(h) not perform work in such as manner as to increase the proper costs to a client.

8. Communicating with client

A practitioner must communicate candidly and in a timely manner with a client in relation to any matter in which the practitioner represents the client.

…

10. Keeping client informed

(1) A practitioner must take all reasonable and practicable steps to inform a client of the client's rights and possible courses of conduct in relation to any matter in which the practitioner represents the client.

(2) A practitioner must take all reasonable and practicable steps to keep a client informed about all significant developments and generally about the progress on any matter in which the practitioner represents the client unless the practitioner has been instructed by the client not to do so.

(3) A practitioner must notify the client promptly if the practitioner receives money or securities on behalf of the client.

…

DUTIES OWED TO THE CLIENT IN RELATION TO COMPETENCE AND CARE[14]

6.11 A failure in terms of the duty owed to a client can be argued to be a breach of the required standard of care (thus actionable in tort), or a breach of the retainer agreement between the practitioner and the client (thus actionable in contract). In both cases, whether the action is in tort or contract, there can be a consequent finding of damages against the practitioner. Such a failure can also result in a finding of misconduct, pursuant to a breach of the Professional Rules of Conduct.

In making such a finding, the court's jurisdiction is exercised, not for the purpose of punishing the practitioner concerned or compensating a client for loss suffered, but for the protection of the public and the reputation and standards of the legal profession. In *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, Dixon CJ noted at [4]:

> When a barrister is justly convicted of a serious crime and imprisoned the law has pronounced a judgment upon him which must ordinarily mean the loss by him of the standing before the court and the public which, as it seems to me, should belong to those to whom are entrusted the privileges, duties and responsibilities of an advocate. There may be convictions for a crime of which this is not true, but I cannot think that the present is one of them.

6.12 The rest of this chapter details examples of duties owed to a client in relation to the practitioner's obligation concerning competence and care.

ACCEPTING INSTRUCTIONS WITHIN THE PRACTITIONER'S AREA OF COMPETENCE

6.13 A solicitor generally has a choice whether or not to accept instructions from a particular client. In relation to the situation where a solicitor accepts instructions that are beyond the solicitors' competence, see the comments of former Queensland Chief Justice de Jersey AC (currently the Governor of Queensland):[15]

> Looking at the obverse, it is plainly of great importance for a practitioner not to take on work beyond his or her capacity, but that should not give rise to undue timidity where the capacity exists. Where the capacity is lacking, it is not only potentially negligent, but in my view unethical as well, for the practitioner to act. As said in *Vulic v Bilinsky* (1983) 2 NSWLR 427, 483:

> '[I]f a solicitor inexperienced and lacking knowledge in the field accepts instructions to act for a person injured at work, he should inform the client of his lack of experience and give the client the alternative to instruct a solicitor who has a degree of experience and expertise in that field. At the very least, if such an inexperienced solicitor wishes to accept those instructions, he should protect himself and his client by seeking advice from Counsel, and this means the furnishing of proper material to Counsel upon which advice might be given.'

KEEPING THE CLIENT INFORMED AND COMPLETING THE REQUIRED WORK WITHIN A REASONABLE TIME

6.14 The Professional Rules of Conduct also reflect the view that if a solicitor receives instructions and it is or it becomes apparent to them that they cannot perform the work with 'reasonable promptness', they should inform the client of that fact. This would allow the client to make a fully informed decision as to what further action (if any) is to be taken in the matter, and thus properly protect the client's interests.

6.15 In *Legal Profession Complaints Committee v Dutton* [2014] WASC 457, Martin CJ, McKechnie, and Allanson JJ noted at [10]:

> The practitioner has repeatedly acted in a manner that is not professionally competent in the pursuit of his clients' interests. He has on multiple occasions failed to carry out the instructions of his clients or take any steps to progress their matters, in circumstances that have caused serious consequences for some of his clients. He has

persistently failed to respond to communications from his clients.

6.16 In *Macindoe v Parbery* (CA) (NSW), Full Court, CA 40640/89, 17 August 1994, unreported), Kirby P said at 3–4 that the solicitors' duty went beyond the obligation to inform and explain to the client the usual perils of purchasing a business, and that it included a duty to explain unusual risks. In the same case, Young AJA said at 18–19:

> [T]here is no lack of authority … that the retainer of a solicitor for the purchaser on the purchase of a business ordinarily extends beyond mere documentation and includes the duty to warn the purchaser of anything that is unusual and anything that may affect the purchaser obtaining the benefit of the contract which he or she discloses to the solicitor.

6.17 To what extent might this require the solicitor to disclose to the client the perils of particular financial (as opposed to legal) commercial transactions? See also Kirby P's views on holding a solicitor liable in *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642, referred to in *Heydon v NRMA Ltd* (2000) 51 NSWLR 1; [2000] NSWCA 374.[16]

6.18 In *Legal Profession Complaints Committee v Waters* [2015] WASC 141, the practitioner had failed to progress the client's claim, and failed to respond to the client's communications. Martin CJ, McKechnie and Beech JJ noted at [9]–[11]:

> [9] By his own admission, over a period of four to five years the practitioner has engaged in conduct which, when viewed collectively, compels the conclusion that he is not a fit and proper person to remain a legal practitioner. [endnotes omitted]
>
> [10] It is evident from the agreed statement of facts and findings set out above that the practitioner disregarded his professional duties in fundamental respects. The practitioner failed to progress Mrs H's

claim to the point where the matter was placed on the Inactive Cases List. Given the considerable workload of the courts and their limited resources, it is essential to the administration of justice and clients' interests that all matters are prosecuted competently and in a timely manner. In the period between July 2008 and October 2012 when Mrs H terminated the practitioner's services, the only document that appears to have been filed was a writ of summons (subsequently amended) that initiated Mrs H's claim. Despite persistent requests by Mrs and Mr H to progress Mrs H's claim both in respect of medical reports and court documents, the practitioner failed to do so. No reasonable explanation was provided for this gross delay.

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[11] The agreed facts and findings also evidence the practitioner's sustained reluctance to communicate with his client in a candid and timely manner. Timely communication is a fundamental pillar of the relationship between practitioner and client, reflected in rules 8 and 10 of the Legal Profession Conduct Rules 2010 (WA). The practitioner's failure to provide adequate responses to Mrs and Mr H's numerous telephone calls and emails is a serious breach of his professional duty. The practitioner also disregarded his statutory duty to notify his client, as soon as practicable, that her matter had been placed on the Inactive Cases List. As the Tribunal noted, litigation is stressful. It is especially stressful for those not trained in the law and civil procedure, and every client is entitled to expect that they will be kept apprised of the progress of their litigation. Clients, fellow practitioners or the courts cannot have any confidence in a legal practitioner who is unable to fulfil this basic responsibility.

6.19 The court also found that the practitioner had deliberately engaged in dishonest conduct. This conduct involved not only making misleading statements in correspondence with his client

and the Committee, but also making deliberately false statements in a sworn affidavit to the District Court. In view of this, the court ordered that the practitioner's name be struck from the Roll of Practitioners in order to protect the public and maintain the reputation and standards of the profession.

UNDERTAKING WORK IN A MANNER SO AS NOT TO INCUR UNNECESSARY COSTS FOR THE CLIENT

6.20 Where it can be said that the legal practitioner was responsible for additional costs, for example due to delay or by engaging in excessive or unnecessary work, the practitioner can be personally liable for those costs.

6.21 In some cases this is made clear by statute — for example, the Civil Procedure Act 2005 (NSW):[17]

> **99 Liability of legal practitioner for unnecessary costs**
>
> (1) This section applies if it appears to the court that costs have been incurred:
>
> [page 240]
>
> (a) by the serious neglect, serious incompetence or serious misconduct of a legal practitioner, or
> (b) improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible.
>
> (2) After giving the legal practitioner a reasonable opportunity to be heard, the court may do any one or more of the following:
> (a) it may, by order, disallow the whole or any part of the costs in the proceedings:

(i) in the case of a barrister, as between the barrister and the instructing solicitor, or as between the barrister and the client, as the case requires, or
(ii) in the case of a solicitor, as between the solicitor and the client,

(b) it may, by order, direct the legal practitioner:
(i) in the case of a barrister, to pay to the instructing solicitor or client, or both, the whole or any part of any costs that the instructing solicitor or client, or both, have been ordered to pay to any other person, whether or not the solicitor or client has paid those costs, or
(ii) in the case of a solicitor, to pay to the client the whole or any part of any costs that the client has been ordered to pay to any other person, whether or not the client has paid those costs,

(c) it may, by order, direct the legal practitioner to indemnify any party (other than the client) against costs payable by that party.

6.22 In other cases, the duty not to incur unnecessary costs for a client is explicit in the Rules,[18] or it is implied as part of the solicitor's retainer. In *NA & J Investments Pty Ltd v Minister Administering the Water Management Act 2000 (No 2)* [2011] NSWLEC 98 (8 June 2011), Pain J noted at [271]:

> The most serious allegation made in relation to the allegation of a breach of the solicitor's retainer is that the proceedings were commenced on behalf of the Applicants with other parties … and that claims other than the amalgamation claim were pursued contrary to or in the absence of the Applicants' instructions. …
>
> This conduct is said to be serious neglect or serious incompetence resulting in costs being incurred because an action was commenced which was not authorised which resulted in the Applicants having to extricate themselves from the proceedings, incurring unnecessary

costs in doing so.

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THE STANDARD OF CARE

6.23 The required standard of care for those who hold themselves out as 'professionals' — which includes legal practitioners — is an objective test, namely, to exercise the care, skill, or diligence that would be expected of a reasonably competent legal practitioner in the circumstances of the defendant.[19]

6.24 Even if not expressed in the retainer agreement with the client, it would be held as an implied term under the contract and, thus, a failure to exercise the required standard of care, apart from giving rise to a potential action against the practitioner for misconduct under the relevant Rules of Conduct, could also result in an action for breach of the retainer or an action in negligence.

6.25 In determining the standard of care, the court is guided not merely by the prevailing professional practice (providing that it is a reasonable practice), but also by any relevant statutory provisions, Rules (or Codes) of Professional Conduct, and the particular circumstances of the case.

6.26 The standard of care for those practising a profession (which would include the practice of law and medicine) has been given statutory effect in a number of Australian jurisdictions. Therefore, although the common law cases remain relevant, when defining the required standard of care, the provisions of the various Civil Liability Acts (or equivalent legislation) need to be considered.

6.27 Can or should solicitors place specific limits on the scope of their representation of their clients? For example, could they 'contract-out' of the duty to exercise competence and care?

6.28 In New South Wales, s 5O of the Civil Liability Act 2002 (NSW) contains the provision reproduced below concerning the standard of care for professionals. Similar provisions apply in Queensland, South Australia, Tasmania, and Victoria.[20]

> **5O Standard of care for professionals**
>
> (1) A person practising a profession ('a professional'[21]) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided)

> was widely accepted in Australia by peer professional opinion as competent professional practice.
>
> (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
>
> (3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
>
> (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

6.29 In *Dobler v Halverson* (2007) 70 NSWLR 151, Kurt Halverson, aged 18, suffered cardiac arrest and hypoxic brain damage. He was left with catastrophic injuries. Represented by his

father as his tutor, he brought proceedings against Dr Kenneth Dobler, the general practitioner under whose care he had been for some years, claiming damages for negligence. With regard to the standard of care required, Giles JA referred to the Civil Liability Act 2002 (NSW) and noted at [59]–[60]:

> [59] … Section 5O [of the Civil Liability Act 2002 (NSW)] has the effect that, if the defendant's conduct accorded with professional practice regarded as acceptable by some (more fully, if he 'acted in a manner that … was widely accepted … by peer professional opinion as competent professional practice'), then subject to rationality[22] that professional practice sets the standard of care.
>
> [60] In this sense, s 5O provides a defence. The plaintiff will usually call his expert evidence to the effect that the defendant's conduct fell short of acceptable professional practice, and will invite the court to determine the standard of care in accordance with that evidence. He will not be concerned to identify and negate a different professional practice favourable to the defendant, and s 5O does not require that he do so. …

6.30 Upon admission to practice, it is reasonable for a client to assume that the lawyer, however inexperienced, will meet the standard of care expected of a reasonable and competent lawyer. In much the same way, the High Court has held that the inexperienced and unqualified driver is expected to meet the standard of care of a reasonable driver. In *Imbree v McNeilly* (2008) 236 CLR 510,[23] Gummow, Hayne, and Kiefel JJ noted at [54], [69]:

> [54] Knowledge of inexperience can thus provide no sufficient foundation for applying different standards of care in deciding whether a learner driver is liable to one passenger rather than another, or in deciding whether that learner driver is liable to a person outside

> the car rather than one who was seated in the car, in the adjoining seat. The other passenger will ordinarily know that the driver is a learner driver; the road user outside the car can see the L-plates. Yet it is not disputed that the learner driver owes each of those persons a standard of care determined by reference to the reasonable driver.
>
> …
>
> [69] The common law recognises many circumstances in which the standard of care expected of a person takes account of some matter that warrants identifying a class of persons or activities as required to exercise a standard of care different from, or more particular than, that of some wholly general and 'objective community ideal'. Chief among those circumstances is the profession of particular skill. A higher standard of care is applied in those cases. That standard may be described by reference to those who pursue a certain kind of occupation, like that of medical practitioner, or it may be stated, as a higher level of skill, by reference to a more specific class of occupation such as that of the specialist medical practitioner. At the other end of the spectrum, the standard of care expected of children is attenuated.

6.31 In terms of the determination of the 'standard of care', it should also be noted that, as set out in s 5O(2) of the Civil Liability Act 2002 (NSW), 'peer professional opinion cannot be relied on for the purposes of the section if the court considers that the opinion is irrational'.[24] It will be no defence to an action in negligence by a client against the legal practitioner, for the practitioner to argue that they were merely following the relevant professional practice, when it can be established that the practice was unsound or unreasonable — for example, where it exposed the client to unnecessary risks. Having said this, the peer professional opinion does not have to be universally accepted to be considered widely accepted.[25]

6.32 When it comes to professionals who purport to have some special expertise or skill, the required standard of care is not that of

'a reasonable practitioner', but rather that of 'a practitioner who has that special skill or expertise'. In *Rogers v Whitaker* (1992) 175 CLR 479, an ophthalmic surgeon (Dr Rogers) failed to advise his patient (Mrs Whitaker) of the possibility that, as a result of surgery proposed on her right eye (following a penetrating injury to it at an early age), she might develop a condition known as sympathetic ophthalmia in her left eye (which was not damaged). The subsequent development of this condition after the operation to her right eye and the consequent loss of sight in her left eye were particularly devastating and left her almost totally blind. In relation to the question of the standard of care, the High Court, per Mason CJ, Brennan, Dawson, Toohey, and McHugh JJ, noted at 487:

> [12] In Australia, it has been accepted that the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising or professing to have that special skill. … Further and more importantly, particularly in the field of non-

> disclosure of risk and the provision of advice and information … the courts have adopted the principle that, while evidence of acceptable medical practice is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care after giving weight to 'the paramount consideration that a person is entitled to make his own decisions about his life.

6.33 *Rogers v Whitaker* (1992) 175 CLR 479 involved an ophthalmic surgeon who was held to have failed to give adequate medical advice to his client. A number of other cases have concerned a failure on the part of legal practitioners to give their

clients adequate advice regarding financial aspects of proposed contracts or transactions. Much will depend on the individual facts of the case and the extent to which the advice is of the kind a client might reasonably expect from the legal practitioner.

6.34 In *Snopkowski v Jones (Legal Practice)* [2008] VCAT 1943, the solicitor, Jones, failed to give her client advice concerning the fact that her client's transfer of a half-share of a property to his wife would trigger a capital gains tax liability. It was held that Jones had breached the required standard of care, not because she failed to give such advice, but rather because she failed to ask her client whether or not he had obtained an accountant's tax advice concerning the capital gains tax implications before completing the transfer, and that if he had not received such advice, to advise him to seek it.

6.35 In *First Mortgage Managed Investments Ltd v Pittman* [2012] NSWSC 1332, Garling J considered circumstances in which two individuals (the borrowers under a loan agreement), whom his Honour referred to as entirely unsophisticated with no real experience in mortgage transactions, borrowed money on security of their properties, and provided the amount borrowed to a third party for the third party's business in which they had no financial interest. It was the third party who had approached the lender and dealt with the loan. The solicitor provided advice to the borrowers on execution of the security documents. His Honour noted at [372]:

> I am satisfied that each of the First Mortgage loan in 2006, and the variation of it in 2008, of which the mortgages over Lots 8, 9 and 23 were a direct consequence, were unjust and the time they were made, and that it would be unjust now to enforce them. I have reached that conclusion for the following reasons:

…

(f) Whilst legal advice which was independent of First Mortgage was obtained, that advice was:

(i) wholly inadequate in content;
(ii) not independent of the true financial beneficiary of the loan, Ms Locke, which was known to First Mortgage;
(iii) was not provided in circumstance which were conducive to its proper appreciation;
(iv) could not have been provided, and was not provided, in a way which met First Mortgage's minimum requirements.

…

(i) The advice was not adequate because it did not explain the provisions of the loan transaction, nor the mortgages and their legal and practical effect. Neither Mr Pittman nor Mr Webster, according to contemporaneous evidence, had a clear understanding

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that they were the borrowers, and that Ms Locke was not legally bound to make any repayments, nor that their land could be sold by First Mortgage without first resorting to all of Ms Locke's assets.

6.36 In *Symond v Gadens Lawyers Sydney Pty Ltd* [2013] NSWSC 955 (19 July 2013), Beech-Jones J noted at [8]:

In summary, I have concluded that Gadens was negligent and in breach of its contract of retainer with Mr Symond in relation to the structure it proposed to Mr Symond, and its advice that the proceeds from the redemption of the preference shares would be 'tax free' in his hands. In proposing that structure and providing that advice it also uttered negligent misstatements and engaged in conduct contrary to s

> 52 of the TPA [Trade Practices Act]. I find that Gadens was obliged to advise Mr Symond not to proceed with the Restructure and instead should have advised him of three other ways to restructure the business so as to achieve Mr Symond's objective. … Had this advice been given, the imposition of the tax, penalties and interest charges and the deduction from Holdings' franking account that occurred as a result of the settlement with the Commissioner [for taxation] as well as various professional fees that Mr Symond paid, would have been avoided, although some allowance needs to be made for the possibility that other costs might have been incurred.

6.37 In *Richtoll Pty Ltd v WW Lawyers Pty Ltd (in liq)* [2016] NSWSC 438 (19 April 2016), Richtoll Pty Ltd and Ongoing Financial Services Pty Ltd (OFS), as former clients, sued WW Lawyers Pty Ltd (in liquidation). They sought damages for professional negligence and breach of contract on the part of WW Lawyers, who had failed to carry out an Australian Securities and Investments Commission (ASIC) search in relation to a proposed loan. The plaintiffs were in the business of lending money for investment, secured by real property. OFS retained WWL to provide services in relation to various loans. The defendants (WW lawyers) relied on the defence concerning peer professional opinion in s 5O(1) of the Civil Liability Act 2002 (NSW). On this point, Hoeben CJ noted at [247]–[253]:

> [247] … I have concluded that WWL was in breach of its duty and its retainer by the plaintiffs in not carrying out a further ASIC search just before the loan draw down. In reaching that decision, I have relied upon the expert opinion of Messrs Rosier and Carkagis. I have taken into account the basis for their conclusion, i.e. the size of the loan and the amount of time which had passed since the previous search. I have also taken into account the relative ease with which such a search can be carried out. A search of the ASIC register can be done online and would occupy only a matter of minutes.

> [248] As indicated, the defendant relies upon s 5O CLA [Civil Liability Act 2002 (NSW)] which provides a defence to professionals if they can demonstrate that irrespective of whether the court might be inclined to objectively consider the conduct to be negligent, it was widely accepted by peer professional opinion as competent practice among solicitors at the time.
>
> …
>
> [253] I am of the opinion that WWL has not made out a defence under s 5O. I have reached that conclusion on the basis of my analysis of the expert evidence upon which the defendant

> relies. The evidence does not establish that in 2007 it was widely accepted in Australia that competent practice on the part of a solicitor was not to search the ASIC register again in the last 10 days before the draw down of a loan.

6.38 It would also be a breach of the duty of care (that is a failure to meet the required standard of care), if a lawyer fails to advise a client that their case lacks merit and involves serious risks of failure. In these circumstances, the lawyer may be held personally liable for costs. This would not be the case if a client, having been fully informed of the risks, instructs the lawyer to proceed with the litigation.

6.39 In *Macindoe v Parbery* ((CA)(NSW), Full Court, CA 40640/89, 17 August 1994, unreported), Kirby P said at 3–4 that the solicitors' duty went beyond the obligation to explain the usual perils. He said that it included a duty to explain unusual risks which were reasonably foreseeable and which the client should weigh. In the same case, Young AJA said at 18–19:

> … there is no lack of authority … that the retainer of a solicitor for the purchaser on the purchase of a business ordinarily extends beyond mere documentation and includes the duty to warn the purchaser of anything that is unusual and anything that may affect the purchaser obtaining the benefit of the contract which he or she discloses to the solicitor. …

6.40 In *Yates v Property Corp v Boland* (1998) 85 FCR 84; 157 ALR 30, the Full Court of the Federal Court considered a case where a solicitor relied on the expertise of counsel, and said at FCR 108; ALR 53:[26]

> Secondly, it may be accepted that a solicitor who does not have specialist experience in a particular field is entitled to rely heavily on counsel. It is proper for a solicitor who conducts a general practice to rely on the Bar to obtain specialist advice. It may be that for many solicitors who have no particular experience in an area of law counsel is the source of specialist advice. In such a case the solicitor will only be guilty of negligence if counsel's advice is obviously wrong — that is, so wrong that the error should be obvious to a reasonably competent solicitor. But a solicitor with expertise in an area of the law cannot rely on counsel to the same degree. When the specialist solicitor receives that advice he is well placed to consider it and form his own view about its correctness. In our view there is no justification for the conclusion that he is absolved from that task merely because he has taken the advice of experienced counsel.

6.41 The case of *Heydon v NRMA Ltd* (2000) 51 NSWLR 1; [2000] NSWCA 374 involved an alleged breach of duty on the part of the appellant for his failure to provide the NRMA with certain information concerning a High Court case that could potentially adversely affect plans by the NRMA to demutualise the Association.[27] One of the issues raised concerned the special

26. *Yates v Boland* was reversed on appeal, but without criticism of the statements of principle concerning the solicitor-counsel

relationship: see comments of the Full Federal Court in *Wakim v McNally* (2002) 121 FCR 162 at 174 [46].

27. Demutualisation is the process through which a member-owned organisation becomes a shareholder-owned company.

expertise of Mr Heydon QC and others, who were among the leaders of their profession in the fields of company and commercial law and, in the case of Heydon, also in the field of trade practices law. The case is also instructive for its discussion of the basis upon which legal action can be taken against a solicitor (where there is a contractual relationship with the client), and a barrister (where no such contractual relationship exists).

6.42 In brief, the NRMA claimed to have incurred losses because of having to discontinue its efforts to demutualise the Association and its insurance company, after the judgment of the High Court in *Gambotto v WCP Ltd* (1995) 182 CLR 432. The critical issue in the appeals was the relevance of this High Court decision to the proposal to demutualise. The NRMA argued that Heydon and Morgan of Allen Allen & Hemsley, and Bateman of Abbott Tout failed to advise them that the *Gambotto* case was on appeal to the High Court and, after the court granted special leave to appeal, that the appeal had a reasonable possibility of success. If it did succeed, there was a real risk that the decision could adversely affect the NRMA proposal. After the *Gambotto* decision, and taking advice from Heydon, Hulme, and Minter Ellison, the NRMA decided to defer the meeting of members, which had already been adjourned.

6.43 Giles J in the lower court found Heydon had breached his

duty to exercise due skill and care. He had failed to warn the NRMA of the risk of a successful *Gambotto* appeal that would have affected the validity of the general meetings' resolutions that decided to deprive members their membership. He held that Heydon should have obtained and examined transcripts of the special leave application. Heydon would have then been able to warn the NRMA that the matter needed to be given further consideration. Giles J awarded damages for professional negligence against Heydon, Bateman, and Morgan. There was an appeal to the NSW Court of Appeal,[28] which was heard by three judges from other jurisdictions because Heydon had been appointed to the NSW Court of Appeal. In 2003 he was appointed to the High Court of Australia.

6.44 In the NSW Court of Appeal,[29] Malcolm AJA noted at [137]–[148], [237]:

> [137] … The essence of the *NRMA* case on *Gambotto* was that it should have been advised … that the appeal had reasonable prospects of success and there was a real risk that the High Court's decision might adversely impact upon the proposal.
>
> [138] It was contended that had that advice been given, the boards would have voted to stop or slow down the proposal and much, if not all, of the expenditure later incurred would have been avoided.
>
> …
>
> [146] … *Rogers v Whitaker* is applicable to the duty of care of legal practitioners and the standard of care. … The standard of care and skill is that which may be reasonably expected of practitioners. In the case of practitioners professing to have a special skill in a particular area of the law, the standard of care required is that of the ordinary skilled person exercising and professing to have that special skill. Each of Mr Heydon, Mr Morgan and Mr Bateman

were persons who were among the leaders of the profession in the fields of company and commercial law and, in the case of Mr Heydon, also in the field of trade practices law. Each was acknowledged as having special skill or competence in the relevant areas. It did not follow from this that they were to be judged by some higher standard in these areas than the ordinary skilled person exercising and professing to have that special skill. …

[147] In this context the content of the duty of care and the liability is the same whether it is founded on contract in the case of a solicitor, or whether it is founded on a duty of care in tort in the case of a barrister. In each case the duty is to apply the relevant degree of skill and exercise reasonable care to carrying out the task. There is no implied undertaking that the advice is correct, but only that the requisite degree of professional skill and care has been exercised in the giving of the advice. Of course, where there is reason for doubt or there are risks which a person possessing the relevant degree of skill and competence should perceive, it follows from the above that there may be a duty to warn of the kind recognised by their Honours in *Rogers v Whitaker*. Thus, in *Hawkins v Clayton* (1988) 164 CLR 539 at 583–585, it was held by Deane J that, in the case of a solicitor, the circumstances may give rise to a duty to do more than simply perform the task defined by his instructions, if circumstances arose giving rise to a real and foreseeable risk of economic loss by the client, or, in particular circumstances, even a person who was not a client but who may be adversely affected. See also *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642 in which the judgment of Deane J was followed. In *Henderson v Merrett Syndicate Limited* [1995] 2 AC 145 the House of Lords declined to follow *Hawkins v Clayton* insofar as it suggested that in the case of a solicitor liability lay only in contract rather than concurrently in contract and tort. In *Astley v Anti-Trust Ltd* [1999] HCA 6; (1999) 73 ALJR 403 the High Court decided to follow the decision in *Henderson v Merrett Syndicate Limited* in preference to the

judgment of Deane J so that in the case of solicitors, the liability remains a concurrent liability in contract and in tort.

[148] As already noted, the liability of a barrister to the lay client has always been founded on tort rather than contract. Prior to the decisions in *Hawkins v Clayton* and *Waimond Pty Ltd v Byrne*, the duty of a barrister briefed to advise was generally regarded as being to advise on the specific matters or questions raised in the brief from the solicitor. It is a nice question whether there was a duty on the part of counsel to volunteer advice beyond the scope of the brief, although counsel may well and generally would volunteer additional advice which was considered relevant, but not specifically raised in the instructions. In the present case the learned trial Judge referred to *Waimond Pty Ltd v Byrne* in the context of findings against the appellants of negligently failing to warn of risks with respect to questions which, on the face of it, were not within the scope of the specific questions on which they had been asked to advise.

…

[237] The conclusions expressed in the preceding paragraphs are in themselves sufficient to allow the appeal and set aside the decision of the learned trial Judge. There were a number of other points taken, however, with which I consider I should deal. … There was no evidence that Mr Heydon assumed a responsibility for making a prediction how the law might change or develop during the prospective life of the proposal. There was no evidence that Mr Heydon's instructing solicitors or the relevant officers of the NRMA relied upon his opinion as involving any prediction. Such evidence as there was suggested to the contrary. … On the basis of the

material before him, I do not consider that, at the time he gave his advice, there was any want of due care, skill or diligence on the part of

Mr Heydon in failing to foresee as a real or significant risk that the decision in *Gambotto* would have any adverse consequences for what was proposed by the NRMA as at 20 December 1993. It follows that Mr Heydon's appeal should be allowed.

6.45 McPherson J, after outlining the facts and the law concerning negligence, concluded that Heydon was not negligent for failing to take the steps as required by Giles J, stating at [387], [403]:

> [387] In the first place, there was no evidence at the trial that in 1993 or 1994 it was the practice of the profession in general, or of senior counsel in particular, preparatory to giving an opinion on a matter of law, to follow up special leave applications in the High Court, or to obtain copies of the transcript of argument on the appeal hearing. It is not self-evident that at that time such transcripts were readily available to persons who were not directly involved in the appeal itself. Mr Sher QC suggested that a copy of the transcript could easily have been obtained from Mr Emmett QC. Having appeared for the respondent on the special leave application and the High Court appeal in *Gambotto*, he knew more about it than anyone. As it is, there is evidence from Mr Morgan that Mr Emmett had told him that in his opinion the appeal would be likely to fail. In any event, judicial utterances in the course of an appeal hearing do not have the status of considered opinions. They do not amount to authority for propositions of law, but are put to counsel for the purpose of testing submissions being advanced in argument. In any event before any significance could be attached to what was said in argument in the *Gambotto* appeal, it would, of course, have been necessary first to know there was an appeal hearing, as well as what was said in the course of it.
>
> …
>
> [403] In my respectful opinion Mr Heydon QC was not negligent or in breach of his duty of care in the advice he gave in December 1993 or that he failed to give in 1994, and the findings against him that he

was negligent … [and] against AAH and AT should also be set aside. I do not think that, at the time in question, it was reasonably foreseeable that the majority reasoning in the High Court decision in *Gambotto* would circumscribe the power of altering articles so narrowly as to require them to warn NRMA that there was a risk that the proposal for reconstruction would be inhibited or precluded in the form that was in contemplation. Nor do I consider that a duty rested on them to follow up the special leave application by obtaining a copy of the transcript of argument on appeal, or to advise NRMA to await the outcome of the appeal in *Gambotto* before proceeding with the proposal. …

6.46 Ormiston AJA also found that Heydon had not breached his duty of competence and care, stating at [653]:

[653] As I stated at the outset of this judgment, the duty of the lawyer, whether Queen's Counsel or senior firm of solicitors, is to advise their clients on the basis of principle, in which I would include for present purposes a proper understanding of statute law and its accepted interpretation. Occasionally, principle is uncertain or the meaning of a statutory provision equivocal, so that lawyers must endeavour to give their advice as best they can by seeking to resolve those differences, not merely if they are asked, but if they fairly see it to

be necessary to give the required advice. But for that purpose they must, in my opinion, act primarily on accepted principle, not upon speculation as to what might become principle this year, next year or the year after. Sometimes principle does not give a conclusive answer because at the highest level there are statements contained in conflicting dicta and issues deliberately left unresolved for future argument. … [His Honour also set aside judgment against each of the appellants.]

6.47 Do you think that in the case of *Heydon*, the court protected the rights of lawyers to the detriment of consumers of legal services? If so, what would you suggest should be done to rectify this situation? If not, how can clients better protect themselves from damage arising from not being made aware of all the possible implications of a particular transaction?

6.48 The experience and knowledge of the client can also affect the scope of the retainer, and therefore the required standard of care. For example, in *Capeboy Holdings Pty Ltd v Marks Healy Sands* [2002] WASC 287, Pullin J noted at [94]:

> [94] There is clearly a difference between the way advice is given to an experienced client and a client completely inexperienced in the type of transaction in respect of which a solicitor is retained. … To take an obvious example, a solicitor retained by a bank to act in relation to a mortgage transaction, gives advice in a much different way from the advice given to the person who has never before been involved in a mortgage transaction. A solicitor acting for a bank, may simply have to tell the bank that there is a caveat protecting another interest in property over which the bank is to take security. That advice and a copy of the caveat may, in a particular case, be sufficient to inform the bank of the prior interest and the consequences. On the other hand, a solicitor acting for a completely inexperienced person, might have to start by explaining what a caveat is, how it operates, how it might be removed and what the effect of a claimed prior interest would be on that person's security.

6.49 In the Privy Council decision of *Pickersgill v Riley* [2004] UKPC 14 (Privy Council), their Lordships, in a judgment delivered by Lord Scott of Foscote, noted at [7]:

> [7] The scope of the duty [owed by the solicitor to the client] may vary depending on the characteristics of the client, in so far as they are apparent to the solicitor. A youthful client, unversed in business affairs, might need explanation and advice from his solicitor before

> entering into a commercial transaction that it would be pointless, or even sometimes an impertinence, for the solicitor to offer to an obviously experienced businessman.

6.50 In *Capeboy Holdings Pty Ltd v Marks Healy Sands* [2002] WASC 287, Pullin J stated that '[t]here is clearly a difference between the way advice is given to an experienced client and a client completely inexperienced in the type of transaction in respect of which a solicitor is retained'. To what extent must the lawyer ascertain the knowledge of the client regarding the matter? Should the lawyer assume that simply because a client is experienced in the type of transaction involved, that they (the client) need not be fully advised of risks and alternatives? Does this expose a client to an unreasonable danger?

NON-CLIENT LIABILITY — WILLS

6.51 In the previous section, we saw that lawyers are liable in both contract and tort for work they perform for their clients. An area of interest is whether liability in tort can be extended to non-clients. An immediate problem is that extending liability to third parties may result in lawyers breaching their duties to their clients, which can lead to a conflict of interest. Lawyers therefore must be careful in relation to third parties in avoiding duties that conflict with duties to their clients. In such circumstances, lawyers will usually be found not to have any obligations to the third party. There are exceptions to the general rule, the most important being when lawyers fail to properly carry out the instructions of their client in executing a client's will.

6.52 The first important case in this area was *Hawkins v Clayton* (1988) 164 CLR 539. The High Court found there was a duty to make reasonable efforts to locate the executor of the will. The majority found there existed a proximity between solicitors and the executor (third party) under the will. In this case, the executor could have been found by a search of the telephone directory. There was economic loss for not meeting the reasonable expectation that the executor would be found.

6.53 In *Hill (t/a R F Hill & Associates) v Van Erp* (1997) 188 CLR 159, the question for the High Court was whether this liability should be extended to a beneficiary under a will. In that case, the appellant solicitor was instructed to prepare the intended last will of her client. The client signed the will and then died five months later. The respondent, who was a beneficiary under the will, lost her bequest because the will was witnessed by her husband, which made the will void under s 15(1) of the Succession Act 1981 (Qld). The appellant solicitor had known the status of the witness, and thus the respondent alleged that she was negligent. The High Court dismissed the appeal from the Queensland Court of Appeal, per Brennan CJ, Dawson, Toohey, Gaudron, and Gummow JJ, with McHugh J dissenting. Brennan CJ noted at 164–71:

> There are conceptual difficulties in the way of allowing a remedy against a testator's solicitor to an intended but disappointed beneficiary. These were rehearsed by Lord Goff of Chieveley in *White v Jones* [1995] 2 AC 207 … at 256–7.
>
> > 'First, the general rule is well established that a solicitor acting on behalf of a client owes a duty of care only to his client. The relationship between a solicitor and his client is nearly always contractual, and the scope of the solicitor's duties will be set by the terms of his retainer. …
> >
> > '… A further reason is given which is said to reinforce the

conclusion that no duty of care is owed by the solicitor to the beneficiary in tort. Here, it is suggested, is one of those situations in which a plaintiff is entitled to damages if, and only if, he can establish a breach of contract by the defendant. First, the plaintiff 's claim is one for purely financial loss; and as a general rule, apart from cases of assumption of responsibility arising under the principle in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, no action will lie in respect of such loss in the tort of negligence. Furthermore, in particular, no claim will lie in tort for damages in respect

of a mere loss of an expectation, as opposed to damages in respect of damage to an existing right or interest of the plaintiff. Such a claim falls within the exclusive zone of contractual liability; and it is contrary to principle that the law of tort should be allowed to invade that zone. …'

Notwithstanding the conceptual difficulties, a majority of the House of Lords held the solicitor liable in negligence to the intended but disappointed beneficiaries. Lord Goff [at 259–60] regarded it of 'cardinal importance' that if the law did not recognise a duty owed to the disappointed beneficiary, there would be a lacuna in the law which, for reasons of practical justice, ought to be filled. Unless such a duty is recognised 'the only persons who might have a valid claim (ie, the testator and his estate) have suffered no loss, and the only person who has suffered a loss (ie, the disappointed beneficiary) has no claim.'

Is there a duty of care in tort?

…

The necessary, but not always sufficient, foundation for a duty of care in tort is reasonable foreseeability of damage to another if the task in hand is carelessly performed. Thus, in *Voli v Inglewood Shire Council* [(1963) 110 CLR 74 at 84], Windeyer J said of an architect:

> 'Whatever might have been thought to be the position before the broad principles of the law of negligence were stated in modern form in *Donoghue v Stevenson* [[1932] AC 562], it is now beyond doubt that, for the reasonably foreseeable consequences of careless or unskilful conduct, an architect is liable to anyone whom it could reasonably have been expected might be injured as a result of his negligence. To such a person he owes a duty of care quite independently of his contract of employment.'
>
> …

Most testators seek the assistance of a solicitor to make their intentions effective. The very purpose of a testator's retaining of a solicitor is to ensure that the testator's instructions to make a testamentary gift to a beneficiary results in the beneficiary's taking that gift on the death of the testator. There is no reason to refrain from imposing on a solicitor who is contractually bound to the testator to perform with reasonable care the work for which he has been retained a duty of care in tort to those who may foreseeably be damaged by carelessness in performing the work. The terms of the retainer determine the work to be done by the solicitor and the scope of the duty in tort as well as in contract. A breach of the retainer by failing to use reasonable care in carrying the client's instructions into effect is also a breach of the solicitor's duty to an intended beneficiary who thereby suffers foreseeable loss.

…

Does the loss of an intended gift found an action in tort?

In one sense, Mrs Van Erp has suffered no loss. She simply failed to obtain a benefit to which she had no legal entitlement. It is of the

nature of a gift that the donee has no

prior legal entitlement to the thing given, nor any right to compel the donor to give the thing. If some formality must be observed by the donor in order to effect the gift and the formality is not observed, the donee has no equitable right to compel the observance of the formality.

Property intended to be given may pass from a donor either during the lifetime of the donor or on the donor's death. In the case of an intended gift inter vivos, if the intended disposition fails for some reason, the thing to be given remains the property of the donor; the donor may then dispose of the thing effectively either to the donee first intended or to another. The intention of the donor is not irrevocably frustrated and, as between the donor and the intended donee, the property is not lost. But in the case of an ineffective gift intended to be given by a testator to a beneficiary, the thing intended to be given passes on the testator's death to another. It is no longer the property of the donor. And, unless the intended but disappointed beneficiary can claim the thing from the testator's estate in proceedings under a statute for the relief of the testator's family and dependants …, the testator's intention is frustrated and the thing which passed from the testator on death is irretrievably lost to the intended donee. That is the nature of the 'loss' with which this class of case is concerned. It is a loss that is suffered upon the dropping of the testator's life. It is a loss which follows immediately from breach of the solicitor's duty to safeguard the intended beneficiary from precisely that kind of loss [See *Caltex Oil (Aust) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529 at 555; 11 ALR 227].

When an intended beneficiary suffers such a loss as the result of the negligence of a third party, is the loss characterised as a loss which might found an action for damages? This is the novel question for

determination.

An action for damages for negligence provides compensation to a plaintiff for loss measured by comparing the plaintiff 's actual situation with the hypothetical situation in which the plaintiff would have been but for the negligence of the defendant. If the plaintiff 's position is economically worse than it would have been but for the carelessness of the defendant, that is economic loss. Ordinarily, economic loss is recoverable when it is suffered in consequence of physical damage sustained by or manifesting itself in the person or property of the plaintiff or when it is caused by a plaintiff 's acting or refraining from acting in reliance on what the defendant has negligently said or done.[30] The present case does not fall within any of these categories.

In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [[1964] AC 465], there was a mutual relationship between the plaintiff and the defendants which gave rise to a duty of care in the making of a representation by the defendants on which the plaintiff relied and acted to its financial detriment. In *White v Jones*, Lord Mustill in dissent held [at 287–90] that a cause of action against the careless solicitor in favour of the intended but disappointed beneficiaries could not be based on Hedley Byrne because there was no undertaking of responsibility by the solicitor to the beneficiaries in the context of some mutual relationship between them. Although Hedley Byrne has been followed in *Mutual Life and Citizens*'

Assurance Co Ltd v Evatt [(1970) 122 CLR 628; [1971] AC 793], it has not been thought to limit the recovery of economic loss to cases which exhibit the elements that attracted liability in *Hedley Byrne*.

In *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* economic loss was treated as a head of damage independent of physical damage

which might be recovered when the circumstances were such as to impose on the defendant a duty of care to avoid that damage [at 555–6, 575–9, 591–3, 606 and cf 597; 11 ALR 227]. The problem was to define the elements additional to mere foreseeability which would allow relief to a plaintiff whose damages consist merely of economic loss. As Stephen J said [at 573–4]:

> '[I]f economic loss is to be compensated its inherent capacity to manifest itself at several removes from the direct detriment inflicted by the defendant's carelessness makes reasonable foreseeability an inadequate control mechanism.'

Hedley Byrne is properly to be understood as a case in which damages for pure economic loss were held to be recoverable when they were suffered as a result of the plaintiff 's reliance on a statement made by a defendant who had undertaken to the plaintiff, by reason of the relationship between them, to exercise reasonable care in making the statement. The assumption of responsibility by the defendants in *Hedley Byrne* was a characteristic of the conduct to which a plaintiff 's economic loss had to be causally related through inducement and reliance [*San Sebastian Pty Ltd*, op cit, at 366–7], not an element that exhausted the circumstances in which damages for economic loss could be recovered. In my respectful opinion, *Hedley Byrne* is one type of case in which damages for pure economic loss can be recovered but it does not deny the possibility of recovery in other types of case.

The objection that no claim for damages for economic loss lies in negligence unless it is in respect of damage to an existing right or interest is, in my opinion, erroneous. True it is that a plaintiff who has no existing right or interest that is adversely affected by a defendant's carelessness may suffer no loss and hence have no foundation for a claim in negligence. But it does not follow that it is only in contract that damages may be recovered for loss of something to which the plaintiff has no prior legal right. A benefit that a plaintiff would have received but for the negligence of the defendant is a loss, whether or not the benefit would have been gratuitous. So far as the element of

causation is concerned, it is sufficient if the links between the negligent act or omission of the defendant and the plaintiff 's loss of the benefit are established [*Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 362; 120 ALR 16]. Cases of the present kind are not concerned with the loss of a *spes successionis*; compensation is sought for the loss of the property which, but for the negligence of the defendant, the plaintiff would have taken. The loss of that property is economic loss of which the law of tort takes cognizance.

By accepting the testator's retainer, the solicitor enters upon the task of effecting compliance with the formalities necessary to transfer property from a testator on death to an intended beneficiary; it is foreseeable that, if reasonable care is not exercised in performing the task, the intended beneficiary will not take the property; the solicitor fails to exercise reasonable care whereby the formalities are not complied with; and the intended beneficiary thereby loses

the property. The elements, additional to the elements required by *Donoghue v Stevenson* in claims for physical damage, which prevent a case of this kind from being a precedent for claims of indeterminate liability for economic loss [See *San Sebastian*, op cit, at 353–4] are twofold: the claim can be made only by an intended but disappointed beneficiary in respect of an intended testamentary gift and the duty of care owed by the solicitor to the intended but disappointed beneficiary is in the performance of the work in which he owes a corresponding duty — albeit contractually — to the testator. It is immaterial, of course, that the negligent act or omission which causes the loss occurs during the lifetime of the testator and the plaintiff 's loss is suffered on or after the testator's death.

…

I would therefore hold Mrs Hill liable in damages to Mrs Van Erp. I

would dismiss the appeal.

6.54 Dawson J (Toohey J in general agreement with the reasons given by Dawson J) held at 174–87:

> … The foreseeability of harm, whilst an essential ingredient of the tort of negligence, is not enough by itself to give rise to a duty of care. … In other words, it does not set the limits of the tort of negligence: there are situations which lie outside the boundaries of compensable damage even though harm may be reasonably foreseeable.
>
> The most significant of those situations is where the damage is not physical injury or loss flowing from physical injury to a person or property, but consists of nothing more than economic loss. The law was compelled to recognise that in that situation, although the damage may have been foreseeable, it could not impose liability in every case. As Brennan J said in *Bryan v Maloney* [(1995) 182 CLR 609 at 632; 128 ALR 163 at 176]:
>
> > 'If liability were to be imposed for the doing of anything which caused pure economic loss that was foreseeable, the tort of negligence would destroy commercial competition [see Lord Reid in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1027], sterilise many contracts and, in the wellknown dictum of Chief Judge Cardozo [*Ultramares Corp v Touche* (1931) 255 NY 170 at 179; 174 NE 441 at 444], expose defendants to potential liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'.
>
> So the law set about defining categories of cases of pure economic loss where, without imposing indeterminate liability or destroying commercial competition, it could recognise the existence of a duty of care, the breach of which would sound in damages. The most significant case is, perhaps, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [[1964] AC 465]. …
>
> And in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'*

[(1976) 136 CLR 529; 11 ALR 227] this Court held that, although as a general rule damages are not recoverable for pure economic loss even where it is foreseeable, damages are recoverable where the defendant has the knowledge or means of knowledge that a particular person, not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence. Again, the particular relationship between the parties was held to give rise to a duty of

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care. Of note is the statement of Stephen J [at 574] that there was a need for 'some control mechanism based upon notions of proximity between tortious act and resultant detriment'.

The notion of proximity in this context was taken up by Deane J in *Jaensch v Coffey* [(1984) 155 CLR 549 at 578–87; 54 ALR 417]. That was a case of injury in the form of nervous shock and fell within another category of case in which it had been held that foreseeability of damage was not of itself sufficient to impose a duty of care. Deane J, with whom Gibbs CJ agreed, said that the relationship between the plaintiff and defendant in that case gave rise to a duty of care on the part of the defendant because it was a relationship of proximity.

…

Reasoning by analogy from decided cases by the processes of induction and deduction, informed by rather than divorced from policy considerations, is not, in my view, dependent for its validity on those cases sharing an underlying conceptual consistency. It is really only dependent upon the fact that something more than reasonable foreseeability is required to establish a duty of care and that what is sufficient or necessary in one case is a guide to what is sufficient or necessary in another.

Nevertheless, and notwithstanding the criticism of the concept by

Brennan J [*San Sebastian Pty Ltd*, op cit, at 368 and *Hawkins v Clayton* (1988) 164 CLR 539 at 555–6 etc], whose approach has found favour in the House of Lords [see *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 618, 633–468], I retain the view which I expressed in *Gala v Preston* [at 276] that the requirement of proximity is at least a useful means of expressing the proposition that in the law of negligence reasonable foreseeability of harm may not be enough to establish a duty of care. Something more is required and it is described as proximity. Proximity in that sense expresses the result of a process of reasoning rather than the process itself [see *Caparo Industries Plc*, op cit, at 632–3 etc], but it remains a useful term because it signifies that the process of reasoning must be undertaken. But to hope that proximity can describe a common element underlying all those categories of case in which a duty of care is recognised is to expect more of the term than it can provide.

…

Thus the difference between the approach based on proximity and that suggested by Brennan J is, in my view, far less than the protracted debate on the subject would suggest, and is, perhaps, more a difference of labelling than one of substance. Reasonable foreseeability of harm does not, of itself, always give rise to a duty to take care. Something more is required according to the category of the case in question, and that something more is called proximity. Where a new category is suggested, regard should be had in the first place to the established categories which may be helpful by way of analogy in determining whether to recognise a duty of care. That is how incremental development takes place [*Home Office v Dorset Yacht Co Ltd*, op cit, at 1058–9 per Lord Diplock]. The process is affected by relevant policy considerations, such as the need to avoid indeterminate liability or the placing of impediments in the way of ordinary commercial activity. It is also important that the tort of negligence should not be regarded as providing an all enveloping remedy, supplanting 'other torts, contractual obligations, statutory duties or equitable rules

in relation to every kind of damage including economic loss' [see *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 at 316]. In the end, policy considerations will set the outer limits of the tort. …

Sometimes the question of proximity will turn upon the nature of the conduct which caused the damage — such as negligent misstatement or a failure to act — as well as the type of damage suffered — nervous shock or economic loss, for example. However, in this case nothing would appear to turn upon the nature of the conduct which constituted carelessness on the part of the solicitor. …

It was pursuant to the contract of retainer between the testatrix and the solicitor that the solicitor undertook to prepare the will and attend to its execution. It was an implied term of the contract that the solicitor should exercise due skill and care in carrying out her duties. The origin of the solicitor's obligations lay in contract, but that is no reason for saying that the relationship to which the contract gave rise could not form the basis of a duty or duties owed otherwise than in contract. After all, it is now clear that the solicitor owed the testatrix a duty to take care in tort as well as in contract [See *Hawkins*, op cit]. And if the relationship between the solicitor and the testatrix gave rise to a duty of care in tort there is no reason in logic or principle why the relationship between the solicitor and the intended beneficiary should not also do so. At any rate, there was nothing in the existence of a contract of retainer between the solicitor and the testatrix which precluded a duty of care in tort being owed to the intended beneficiary any more than it precluded a duty of care in tort being owed to the testatrix. …

… [A] duty of care is imposed on a person who places himself in a relationship which the law will recognise as one of proximity with other persons where damage to those others is reasonably foreseeable as a consequence of careless behaviour on his part, and merely because a person has placed himself in that relationship by reason of a

contract with another does not necessarily preclude a finding of proximity (although in some cases it might do so) [See *Bryan*, op cit, at 621]. The contract may give rise to an obligation to perform a task but the performance of the task may, in all the circumstances, give rise to a duty of care to perform it so as not to cause damage, whether of a physical or economic kind, to another. Even if one party to a contract can exclude liability to the other party for negligence in the performance of the contract but cannot do so with respect to someone who is not a party to the contract that is no reason to deny the existence of a duty of care to that third party. A party to a contract is able to negotiate with respect to the protection of his interests whereas a third party is not in a position to do so.

These considerations lead me to conclude that, even though the loss suffered by a disappointed beneficiary is purely economic, there are not the same reasons to tread warily in that situation as there are in some other cases of economic loss. …

In my view, the relationship between the solicitor, Mrs Hill, and the intended beneficiary, Mrs Van Erp, was one of proximity which did give rise to a duty of care on the part of Mrs Hill towards Mrs Van Erp. No single factor, such as an assumption of responsibility by the solicitor, leads me to that conclusion. The relevant circumstances are more complex than that.

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A client who retains a solicitor to draw up a will and attend to its execution must ordinarily rely upon the solicitor to carry out those functions to effectuate the client's testamentary intentions. In that situation the responsibility assumed by the solicitor to the client is clearer, if anything, than it was in *Hawkins v Clayton* where a solicitor entrusted with custody of a client's will was held to be under a duty to take reasonable steps to find the executor and inform him of the existence, contents and custody of the will. In that case Deane J

identified the factors which led him to recognise a duty of care [at 578–9]:

> 'The critical factors of the relationship between the testatrix and the firm which gave it the character of a relationship of proximity with respect to economic loss of the kind sustained in the present case are those related elements which lie at the heart of the ordinary relationship between a solicitor and his client, namely, assumption of responsibility and reliance. The solicitor, as a specially qualified person possessing expert knowledge and skill, assumes responsibility for the performance of professional work requiring such knowledge or skill. The client relies upon the solicitor to apply his expert knowledge and skill in the performance of that work. In the ordinary case, the only kind of damage which is likely to result from the negligence of the solicitor in the performance of his professional work is pure economic loss. In that context, the elements of assumption of responsibility and of reliance combine with that of the foreseeability of a real risk of economic loss to give the ordinary relationship between a solicitor and his client the character of one of proximity with respect to foreseeable economic loss.'
>
> '… The requirements of an assumption of responsibility and the element of reliance to which Deane J referred in the passage I have just quoted are a means by which the law seeks to avoid undesirable consequences such as indeterminate liability, the destruction of legitimate commercial competition, or the emasculation of other bodies of legal doctrine. Where there is no threat of those undesirable consequences, the assumption of responsibility by a defendant and reliance, or request, by a plaintiff may suggest policy reasons for recognising the existence of a duty of care, although they may not be determinative. Indeed, the element of reliance may be unhelpful as an

> indication of a relationship of proximity in cases of economic loss which do not involve misstatement [See *San Sebastian Pty Ltd*, op cit, at 357]. Of course, in cases involving misstatement, the element of reliance plays a prominent part not only in establishing proximity but also in establishing causation. Even in cases involving misstatement, request is 'by no means essential' [*San Sebastian Pty Ltd* at 357]. This is why Deane J said in *Hawkins v Clayton* [at 576] that in economic loss cases the requisite relationship of proximity is to be found in 'some additional element or elements which will commonly (but not necessarily) consist of known reliance (or dependence) or the assumption of responsibility or a combination of the two'.

However, in cases such as the present one, there is both an assumption of responsibility of a kind and reliance of a kind, which at least on grounds of policy suggest that a relationship of proximity might be recognised even though neither is in a form which would suffice in cases where those elements are crucial to a relationship of proximity. The person to whom a testator wishes to make a bequest is the object of the testator's intentions. The reason

for engaging a solicitor to make a will is to confer benefits upon the beneficiaries. … As Nicholls V-C said in the Court of Appeal in *White v Jones* [quoted in [1995] 2 AC 207 at 222]:

> 'The very purpose of the employment of the solicitor is to carry out the client's wish to confer a particular testamentary benefit on the intended beneficiary. There is no other purpose.'

Thus, when a solicitor accepts responsibility for carrying out a client's testamentary intentions, he or she cannot, in my view, be regarded as being devoid of any responsibility to an intended beneficiary. The responsibility is not contractual but arises from the solicitor's undertaking the duty of ensuring that the testator's intention of conferring a benefit upon a beneficiary is realised. In a factual, if not a legal sense [See *White v Jones* at 273–4], that may be seen as assuming a responsibility not only to the testatrix but also to the intended beneficiary.

In the present case there was no reliance upon the solicitor by Mrs Van Erp nor did she request her to do anything for her. Mrs Van Erp did not change her position in reliance upon anything said or done by the solicitor. It is true that Mrs Van Erp was told that she was a beneficiary under the will and took no steps to protect her position. In that way it might be said that she relied upon the solicitor to carry out the testatrix's instructions carefully. However, I make no point of that in the present case [cf *White v Jones* at 219].

What is important is the position of a solicitor as a professional person of specialised skill and knowledge. That is significant with respect to the drawing up and execution of a will because the failure to exercise due care may affect not only the interests of the client but also the interests of others whom the client has in mind as beneficiaries. The interests of those others are relevantly the same as the interests of the client in that situation. Because wills are legal documents involving many technicalities, attending to their preparation and execution requires the exercise of professional skill and care. …

For all of these reasons, I am of the view that a solicitor retained to draw up and attend to the execution of a will is in a relationship of proximity with an intended beneficiary under the will. That relationship gives rise to a duty to exercise reasonable skill and care in the performance of those tasks. That will be so whether or not the intended beneficiary knows of the bequest. The duty arises from the special considerations involving testamentary dispositions which I have discussed above. There is nothing in what I have said which is

intended to convey the view that whenever a person's performance of a contractual obligation may, if performed negligently, injure a third party's economic interests, that person owes the third party a duty of care. Nor is anything I have said intended to convey the view that, other than in a case of the present kind, a solicitor owes a duty of care to persons other than his client whose interests may be affected by the solicitor's performance of his or her duties to the client. The duty of care which I would recognise in the present case arises from the particular relationship between the parties, that relationship being analogous to other relationships of proximity in which a duty of care has been held to arise. It is that which, in addition to the foreseeability of harm, provides the basis in this case for the recognition of tortious liability for negligence. I would therefore dismiss the appeal.

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6.55 Gaudron J held at 193–9:

… Quite apart from any consideration of proximity, the recognition of a duty of care on the part of a solicitor to an intended beneficiary whose interests (in the sense of rights he or she would otherwise have acquired) are defeated by the solicitor's negligent failure to carry a testator's instructions into effect would bring the law of this country into line with the weight of authority in other common law countries.

… As noted by Lord Goff of Chieveley in *White v Jones* [at 255], it has been held in New Zealand, in *Gartside v Sheffield, Young & Ellis* [[1983] NZLR 37], that a solicitor is under a duty of care to an intended beneficiary whose intended interest is lost as a result of the solicitor's negligence. His Lordship also observed that the law appeared to be developing in the same direction in Canada [*Peake v Vernon & Thompson* (1990) 49 BCLR (2d) 245], his observations in this regard having been confirmed, to some extent, by the subsequent decision of the Supreme Court of British Columbia in *Smolinski v*

Mitchell [[1995] 10 WWR 68]. Moreover, as was also observed in *White v Jones*, 'the trend … appears to be moving strongly in favour of liability' in the United States [at 255]. …

Once it is accepted, as it is by the appellant in this case, that but for negligence on the part of a solicitor, a person would have benefited under the will of a testator, the would-be beneficiary's loss is not properly treated as the loss of a mere *spes successionis*. To determine what has been lost, it is necessary to look to the situation as it would have been had there been no negligence. And when viewed in that way, it is apparent that the intended beneficiary has lost a legal right, namely, the right to have the testator's estate properly administered in accordance with the terms of the will. There is nothing novel in the imposition of liability in tort for the loss or impairment of a legal right. …

The relationship in this case as between Ms Hill and Mrs Van Erp is not one that is characterised either by the assumption of responsibility or reliance. Rather, what is significant is that Ms Hill was in a position of control over the testamentary wishes of her client and, thus, in a position to control whether Mrs Van Erp would have the right which the testatrix clearly intended her to have, namely, the right to have her estate properly administered in accordance with the terms of her will.

The importance of control as a factor in proximity and also as a factor governing the content of the duty of care is apparent in *Burnie Port Authority v General Jones Pty Ltd* [at 551]. And although Deane J rested his judgment in *Hawkins v Clayton* on assumption of responsibility and reliance [at 578–9], it seems to me that that case is more easily explained in terms of control. Thus, there was a duty on the part of the solicitor in that case to take reasonable steps to make the contents of a will known to the named executor because, as Brennan J pointed out, 'the executor need[ed] to know of the will and its contents before he [could] accept the office and undertake administration of the estate in accordance with the will' [at 552–3]. Or as I put it in that case, 'a person in that position of control ought to have [the executor] in contemplation as one affected by his failure to

> disclose [the contents of the will]' [at 597]. Moreover, control is in some respects a more stringent test than assumption of responsibility. Certainly neither law nor logic excludes it from consideration as a determinant of proximity in cases of pure economic loss.

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> I am of the view that, by reason of her position of control, in particular her position to control whether Mrs Van Erp would acquire the right to have Mrs Currey's estate properly administered in accordance with the terms of her will, there was a relationship of proximity between Ms Hill and Mrs Van Erp such that Ms Hill was under a duty of care to take reasonable steps to ensure that Mrs Van Erp's testamentary intentions were not defeated by s 15 of the Act. …
>
> The appeal should be dismissed.

6.56 Gummow J concurred with the majority in dismissing the complaint and relied on the proximity test. McHugh J dissented.

6.57 What do you think is the *ratio decidendi* in the *Hill* case? Does the majority limit its decision only to beneficiaries of wills, or can you argue that it extends to other areas of legal practice? What is the role of the proximity test in deciding the extent of liability of lawyers as a result of the *Hill* case? How does the concept of 'control' influence the finding of proximity?

6.58 In his dissenting judgment, McHugh J said that extending liability will lead to increased insurance costs and furthermore that lawyers receive a low income from drawing up wills. Is this a relevant concern? He also argues that the decision has far broader economic implications than just liability for negligently drawing up a will. Do you agree with this point of view?

6.59 The *Hill* case appears to state that the extension of liability of solicitors is only in relation to wills. The court does not clarify how far they would be willing to extend the liability of solicitors to non-clients in other areas. The case has been applied in a number of subsequent cases. The Court of Appeal in New South Wales in *Summerville v Walsh* (Court of Appeal, 26 February 1998, unreported, BC9899342), held that a solicitor is liable to the beneficiary of an intended will for failure to execute the will. In *Humblestone v Martin Tolhurst Partnership* [2004] WTLR 343, solicitors were held liable when they failed to properly execute a will. In this case, there was failure to check the documents to confirm that they were properly executed. For an example where there was no duty found to a beneficiary because the solicitor acted reasonably, see *Miller v Cooney* [2004] NSWCA 380.

6.60 In *Oakley Thompson and Co v Canik* (1998) 23 Fam LR 356; 145 FLR 438, the Family Court used the proximity test to find that a solicitor had no liability to a third party. The court, in applying the test, held that reasonable foreseeability of harm may not be enough to create a duty of care to a third party. In that case, the husband had transferred land to a third party without proper security. The third party defaulted on the mortgage repayments and the mortgagee sold the land. The husband claimed that the transfer took place because of a mistake by the solicitor acting for the third party. The trial judge had found in favour of the husband against this solicitor. The court allowed the appeal and said that the trial judge was wrong to extend the *Hill* case by analogy to a case that had very different policy considerations than the protection of an intended beneficiary of a will.

6.61 An interesting decision in *Queensland Art Gallery Board of Trustees v Henderson Trout (a firm)* [2000] QCA 93, concerned the

situation where, because of a number of circumstances

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including indecision on the part of the testator, and not due to any fault of the solicitor, the testator's instructions did not become finalised. The solicitor, under instructions, had drafted a new will. It was held that there was no duty to the disappointed beneficiary because the testator died before her instructions could be finalised.[31] Although Pincus JA agreed that there was no liability, he said at [31]:

> [31] If a mistake in arranging for the execution of a will as in *Hill v Van Erp* and in *Sommerville v Walsh* … suffices to create a duty of care, then I can see no reason why it should be *held* that a disappointed beneficiary, whose hope of benefit is evident to the solicitor engaged, should not have a right to sue if that hope fails of realisation because of the solicitor's culpable delay in preparing a will.

6.62 For a different result from *Queensland Art Gallery Board of Trustees*, see *Maestrale v Aspite* [2012] NSWSC 1420, where liability was found. A terminally ill client had instructed the solicitor to prepare a new will. He failed to do so for seven days and the client died. The court said that liability did not come from an 'unduly dilatory approach to preparation of the will by allowing the passage of seven days before the will was prepared but in his failure to respond to the plaintiff 's [one of the beneficiaries] urgent calls for advice and attention in the interim'.

6.63 In the recent case of *Howe v Fischer* [2014] NSWCA 286, the Court of Appeal reversed a finding of liability by the lower court, where the solicitor had failed to prepare an informal will

allowed under s 8 of the Succession Act 2006 (NSW). The informal will would have been for a 94 year old woman who died 12 days after meeting with the solicitor. The Court of Appeal allowed the appeal because there were doubts as to whether the deceased had irrevocably committed herself to the scheme of benefits at the conference with her solicitor. Furthermore, the court said there was no indication of impending death or loss of mental capacity at the time of the meeting.

NON-CLIENT LIABILITY — OTHER AREAS

6.64 In relation to non-clients, a solicitor may be wise to draw up in writing a disclaimer of liability to such parties. Furthermore, the solicitor might also state in writing that the third party should seek the advice of their own solicitor. Such a disclaimer can be negated if the solicitor acts in a manner that would justify reliance by the non-client on that solicitor. The following cases are examples of impressions, assurances, and misleading statements relied on by non-clients. In some of these cases, the solicitors were liable, and in others they were not.

6.65 In *Hardware Services v Primac Association Ltd* [1988] 1 Qld R 393, the plaintiff had a three-year unregistered lease that contained an option to renew for three more years. The defendant had given a undertaking to the plaintiff to obtain from any purchaser of the property

a covenant protecting the option. Primac's solicitors had been

instructed to register the lease and this covenant. The plaintiff orally and by writing had also requested Primac's solicitors to do this. The solicitors did not respond to this request by the plaintiff. The plaintiff made no inquiry, nor employed a solicitor or anyone to check on the matter. Primac's solicitors failed to register the lease. When the property was sold, the new owners evicted the plaintiff. Thomas J found that the solicitors had breached their duty to Primac, but not to the plaintiff. Furthermore, that there was no response by the solicitors to the plaintiff 's request, and thus the plaintiffs could not have had any reasonable expectations that the solicitors would carry out the instructions.

6.66 Thomas J based his views on a New Zealand Court of Appeal decision, *Allied Finance and Investments Ltd v Haddow* [1983] NZLR 22, but came to a different result than that case. The solicitors in the *Haddow* case were found liable to a third party where reliance by that party on the solicitor acting was contemplated. The solicitor had acted by giving a certificate to a money-lender to the effect that the client's yacht was free of any charges. The court said that a certificate is more than a mere statement, but something less than an undertaking. It found that the solicitor's action had given the third party the wrong impression. Therefore, a reasonable expectation that the yacht was unencumbered had been created for the third party.

6.67 The Victorian Court of Appeal in *McGee O'Callaghan Gill Pty Ltd v Deacons Graham James* [2001] VSCA 105, held that the solicitors were not liable to a third party real estate agent. The court said that the solicitors could not have foreseen that the owner and its agent would not exercise ordinary prudence to protect the exercise of an option. The Court of Appeal did not apply the *Hill* case, but did make reference to the *Hawkins* case.

6.68 In *Thors v Weeke* (1989) 92 ALR 131, it was alleged by the plaintiffs that the respondents' solicitors had an obligation to disclose to them that no title search had been taken. No liability was found because the plaintiffs were represented by their own solicitors. Thus there did not exist an assumption of responsibility and reliance giving rise to a duty of care.

6.69 In *Watkins v De Varda* [2003] NSWCA 242, a solicitor had been asked to prepare two contracts to transfer a client's property interests in Cambodia to the respondent in return for gold bullion and cash. These were paid, but the property could not be transferred, as the contracts were legally ineffective. The respondent sued the solicitor when he could not recover the money and bullion. The trial judge found that the respondent relied on the solicitor to protect his interests because the solicitor had given the impression that he was acting for both the client and the respondent. The Court of Appeal upheld the decision and found that the solicitor owed a duty of care to the respondent, even though there was a conflict of interest with his client.

6.70 In *Bartle v GE Custodians* [2010] 1 NZLR 802, the New Zealand High Court found liability for the giving of preliminary advice. The solicitor expected to be retained in due course by the plaintiffs. The plaintiffs had asked him about the risks concerning a joint venture and he conveyed a misleading impression as to the risks that were involved. The judge said that it

should have been obvious to the solicitor that if the joint venture failed, the plaintiffs did not have the means to meet their

obligations.

6.71 In England, it was stated in *Business Computers International Ltd v Registrar of Companies* [1987] 3 WLR 1134, that '[a] solicitor acting for a party who is engaged in "hostile" litigation owes a duty to his client and to the court, but he does not normally owe any duty to his client's opponent'. The English courts have made an exception to this rule and held solicitors to be liable when they have assumed responsibility towards the opposing side, and that party has relied on that assumption. An example of this exception is the case of *Al-Kandari v JR Brown & Co* [1988] QB 665. The solicitors for the respondent husband in a custody matter lodged their client's passport with the Kuwait Embassy to have the children's names removed. This action was against an undertaking of the husband that his passport would be retained by the respondent. The husband secured the passport from the Embassy and abducted the children to Kuwait. The appellant wife won an action in the Court of Appeal, which held that the husband's solicitors owed her a duty of care.

DEVELOPMENT OF THE IMMUNITY DOCTRINE

6.72 Australia and Scotland are the only jurisdictions that retain the immunity doctrine. The doctrine exempts lawyers from their negligence actions with some exceptions. This doctrine was developed by the English courts over a long period of time and was followed in Australia. It is somewhat ironic that the House of Lords removed the doctrine in 2002, while it was retained in Australia. It is important to see what reasons are still present for maintaining the doctrine. In this section we look at how the case law has developed the scope of the immunity doctrine.

6.73 In *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 (House of Lords), Ali, the passenger, and Akram, the driver, were injured in an accident with a motor vehicle driven by Mrs Sugden and owned by her husband. Ali and Akram retained Sydney Mitchell & Co, a firm of solicitors, which instructed a barrister to advise on the matter. The firm followed the barrister's advice, and proceedings were jointly commenced by Ali and Akram against Mr Sugden. Mr Sugden then asserted that Mrs Sugden had not been driving as his agent, and that Akram had been negligent and should be joined as a defendant. Again they sought advice from the barrister, who told them to join Akram and Mrs Sugden as defendants. However, by this time it was too late to add them as defendants because the limitation period had expired. When the action against Mr Sugden was unsuccessful, Ali commenced proceedings for negligence against his solicitors for failing to add the other two as defendants. The solicitors, in turn, sought to join the barrister in the action, which raised the question of the barrister's immunity to the action.

6.74 Lord Wilberforce noted at 210–15:

> My Lords, in *Rondel v Worsley* [1969] 1 AC 191, this House decided that a barrister was immune from an action for professional negligence in respect of acts or omissions during the trial of criminal proceedings against his lay client. …

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> [T]he existence of a duty of care, and correspondingly of liability in negligence for failure to exercise that duty, continues in the natural course of legal evolution to expand as new situations come before the courts. But I do not think that this natural process which bears upon the existence of a duty of care should lead us to sweep away after so

short a time an immunity from suit on special grounds of principle, which after many centuries of existence has been restated by this House. No ground was suggested why we should reopen the decision in *Rondel v Worsley* and I do not think we should do so. What is required of us is a decision on the limits of an immunity held by this House to exist — a fringe decision rather than a new pattern. …

His Lordship then quoted the test formulated by McCarthy P in *Rees v Sinclair* [1974] 1 NZLR 180 at 187:

> 'I cannot narrow the protection to what is done in court: it must be wider than that and include some pre-trial work. Each piece of before-trial work should, however, be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice, and that is why I would not be prepared to include anything which does not come within the test I have stated.'

… [This] passage, if sensibly, and not pedantically, construed, provides a sound foundation for individual decisions by the courts whether immunity exists in any given case. I should make three observations. First, I think that the formulation takes proper account, as it should, of the fact that many trials, civil and criminal take place only after interlocutory or pre-trial proceedings. At these proceedings decisions may often fall to be made of the same nature as decisions at the trial itself: it would be illogical and unfair if they were protected in the one case but not in the other. … Thirdly, I would hold that the same immunity attaches to a solicitor acting as an advocate in court as attaches to a barrister. …

His Lordship then held that failure in this case fell well outside the immunity area.

6.75 Lord Diplock noted at 220:

> My Lords, the argument founded upon the barrister's competing duties to court and client, upon which this House so strongly relied in *Rondel v Worsley*, loses much of its cogency when the scene of the exercise of the barrister's judgment as to where the balance lies between these duties is shifted from the hurly-burly of the trial to the relative tranquillity of the barrister's chambers. The kind of judgment which a barrister has to exercise in advising a client as to who should be made defendant to a proposed action and how the claim against him should be pleaded, if made with opportunity for reflection, does not seem to me to differ in any relevant respect from the kind of judgment which has to be made in other fields of human activity, in which prognosis by professional advisers plays a party. If subsequently a barrister is sued by his own client for negligence on what he advised or did in the particular case, he has the protection that the judge before whom the action for negligence against

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> him will be tried is well qualified without any need of expert evidence, to make allowance for the circumstances in which the impugned decision fell to be made and to differentiate between an error that was so blatant as to amount to negligence and an exercise of judgment which, though in the event it turned out to have been mistaken, was not outside the range of possible courses of action that in the circumstances reasonably competent members of the profession might have chosen to take.

6.76 Lord Diplock then discussed the 'cab rank' used in *Rondel v Worsley* for maintaining the immunity, and rejects its relevance, noting at 221–4:

> There are, however, two additional grounds referred to in some of the speeches in *Rondel v Worsley* which can be used to supplement those

reasons so far as they protect a barrister from liability in respect of the way in which he has conducted proceedings in court, including in this expression interlocutory proceedings before the master or in chambers; save to a very limited extent, however, neither of them would apply to work done out of court.

The first is that the barrister's immunity from liability for what he says and does in court is part of the general immunity from civil liability which attaches to all persons in respect of their participation in proceedings before a court of justice; judges, court officials, witnesses, parties, counsel and solicitors alike. The immunity is based on public policy, designed, as was said by Lord Morris of Borth-y-Gest in *Rondel v Worsley* (p 251), to ensure that trials are conducted without avoidable stress and tensions of alarm and fear in those who have a part to play in them. The courts have been vigilant to protect this immunity from indirect as well as direct attack — for instance by suing witnesses for damages for giving perjured evidence or for conspiracy to give false evidence. In *Watson v M'Ewan* [1905] AC 480, this House held that in the case of witnesses the protection extended not only to the evidence that they give in court but to statements made by the witness to the client and to the solicitor in preparing the witness's proof for the trial; since, unless these statements were protected, the protection to which the witness would be entitled at the trial could be circumvented.

The second reason is also based upon the need to maintain the integrity of public justice. An action for negligence against a barrister for the way in which he has conducted a case in court is founded upon the supposition that his lack of skill or care has resulted in the court having reached a decision that was not merely adverse to his client as to liability or quantum or damages but was wrong in being adverse and in consequence was unjust, for otherwise no damage could be shown to have resulted from the barrister's act or omission of which complaint is made. The client cannot be heard to complain that the barrister's lack of skill or care prevented him from obtaining a wrong decision in his favour from a court of justice. So he must prove that if the action had been conducted by his counsel he would have

succeeded instead of failed.

Under the English system of administration of justice, the appropriate method of correcting a wrong decision of a court of justice reached after a contested hearing is by appeal against the judgment to a superior court. This is not based solely on technical doctrines of *res judicata* but upon principles of public policy, which also discourage collateral attack on the

correctness of a subsisting judgment of a court of trial upon a contested issue by re-trial of the same issue, either directly or indirectly in a court of co-ordinate jurisdiction. Yet a re-trial of any issue decided against a barrister's client in favour of an adverse party in the action in respect of which allegations of negligent conduct by the barrister are made would be an indirect consequence of entertaining such an action.

The re-trial of the issue in the previous action, if it depended on oral evidence, would have to be undertaken de novo. This would involve calling anew after a lapse of time witnesses who had been called at the previous trial and eliciting their evidence before a different judge by question in examination and cross-examination that were not the same as those that had been put to them at the previous trial. The circumstances in which the barrister had made decisions as to the way in which he would conduct the previous trial, and the material on which those decisions were based, could not be reproduced in the re-trial; and the initial question in the action for negligence: whether it has been established that the decision adverse to the client reached by the court in the previous trial was wrong, would become hopelessly entangled with the second question: whether it has been established that notwithstanding the differences in the circumstances in which the previous trial was conducted, it was the negligent act or omission of the barrister in the conduct of his client's case that caused the wrong

decision by the court and not any other of those differences. …

My Lords, it seems to me that to require a court of co-ordinate jurisdiction to try the question whether another court reached a wrong decision and, if so, to inquire into the causes of its doing so, is calculated to bring the administration of justice into disrepute. …

… The two additional grounds of public policy for granting a barrister immunity for what he does in court apply with equal force to what a solicitor does when acting as advocate in those courts in which solicitors have rights of audience; but subject to what is said below neither of them applies to what a barrister does outside court in advising about litigation or settling documents for use in litigation. Without the support of those additional grounds of public interest, as I have already indicated, I can find no sufficient reason for extending the immunity to anything that a barrister does out of court; save for a limited exception analogous to the extension of a witness's protection in respect of evidence which he gives in court to statements made by him to the client and his solicitor for the purpose of preparing the witness's proof for trial. The extent of this exception was in my view well expressed by McCarthy P in the Court of Appeal of New Zealand (where the profession is fused) in *Rees v Sinclair* [1974] 1 NZLR 180 at 187. So for instance in the English system of a divided profession where the practice is for the barrister to advise on evidence at some stage before the trial his protection from liability for negligence in the conduct of the case at trial is not to be circumvented by charging him with negligence in having previously advised the course of conduct at the hearing that was subsequently carried out.

It would not be wise to attempt a catalogue of before-trial work which would fall within this limited extension of the immunity of an advocate from liability for the way in which he conducts a case in court.

> The work which the barrister in the instance case is charged with having done negligently, viz in advising as to who was to be a party to an action and settling pleadings in accordance with that advice, was all done out of court. In my view, it manifestly falls outside the limited extension of the immunity which I have just referred to.

6.77 Lord Salmon expressed his agreement with the adoption of the *Rees v Sinclair* test, and accepted that advocate solicitors enjoy exactly the same immunity as barristers. He pointed out that the duty to the court, the inability to sue for fees, and the lacking of contractual relations — as public policy arguments from *Rondel v Worsley*, which were grounds for granting the immunity in that case — had no place in the present case. Lord Russell of Killowen and Lord Keith of Kinkel dissented, holding that there should be no exceptions to the immunity doctrine — that it covered all work.

6.78 If an advocate is negligent in a criminal matter, the accused can appeal on the grounds of ineffective representation leading to a miscarriage of justice. What remedy does a litigant in a civil action have against a negligent advocate? What if the advocate is grossly negligent in a civil action — should there be a right to appeal, similar to that in criminal actions?

6.79 In *Giannarelli & Shulkes v Wraith* (1988) 165 CLR 543; 81 ALR 417, the High Court decided at 4:3 that s 10(2) of the Legal Profession Practice Act 1958 (Vic) did not negate the immunity doctrine and allow advocates to be subject to liability for negligence. The Legal Practice Act 1996 (Vic) under s 442 stated that '[n]othing in this Act abrogates any immunity from liability for negligence enjoyed by legal practitioners before the commencement of this section'. This provision was re-enacted in almost identical language in s 7.2.11 of the Legal Profession Act 2004 (Vic), but does not appear in the new Legal Profession Uniform Law Act (Vic) 2014.

6.80 The court also held in *Giannarelli* by a 4:1 majority that advocates were not subject to a common law duty of care in negligence. The majority directly or indirectly adopted the 'intimately related to litigation' test in *Rees v Sinclair*. The majority in *Giannarelli* based its reasons for upholding the immunity on public policy grounds. Mason CJ felt that counsels' overriding duty to the court would be affected if they were exposed to liability in negligence. This would therefore create a real risk of adverse consequences for the efficient administration of justice. He also said that there would be an adverse impact on the administration of justice if court decisions become the subject of collateral attack. Wilson and Dawson JJ agreed with the likelihood of adverse impact on the administration of justice as a result of collateral attack on judgments. They also said that public policy demanded that advocates in court should be free from the constraints which the possibility of civil action would necessarily impose. For this purpose, there was no real difference between an action for damages for defamation or for negligence. Brennan J based his decision on the fact that the abrogation of the immunity would imperil the assistance that the courts obtain from the advocacy of an independent profession.

6.81 There have been a number of cases dealing with the problem of applying the 'intimately related to litigation' test. The test has been applied to both solicitors and barristers. The cases

show the difficulty of applying the test, especially for negligence actions occurring before litigation or during litigation, but not in the court room or for 'mechanical' tasks.

6.82 In *Keefe v Marks* (1989) 16 NSWLR 713 in the New South Wales Court of Appeal, the barrister failed to include interest on the damages in the statement of claim. The majority, Gleeson CJ and Meagher JA, held that the interest on the damages fell within the scope of the immunity doctrine because it was intimately related to litigation.[32] Priestley JA dissented, quoting from Mason CJ in *Giannarelli & Shulkes v Wraith* (1988) 62 ALJR 611 at 614–15; 81 ALR 417 at 424; 35 A Crim R 1 at 7, and noting as follows at 722–5:

> 'The problem is: where does one draw the dividing line? Is the immunity to end at the courtroom door so that the protection does not extend to preparatory activities such as the drawing and settling of pleadings and the giving of advice on evidence? To limit the immunity in this way would be to confine it to conduct and management of the case in the courtroom, thereby protecting the advocate in respect of his tactical handling of the proceedings.
>
> 'However, it would be artificial in the extreme to draw the line at the courtroom door. Preparation of a case out of court cannot be divorced from presentation in court. The two are inextricably interwoven so that the immunity must extend to work done out of court which leads to a decision affecting the conduct of the case in court. But to take the immunity any further would entail a risk of taking the protection beyond the boundaries of the public policy considerations which sustain the immunity. I would agree with McCarthy P in *Rees v Sinclair* [1974] 1 NZLR 180. …'

[In *Giannarelli*] Wilson J did not explicitly formulate what he thought the general rule was, but his references to *Rondel, Rees* and *Saif Ali* … seem to me to make it relatively clear that he accepted the reasoning in those decisions, including the adoption in *Saif Ali* of the statements by McCarthy P in *Rees* which Mason CJ reproduced in that part of his

reason … Brennan J said he agreed with Mason CJ on the common law immunity aspect of the case, then adding (at 623; 439; 22–23):

> '… Therefore I would hold the common law to be this: neither a barrister nor a solicitor may be sued by a client in respect of any act done or omission made in the conduct of the client's case in court or in the making of preliminary decisions affecting the way in which the case is to be conducted when it comes to a hearing.'

…

In the present case, the gist of the barrister's alleged negligence is that at no time from his first receipt of the brief to advise and appear on hearing until after the Master had given judgment did he do anything about claiming interest upon any damages accrued before judgment. This allegation embraced the conduct of the case both out of court before hearing and in court. It was not contested in the argument in this Court that the opponent was immune from liability for negligence in respect of the in-court part of the allegation. The question became whether it was arguable that the failure to raise the question of interest

before the in-court stage of the proceedings was reached fell within the description of work so intimately connected with the in-court conduct of the case that it could fairly be said to be a preliminary decision affecting the way the cause was to be conducted in court: or, to ask the question formulated by Brennan J, did the out-of-court failure to raise the question of interest amount to the making of a preliminary decision affecting the way in which the case was to be conducted in court.

In many cases [such as this case] the only preparation necessary in regard to the interest component of a claim, which is not part of the

> cause of action, will be the need to bear in mind that the claim should be made and readiness to put some simple arithmetical submissions to the Court. These matters are essentially incidental and not integral to the establishment of the cause of action in a negligence case and hence the conduct of that case in court.
>
> …
>
> The foregoing reasons lead me to conclude that it was arguable that the negligence alleged in the statement of claim did not fall within the out-of-court immunity rule supported by the majority of the High Court in *Giannarelli*. …

6.83 In *Keefe v Marks* (1989) 16 NSWLR 713, Priestley J appears to argue that the 'intimately related to litigation' test only includes within its scope matters that are integral to the establishment of the cause of action. If a matter is incidental to conduct of the case in court, should it fall outside the test?

6.84 In *Symonds v Vass* [2007] NSWSC 1274, Patten AJ had to deal with where to draw the line on the scope of the immunity doctrine in relation to the actions of a solicitor litigator. The immunity doctrine was upheld in relation to any negligence on the part of the solicitor that took place in the proceedings brought against the valuer and for the negotiated settlement agreed to by the plaintiffs. However, Patten AJ did find that other actions by the solicitor fell outside the scope of the doctrine. He said that the failure to provide proper particulars, the acceptance of a trial date for a case when not being ready for trial, and the failure to seek vacation of the hearing date all fell outside the 'intimately connected to litigation' test. The plaintiffs appealed the aspect of the case that upheld the immunity doctrine in relation to the proceedings against the valuer in *Symonds v Vass* [2009] NSWCA 139. The appeal was dismissed by a 2:1 judgment.

6.85 It should be noted that the inability to sue because of the immunity doctrine is not a barrier to disciplinary action for negligence. In a matter before the New South Wales Legal Services Tribunal, a barrister was negligent in drawing up terms of a settlement agreement that was read and adopted 'in court', but had not been agreed to by the client. Although the barrister was immune from being sued, the Tribunal found that the barrister's failure was negligence that constituted 'unsatisfactory professional conduct'. A penalty was imposed.[33]

ABOLITION OF THE IMMUNITY DOCTRINE IN ENGLAND

6.86 *Hall & Co v Simons* [2000] 3 All ER 673 involved claims against firms of solicitors in three separate actions that were heard together on appeal. Two of the cases concerned allegations of negligence in family proceedings, and the third dealt with negligent advice on the settlement concerning the claim for a share of the matrimonial home after a divorce. The allegations had not been investigated in the lower court until the appeals resolved the issue of immunity. Although the allegations related to civil matters, the contentious issue before the Lords was the removal of the immunity in criminal cases. The Lords, by a unanimous decision, removed the immunity for civil matters, and by a 4:3 vote removed the immunity for criminal matters. Lord Steyn discussed the arguments for and against the immunity and showed that the reasons for maintaining it no longer existed. As will be seen later in this Chapter,[34] the Australian High Court agreed with almost all

these reasons, but still retained the doctrine. In his judgment, Lord Browne-Wilkinson gives important reasons why the immunity should be removed in criminal cases.

6.87 Lord Steyn held at 680–2:

> … It is now possible to take stock of the arguments for and against the immunity. … First, there is the ethical 'cab rank' principle. It provides that barristers may not pick and choose their clients. It binds barristers but not solicitor advocates. It cannot therefore account for the immunity of solicitor advocates. It is a matter of judgment what weight should be placed on the 'cab rank' rule as a justification for the immunity. It is a valuable professional rule. But its impact on the administration of justice in England is not great. In real life a barrister has a clerk whose enthusiasm for the unwanted brief may not be great, and he is free to raise the fee within limits. It is not likely that the rule often obliges barristers to undertake work which they would not otherwise accept. When it does occur, and vexatious claims result, it will usually be possible to dispose of such claims summarily. In any event, the 'cab rank' rule cannot justify depriving all clients of a remedy for negligence causing them grievous financial loss. … Secondly, there is the analogy of the immunities enjoyed by those who participate in court proceedings. … Those immunities are founded on the public policy which seeks to encourage freedom of speech in court so that the court will have full information about the issues in the case. For these reasons they prevent legal actions based on what is said in court. … [T]his has little, if anything, to do with the alleged legal policy which requires immunity from actions for negligent acts. … If the latter immunity has merit it must rest on other grounds. Whilst this factor seemed at first to have some attractiveness, it has on analysis no or virtually no weight at all.
>
> The third factor is the public policy against re-litigating a decision of a court of competent jurisdiction. This factor cannot support an immunity extending to cases where there was no verdict by the jury or decision by the court. It cannot arguably justify the immunity in its

present width. The major question arises in regard to criminal trials which have resulted in a verdict by a jury or a decision by the court. Prosecuting counsel owes no duty of care to a defendant: *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335. The

position of defence counsel must however be considered. Unless debarred from doing so, defendants convicted after a full and fair trial who failed to appeal successfully, will from time to time attempt to challenge their convictions by suing advocates who appeared for them. This is the paradigm of an abusive challenge. It is a principal focus of the principle in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. Public policy requires a defendant, who seeks to challenge his conviction, to do so directly by seeking to appeal his conviction. In this regard the creation of the Criminal Cases Review Commission was a notable step forward. Recently in *Reg v Secretary of State for the Home Department, Ex parte Simms* [1999] 3 WLR 328, 338, there was uncontroverted evidence before the House that the Commission is seriously under-resourced and under-funded. Incoming cases apparently have to wait two years before they are assigned to a case worker. This is a depressing picture. The answer is that the functioning of the Commission must be improved. But I have no doubt that the principle underlying the *Hunter* case must be maintained as a matter of high public policy. In the *Hunter* case the House did not, however, 'lay down an inflexible rule to be applied willy-nilly to all cases which might arguably be said to be within it': *Smith v Linskills* [1996] 1 WLR 763, 769C–F *per* Sir Thomas Bingham, MR (now Lord Bingham of Cornhill). It is, however, prima facie an abuse to initiate a collateral civil challenge to a criminal conviction. Ordinarily therefore a collateral civil challenge to a criminal conviction will be struck out as an abuse of process. On the other hand, if the convicted person has succeeded in having his conviction set aside on any ground, an action against a barrister in negligence

will no longer be barred by the particular public policy identified in the *Hunter* case. But, in such a case the civil action in negligence against the barrister may nevertheless be struck out as unsustainable under the new flexible Civil Procedure Rules, 1999; rules 3.4(2)(a) and 24.2. If the *Hunter* case is interpreted and applied in this way, the principal force of the fear of oblique challenges to criminal convictions disappears. Relying on my experience of the criminal justice system as a presiding judge on the Northern Circuit and as a member of the Court of Appeal (Criminal Division), I do not share intuitive judgments that the public policy against re-litigation still requires the immunity to be maintained in criminal cases. That leaves collateral challenges to civil decisions. The principles of res judicata, issue estoppel and abuse of process as understood in private law should be adequate to cope with this risk. It would not ordinarily be necessary to rely on the *Hunter* principle in the civil context but I would accept that the policy underlying it should still stand guard against unforeseen gaps. In my judgment a barrister's immunity is not needed to deal with collateral attacks on criminal and civil decisions. The public interest is satisfactorily protected by independent principles and powers of the court.

The critical factor is, however, the duty of a barrister to the court. It also applies to every person who exercises rights of audience before any court, or who exercises rights to conduct litigation before a court. … It is essential that nothing should be done which might undermine the overriding duty of an advocate to the court. The question is however whether the immunity is needed to ensure that barristers will respect their duty to the court. The view of the House in 1967 was that assertions of negligence would tend to erode this duty. In the world of today there are substantial grounds for questioning this ground of public policy. In 1967 the House considered that for reasons of public policy barristers must be accorded a special status.

Nowadays a comparison with other professionals is important. Thus doctors have duties not only to their patients but also to an ethical code. Doctors are sometimes faced with a tension between these duties.

Concrete examples of such conflicting duties are given by Ian Kennedy, *Treat Me Right; Essays in Medical Law and Ethics*, (1988). A topical instance is the case where an Aids infected patient asks a consultant not to reveal his condition to the patient's wife, general practitioner and other healthcare officials. Such decisions may easily be as difficult as those facing barristers. And nobody argues that doctors should have an immunity from suits in negligence.

Comparative experience may throw some light on the question whether in the public interest such an immunity of advocates is truly necessary. In 1967 no comparative material was placed before the House. Lord Reid did, however, mention other countries where public policy points in a different direction: [1969] 1 AC 191, 228E. In the present case we have had the benefit of a substantial comparative review. …

6.88 Lord Browne-Wilkinson held at 685–6:

… The point on which your Lordships are divided is whether the same rules should apply whether the negligence alleged against the advocate relates to his conduct of a civil action or to a criminal prosecution. Are there, as some of your Lordships think, special reasons which require the immunity of the advocate in a criminal trial to be maintained? Of the four main grounds relied upon as justifying the immunity, only one seems to me to be capable of justifying the immunity, namely that to allow an action for negligence against the advocate for his conduct in earlier litigation is necessarily going to involve the risk that different conclusions on issues decided in the first case will be reached in the later case. In the context of civil proceedings (ie, where the advocate is sought to be made liable for his conduct of a civil action) although such conflicting decisions are undesirable, they are far from unknown. But in the context of criminal

proceedings (ie, when the advocate's negligence occurred in the course of a criminal trial) the decision is far more difficult. In the overwhelming majority of cases, the action in negligence will not be capable of succeeding unless the verdict of guilty in the original trial is held to have been incorrect; if the complainant was in any event guilty of the alleged crime, the negligence of his advocate, even if proved, would not have been shown to be causative of any loss.

Therefore, if there is to be a successful action for negligence in criminal matters, so long as the plaintiff 's criminal conviction stands there will be two conflicting decisions of the court, one (reached by judge and jury on the criminal burden of proof) saying that he is guilty, the other (reached by a judge alone on balance of probability) that he is not guilty. My Lords, I would find such conflicting decisions quite unacceptable. If a man has been found guilty of a crime in a criminal trial, for all the purposes of society he is guilty unless and until his conviction is set aside on appeal.

Therefore, if the removal of the advocate's immunity in criminal cases would produce these conflicting decisions, I would have no doubt that the public interest demanded that the advocate's immunity be preserved.

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But in my judgment the law has already provided a solution where later proceedings are brought which directly or indirectly challenge the correctness of a criminal conviction. *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 establishes that the court can strike out as an abuse of process the second action in which the plaintiff seeks to re-litigate issues decided against him in earlier proceedings if such re-litigation would be manifestly unfair to the defendant or would bring the administration of justice into disrepute. In view of the more restrictive rules of res judicata and issue estoppel it is not clear to me how far the *Hunter* case goes where the challenge

is to an earlier decision in a civil case. But in my judgment where the later civil action must, in order to succeed, establish that a subsisting conviction is wrong, in the overwhelming majority of cases to permit the action to continue would bring the administration of justice into disrepute. Save in truly exceptional circumstances, the only permissible challenge to a criminal conviction is by way of appeal.

It follows that, in the ordinary case, an action claiming that an advocate has been negligent in criminal proceedings will be struck out as an abuse of process so long as the criminal conviction stands. Only if the conviction has been set aside will such an action be normally maintainable. In these circumstances there is no need to preserve an advocate's immunity for his conduct of a criminal case since, in my judgment, the number of cases in which negligence actions are brought after a conviction is quashed is likely to be small and actions in which the conviction has not been quashed will be struck out as an abuse of process. …

6.89 Lord Hoffmann said at 689:

Members of other professions, and the public in general, are bound to view with some scepticism the claims of lawyers that the public interest requires them to have a special immunity from liability for negligence. If your Lordships are convinced that there are compelling arguments for such an immunity, you should not of course be deterred from saying so by fear of unfounded accusations of collective self-interest. But those arguments need to be strong enough to convince a fair-minded member of the public. They cannot be based merely upon intuitions.

RETENTION OF THE IMMUNITY DOCTRINE IN AUSTRALIA

6.90 It was thought at the time that the House of Lords' decision in *Hall & Co v Simons* [2000] 3 All ER 673 may have acted as an incentive for change in Australia. However, this was not the case.

The High Court is not bound by the House of Lords' decisions.

6.91 In *D'Orta-Ekenaike v Victorian Legal Aid* [2005] HCA 12; (2005) 223 CLR 1, the High Court retained the immunity doctrine 6-1 on the basis of the finality principle. The majority opinion was written by Gleeson CJ, Gummow, Hayne, and Heydon JJ. McHugh and Callinan JJ also agreed with the decision, but wrote separate opinions. Kirby J was the only dissent. Most of the extensive footnotes have been removed.

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In this case, the applicant alleged that he was wrongly advised and pressured to plead guilty to rape at his committal hearing. He later changed the plea at trial and was found guilty, but on appeal the verdict was quashed. At his new trial, with different lawyers, he was found not guilty. He then wanted to sue the original lawyers — a solicitor retained by Victoria Legal Aid and the barrister briefed in the matter — and was granted leave to appeal.

6.92 Gleeson CJ, Gummow, Hayne, and Heydon JJ held as follows at [1]–[92].

> [1] There are two principal issues in this matter. First, should the court reconsider its decisions in *Giannarelli v Wraith*? …
>
> Secondly, does the immunity apply to the acts or omissions of a solicitor which, if committed by an advocate, would be immune from suit? …
>
> …
>
> [The court then outlines the facts of the case and discusses, as the first aspect of *Giannarelli*, the statutory retention of immunity in Victoria, which has been omitted.]

[25] The second aspect of the decision in *Giannarelli* which is now important is the conclusion reached about the common law. … [T]he decision in *Giannarelli* must be understood having principal regard to two matters:

(a) the place of the judicial system as a part of the governmental structure; and
(b) the place that an immunity from suit has in a series of rules all of which are designed to achieve finality in the quelling of disputes by the exercise of judicial power.

Although reference is made in *Giannarelli* to matters such as:

(a) the supposed connection between a barrister's immunity and an inability to sue the client for professional fees;
(b) the potential competition between the duties which an advocate owes to the court and a duty of care to the client; and
(c) the desirability of maintaining the cab rank rule;

each was, and should be, put aside as being, at most, of marginal relevance to whether an immunity should be held to exist. …

[28] Likewise, it is as well to mention at this point a further consideration that must be put aside as irrelevant. It may readily be accepted that advocates must make some decisions in court very quickly and without pausing to articulate the reasons which warrant the choice made. But so too do many others have to make equally difficult decisions. Reference to the difficulty of the advocate's task is distracting and irrelevant.

[29] Further, although not irrelevant, we would consider the 'chilling' effect of the threat of civil suit, with a consequent tendency to the prolongation of trials, as not of determinative significance in deciding whether there is an immunity from suit. …

[30] Chief attention must be given to the nature of the judicial process and the role that the advocate plays in it.

The judicial process as an aspect of government

[31] In *Giannarelli*, Mason CJ said that 'the barrister's immunity, if it is to be sustained, must rest on considerations of public policy'. His Honour explained that the term 'immunity' was used in a sense which assumed that rights and duties might otherwise exist at common law, but the immunity is sustained on considerations of public policy and 'the injury to the public interest that would arise in the absence of immunity'. Of the various factors advanced to justify the immunity, 'the adverse consequences *for the administration of justice* which would flow from the relitigation in collateral proceedings for negligence of issues determined in the principal proceedings' (emphasis added) was held to be determinative. The significance of the reference to the administration of justice is of fundamental importance to the proper understanding of the immunity and its foundation.

[32] To adopt the language found in the cases considering Ch III of the Constitution, the central concern of the exercise of judicial power is the quelling of controversies. Judicial power is exercised as an element of the government of society and its aims are wider than, and more important than, the concerns of the particular parties to the controversy in question, be they private persons, corporations, polities, or the community as personified in the Crown or represented by a Director of Public Prosecutions. No doubt the immediate parties to a controversy are very interested in the way in which it is resolved. But the community at large has a vital interest in the final quelling of that controversy. And that is why reference to the 'judicial branch of government' is more than a mere collocation of words designed to instil respect for the judiciary. It reflects a fundamental observation about the way in which this society is governed.

…

Finality

[34] A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. That tenet finds reflection in the restriction upon the reopening of final orders after entry and in the rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud [*DJL v Central Authority* (2000) 201 CLR 226]. The tenet also finds reflection in the doctrines of res judicata and issue estoppel. Those doctrines prevent a party to a proceeding raising, in a new proceeding against a party to the original proceeding, a cause of action or issue that was finally decided in the original proceeding [See, for example, *Hoysted v Federal Commissioner of Taxation* (1925) 37 CLR 290; [1926] AC 155; *Blair v Curran* (1939) 62 CLR 464; *Jackson v Goldsmith* (1950) 81 CLR 446; *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353]. It is a tenet that underpins the extension of principles of preclusion to some circumstances where the issues raised in the later proceeding could have been raised in an earlier proceeding [*Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589].

[35] The principal qualification to the general principle that controversies, once quelled, may not be reopened is provided by the appellate system. But even there, the importance of finality pervades the law. Restraints on the nature and availability of appeals, rules about

what points may be taken on appeal [*Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73] and rules about when further evidence may be called in an appeal (in particular, the so-called 'fresh evidence rule' [*Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418; *O'Brien v Komesaroff* (1982) 150 CLR 310; *Coulton v Holcombe* (1986) 162 CLR 1]) are all rules based on the need for finality.

…

Other immunities from suit

[37] Parties who fail in litigation, whatever its subject, may well consider the result of that litigation to be wrong, even unjust. Seldom will a party have contested litigation without believing, or at least hoping, that it will be resolved in that party's favour. If that party does not succeed, an explanation for failure may be sought in what are perceived to be the failures of others — the judge, the witnesses, advocates — anyone other than the party whose case has been rejected.

[38] This is no new phenomenon. It is a problem with which the common law has had to grapple for centuries. Its response has been the development of immunities from suit for witnesses, judges and advocates. The origin of these rules can be traced to decisions of the 16th and 17th centuries.

…

[The court then discusses in detail the development of the immunities, and concludes this section by stating:]

[42] … Of that immunity it has been said in *Mann v O'Neill* [(1997) 191 CLR 204 at 239 per Gummow J] that it responds to two related considerations, 'to assist full and free access to independent courts for the impartial quelling of controversies, without fear of the consequences' and 'the avoidance of the re-agitation by discontented parties of decided cases after the entry of final judgment' other than by appellate processes. That view of the matter reflects the consideration that what is at stake is the public interest in 'the effective performance' of its function by the judicial branch of government [cf *Gibbons v Duffell* (1932) 47 CLR 520 at 528 per Gavan Duffy CJ, Rich and Dixon JJ].

The judicial process as an aspect of government — conclusions

[43] The 'unique and essential function' of the judicial branch is the quelling of controversies by the ascertainment of the facts and the

application of the law. Once a controversy has been quelled, it is not to be relitigated. Yet relitigation of the controversy would be an inevitable and essential step in demonstrating that an advocate's negligence in the conduct of litigation had caused damage to the client.

[44] The question is not, as may be supposed [cf *Arthur J S Hall v Simons* [2002] 1 AC 615 at 680 per Lord Steyn], whether some special status should be accorded to advocates above that presently occupied by members of other professions. Comparisons made with other professions appear sometimes to proceed from an unstated premise that the law of negligence has been applied, or misapplied, too harshly against members of other

professions, particularly in relation to factual findings about breach of duty, but that was not a matter argued in this court and should, in any event, be put to one side. Nor does the question depend upon characterising the role which the advocate (a private practitioner) plays in the administration of justice as the performance of a public or governmental function.

[45] Rather, the central justification for the advocate's immunity is the principle that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances. This is a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society. If an exception to that tenet were to be created by abolishing that immunity, a peculiar type of relitigation would arise. There would be relitigation of a controversy (already determined) as a result of what had happened during, or in preparation for, the hearing that had been designed to quell that controversy. Moreover, it would be relitigation of a skewed and limited kind. No argument was advanced to this court urging the abolition of judicial or witness immunity. If those immunities remain,

it follows that the relitigation could not and would not examine the contribution of judge or witness to the events complained of, only the contribution of the advocate. An exception to the rule against the reopening of controversies would exist, but one of an inefficient and anomalous kind.

[46] A justification based on finality has as much force today as it did when *Giannarelli* was decided. Given this, what changes have occurred since the decision in *Giannarelli* which would necessitate a reconsideration of that decision?

[47] Three matters will be considered. First, there have been some changes to statutes that must be noticed. Secondly, there has been the decision of the House of Lords in *Arthur J S Hall & Co v Simons* that the public interest in the administration of justice in England and Wales no longer required that advocates enjoy immunity from suit for alleged negligence in the conduct of civil or criminal proceedings. Thirdly, it will be necessary to say something shortly about the experience in other jurisdictions.

…

[The court then says it will look at changes since *Giannarelli* because of new legislation, the *Arthur J S Hall & Co* case, and the experience in other jurisdictions. It finds that the statutory changes have not affected the immunities from suit of advocates, witnesses, or judge. The court then states:]

[56] The House of Lords has restated the common law about advocates' immunity, at least for England and Wales. (Perhaps there may remain some question whether the law in Scotland still accords with what was decided in *Rondel v Worsley* and *Saif Ali v Sydney Mitchell & Co* but that question need not be examined.) The House was divided in opinion in some aspects of the decision. All of their Lordships concluded that reconsideration of advocates' immunity was appropriate in the light of changes in the law of negligence, the functioning of the legal profession, the administration of justice, and public perceptions. But, as Lord Millett pointed out, much also turned

on the then imminent coming into operation of the Human Rights Act 1998 (UK) and the consequent application of Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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[57] Three members of the House would have retained the immunity in relation to criminal proceedings. A majority of the House, however, concluded that since a collateral challenge in civil proceedings to a criminal conviction was prima facie an abuse of process, and ordinarily such an action would be struck out, an immunity from suit was not required to prevent collateral attacks on criminal decisions.

[58] The conclusion about collateral challenges and abuse of process was critical to the outcome in *Arthur J S Hall v Simons*. It will be necessary to consider that topic. Before doing so, however, it is as well to make two other points of basic importance.

…

[The court points out that it decided in 1963 to no longer follow decisions of the House of Lords and there has been for a long time:]

[60] … no automatic transposition of the arguments found persuasive there to the Australian judicial system. Especially is that so when the decision may well be thought to have been significantly affected by the European considerations to which Lord Millett referred. In addition, of course, account must be taken not only of the fact that the legal profession is organised differently in the several States and Territories of Australia, but also of the fact that in none of those States or Territories is the profession organised in precisely the same way as it is in England and Wales. …

Experience in other jurisdictions

[61] Care must also be exercised in dealing with the applicant's

contention that advocates' immunity has not been thought to be a necessary part of the law of other jurisdictions — in particular, Canada, New Zealand or the several jurisdictions in the United States of America. In Canada, a single judge of the Ontario High Court of Justice, Krever J, held in 1979 [*Demarco v Ungaro* (1979) 95 DLR (3d) 385] that an advocate was not immune from suit. It appears that this decision has not since been challenged in Canada. In New Zealand, the High Court held that it was bound by earlier authority to hold that there is an advocates' immunity. On appeal, the Court of Appeal of New Zealand reversed that decision [*Lai v Chamberlains* unreported, Court of Appeal of New Zealand, 8 March 2005]. Whether there will be an appeal to the Supreme Court of New Zealand is not yet known. In the United States of America, it is said that there is no advocates' immunity.

[62] But in each of these jurisdictions it is necessary to look beyond the bare statement that there is, or is not, an advocates' immunity. For example, in both Canada [*Nelles v Ontario* [1989] 2 SCR 170] and the United States [*Gregoire v Biddle* 177 F 2d 579 (2nd Cir 1949) cert den 339 US 949 (1950); *Imbler v Pachtman* 424 US 409 (1976)] a prosecutor is immune from suit [cf in the United Kingdom *Elguzouli-Daf v Commissioner of Police* [1995] QB 335]. And in the United States absolute immunity for judges is the rule [*Stump v Sparkman* 435 US 349 (1978)] despite the criticism that sometimes is directed at the rule. See Shaman, 'Judicial Immunity from Civil and Criminal Liability', (1990) 27 *San Diego Law Review* 1]. Whether a public defender is immune [*Black v Bayer* 672 F 2d 309 (3rd Cir 1982); cf *Ferri v Ackerman* 444 US 193 (1979)] may remain a matter of controversy.

[63] A description of the position in the United States would be incomplete, however, if no account was taken of the operation of the

doctrine of collateral estoppel [*Ashe v Swenson* 397 US 436 (1970); *Allen v McCurry* 449 US 90 (1980)]. In particular, it would be necessary to take account of principles like that described in the *Restatement Third of The Law Governing Lawyers* [§53 Comment d at 392] as being that a judgment, in a post-conviction proceeding in a criminal matter (as, for example, an appeal) about whether the lawyer was negligent, may be binding in a subsequent malpractice action against the lawyer even though the lawyer sued was not a party to that litigation. [See, for example, *McCord v Bailey* 636 F 2d 606 (DC Cir 1980)]. And the application of such principles is not confined to criminal matters [See, for example, *McCord v Bailey* 636 F 2d 606 (DC Cir 1980)].

[64] Principles of finality find different expression in different jurisdictions. The particular step taken by the House of Lords in *Arthur J S Hall v Simons* can be understood as influenced, if not required, by Art 6 of the European Convention to which Lord Millett referred. Article 6 was then understood (in the light of *Osman v United Kingdom* [(1998) 29 EHRR 245]) as securing the right to have *any* claim relating to civil rights and obligations brought before a court or tribunal. The immediate question in this case, however, is how, in Australia, the principle for which the applicant now contends is to be accommodated with the general principle that controversies, once quelled, should not be reopened. No competition with a general right of the kind considered in *Osman v United Kingdom* need be resolved.

Rules about abuse of process and finality

[65] … First, what is the nature of the complaint that is made?

The nature of the client's complaint

[66] In every case the complaint must be that a consequence has befallen the client which has not been, and cannot be, sufficiently corrected within the litigation in which the client was engaged. That consequence may take a number of forms. For the moment, it will suffice to identify what may appear to be the three chief consequences:

(a) a wrong final result; (b) a wrong intermediate result; and (c) wasted costs.

[67] A client may wish to say that the conduct of the advocate was a cause of the client losing the case because, for example, a point was not taken, or a witness was not called, or evidence was not led. The client may have no appeal, or no remedy on appeal, as, for example, would generally be the case if the evidence not called was available at trial.

[68] A client may wish to say, as the applicant does in this case, that the conduct of the advocate (or here, the advocate and VLA) was a cause of the client suffering an intermediate consequence (conviction at the first trial and imprisonment) which was not wholly remedied on appeal. (The conviction was set aside but the client was incarcerated for a time and complains of that and what is said to have been caused by it.)

[69] A client may wish to say that the conduct of the advocate was a cause of the client incurring unnecessary expense. That may be because a costs order was made against the client or because unnecessary costs were incurred in taking a step in the litigation.

[70] What unites these different kinds of consequence is that none of them has been, or could be, wholly remedied within the original litigation. The final order has not been, and cannot be, overturned on appeal. The intermediate consequence cannot be repaired or expunged on appeal. The costs order cannot be set aside; the costs incurred cannot be recovered from an opposite party. And in every one of these cases, the client would say that, but for the advocate's conduct, there would have been a different result. In particular, leaving cases of wasted costs aside, the client wishes to assert that, if the case had been prepared and presented properly, a different final,

or intermediate, result would have been reached. And yet the judicial system has arrived at the result it did. The consequences that have befallen the client are consequences flowing from what, by hypothesis, is a *lawful* result. So, to take the present case, the imprisonment of which the applicant seeks to complain is *lawful* imprisonment. In a case where the client would say the wrong final result is reached, the result in fact reached is, by hypothesis, one that was *lawfully* reached. Whether the lawful infliction of adverse consequences (such, for example, as imprisonment) can constitute a form of damage is a question that may be noted but need not be answered.

The premise for the applicant's argument

[71] The premise for the contention that a client should have an action against a negligent advocate whose negligence caused loss to the client is that there should be no wrong without remedy. If full effect is given to that premise, the client who is defamed in proceedings should have a remedy, at least if the defamation was published otherwise than without malice and in the intended performance of an advocate's or a judge's duty. But the absolute privilege accorded to all participants in the court process *and* the privilege given to those who publish fair and accurate reports of what is said in court are not challenged. Nor is there any challenge to the immunity of witnesses from suit whether for negligence or intentional torts. Yet it is said that there should be a remedy for the advocate's negligence.

[72] If that is right, the paradigm case in which there should be a remedy is where the advocate's negligence is a cause of the client losing the litigation. That is, there should be a remedy for cases in which the client seeks to challenge the *final* result. There are two consequences that follow from recognising that this is the paradigm case.

[73] First, the tension between the principle of finality and allowing litigation seeking damages in cases where, in order to succeed, it will be necessary to impugn the final result of earlier litigation, is evident. Secondly, recognising that to permit a challenge to the final result is

inconsistent with the need for finality shifts attention to whether there are to be *exceptional* cases in which that may be permitted. In *Arthur J S Hall v Simons*, all members of the House accepted that there are circumstances in which the result reached in earlier litigation should not be reopened. Those circumstances were to be identified by using rules about abuse of process. And in the present case, the applicant submitted that it was enough to show that he would not seek to impugn the *final* result of the litigation in which he had been engaged.

Abuse of process

[74] Questions of abuse of process can be relevant to the present issue only if it is accepted that there are, or may be, circumstances in which the result reached in earlier litigation

should not be impugned. The circumstances in which proceedings might be classified as an abuse of process have been described in various ways. In *Hunter v Chief Constable of the West Midlands Police* [[1982] AC 529], to which extensive reference was made in the speeches in *Arthur J S Hall v Simons*, Lord Diplock spoke of abuse of process as a misuse of a court's procedure which would 'be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people'. In *Rogers v The Queen* [(1994) 181 CLR 251 at 256], Mason CJ observed of Lord Diplock's speech that, with what had been said in this court [*Williams v Spautz* (1992) 174 CLR 509; *Walton v Gardiner* (1993) 177 CLR 378], it indicated:

> '… that there are two aspects to abuse of process: first, the aspect of vexation, oppression and unfairness to the other party to the litigation and, secondly, the fact that the matter complained of will bring the administration of justice into disrepute.'

[75] But in the present case it is necessary to focus attention more closely upon what it is about the circumstances that might make prosecution of the case 'manifestly unfair' or might 'bring the administration of justice into disrepute among right-thinking people'. When it is recognised that the particular circumstance which is said to engage consideration of questions of abuse of process is that the proceeding against the advocate requires challenging the result arrived at in earlier proceedings, the question then becomes how can a distinction be drawn between results that can be attacked, and those that cannot. Two different bases of distinction must be examined. First, can a distinction be drawn, as it was in *Arthur J S Hall v Simons*, between civil and criminal proceedings? Secondly, can a distinction be drawn between challenging the final outcome of litigation and challenging some intermediate outcome?

An exception for criminal cases?

[76] The difficulties of dividing the litigious world into two classes, one marked 'civil' and the other marked 'criminal', were identified in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* [(2003) 216 CLR 161]. Those difficulties are reason enough to reject a principle founded in drawing such a distinction.

…

[79] In cases where a client sues an advocate, the client will always have been a party to the proceeding the result in which is challenged. If effect is to be given to the principle that decisions of the courts, unless set aside or quashed, are to be accepted as incontrovertibly correct, it must be applied at least to the parties to the proceeding in which the decision is given. The final outcome of the proceeding, whether 'civil' or 'criminal' or a hybrid proceeding, must be incontrovertible by the parties to it.

[80] If that is right, it follows that no remedy is to be provided if its provision depends upon demonstrating that a different *final* result should have been reached in the earlier litigation. Cases such as the present, in which the challenge made is to an intermediate result, can

then be seen to be exceptional. The contention would be that, even if a client cannot say that a different *final* outcome should have been reached, the client may nonetheless complain about an intermediate result.

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An exception for challenges to intermediate outcomes?

[81] The existence of cases in which there would be an intermediate result of which complaint could be made would depend upon that intermediate result having been set aside on appeal. Here it is important to recognise that, just as was the case in the present matter, the grounds on which an intermediate result is set aside may be unrelated to what is now alleged to have been the advocate's negligent conduct. In this case, the conviction at the first trial was quashed for want of proper direction about how the plea of guilty at committal might be used, not because the guilty plea was improvidently entered.

[82] Incompetence of counsel is not a separate ground of appeal. As was pointed out in *TKWJ v The Queen* [(2002) 212 CLR 124 at 132–133 [23]–[25] per Gaudron J, 157 [102]–[103] per Hayne J], the relevant question on appeal in a criminal matter will be whether there was a miscarriage of justice. In general, then, if an intermediate result is set aside, it will be for reasons unconnected or, at best, only indirectly connected, with the client's contention that the advocate was negligent. It follows, therefore, that the class of cases in which an intermediate result would be open to challenge not only would be exceptional, in the sense of standing apart from challenges to final decisions, but also would be a class of case whose membership would depend upon the application of criteria unconnected with what, for present purposes, is the central focus of debate, namely the alleged negligence of the advocate. By this stage of the argument, in which attention is directed solely to exceptional cases, the proposition that for every wrong there should be a remedy has become too attenuated

to be of any relevant application. Especially is that so when the very existence of the relevant exceptional case depends for the most part upon considerations that are irrelevant to the wrong that is to be remedied. If final results cannot be challenged, intermediate results should not be treated differently.

…

No re-litigation

[84] To remove the advocate's immunity would make a significant inroad upon what we have earlier described as a fundamental and pervading tenet of the judicial system. That inroad should not be created. There may be those who will seek to characterise the result at which the court arrives in this matter as a case of lawyers looking after their own, whether because of personal inclination and sympathy, or for other base motives. But the legal principle which underpins the court's conclusion is fundamental. Of course, there is always a risk that the determination of a legal controversy is imperfect. And it may be imperfect because of what a party's advocate does or does not do. The law aims at providing the best and safest system of determination that is compatible with human fallibility [*R v Carroll* (2002) 213 CLR 635 at 643 [22] per Gleeson CJ and Hayne J; *The Ampthill Peerage* [1977] AC 547 at 569 per Lord Wilberforce; *Erinford Properties Ltd v Cheshire County Council* [1974] Ch 261 at 268 per Megarry J]. But underpinning the system is the need for certainty and finality of decision. The immunity of advocates is a necessary consequence of that need.

…

[The court then decides there is no need to redraw the boundary of the immunity doctrine, stating:]

> [89] VLA cannot be said to stand in any different position from the advocate. … VLA was equated by the Legal Aid Act with a private firm of solicitors …
>
> [90] … Neither junior counsel nor the instructing solicitor may have addressed the court in any subsequent court appearance. The duties which each owes the client are identical. The content of the advice is identical. It cannot be said that the advice of one is more closely related to the court proceedings than the other, let alone one being intrinsically superior to or more effective than the other (if such a distinction were possible or relevant). What this example reveals is that the considerations of finality which require maintenance of the advocate's immunity require that the immunity extend to the advice allegedly given by Ms Greensill on behalf of VLA.
>
> [91] Because the immunity now in question is rooted in the considerations described earlier, where a legal practitioner (whether acting as advocate, or as solicitor instructing an advocate) gives advice which leads to a decision (here the client's decision to enter a guilty plea at committal) which affects the conduct of a case in court, the practitioner cannot be sued for negligence on that account. …
>
> [92] For these reasons, special leave to appeal should be granted, the appeal treated as instituted and heard instanter, but dismissed with costs.

6.93 McHugh and Callinan JJ in their concurring opinions accepted the main argument for retention of the doctrine as stated by the joint majority — the finality principle. Both judges based their decision on other broader reasons, including some of the traditional justifications rejected by the joint-majority judgment.

6.94 Kirby J in his dissent noted at [210]:

> [210] [During] the course of a century, this court has heard countless cases in which negligence has been alleged against professional and other skilled persons. Thus, it has held to legal account architects, civil engineers, dental surgeons and specialist physicians and surgeons,

> anaesthetists, electrical contractors, persons providing financial advice, police officers, builders, pilots, solicitors (in respect of out-of-court advice) and teachers. In individual cases, the professional person concerned has won or lost. But liability has been decided by the application of the general principles of the law of negligence as elaborated at the time of the decision. None of the defendants in any of the foregoing cases claimed, still less received, the benefit of an absolute immunity from liability. So why are the lawyers in this case entitled to be treated in such a special, protective and unequal way? Is this truly the law of Australia, applicable to the case? If so, what is the justification?

6.95 Kirby J gives extensive reasons for rejecting the majority opinions. Do you find the reasoning of the joint majority sound? What is the test now in applying the immunity doctrine in light of the comments of the majority? Kirby J also stated at [211]:

> '*The cards are now stacked*': In earlier times, the law in Australia (as even earlier in England) recognised an immunity for barristers from liability for negligence. However, there is no such general immunity for advocates in, for example, the United States of America, Canada, the European Union, Singapore, India or Malaysia. [footnotes deleted]

6.96 Although New Zealand has also rejected the immunity doctrine, Tipping J in his judgment in *Chamberlains v Lai* [2007] 2 NZLR 7, pointed out that claims against advocates 'may well be difficult to establish'. This view is also confirmed by English courts.[35]

6.97 By contrast to New Zealand, the Inner House (Appeal Court) of Scotland's Court of Session refused the invitation to

abolish the immunity doctrine for criminal cases in *Wright v Paton Farrell* [2006] SLT 269. This was an appeal from a Scottish (Outer) Court of Session decision (Scotland's supreme civil court) in *Wright v Paton Farrell* [2002] Scot CS 341. In that case, the court indicated that the immunity doctrine still applied. Thus, the argument that Australia is alone in maintaining the doctrine is incorrect.

6.98 Peter Cane[36] has strongly criticised the *D'Orta-Ekenaike* decision. He notes that by rejecting most of the traditional arguments and basing its decision on the finality principle, the joint majority has severely 'destabilised' the retention of the doctrine. Thus, the decision 'is unlikely to be other than a temporary staging post on the road to resolution of the important issue of principle it raises'. He continues:

> [T]he joint-majority's approach presents us with a dilemma. On the one hand, if we take their reasoning seriously, we are forced to brand the dismissal of the appeal as a mistake. On the other hand, if we accept the outcome as correct (in the sense of 'justified'), we need reject most of the joint-majority's reasoning as mistaken and irrelevant. Neither conclusion is satisfactory and either leaves the law in a state of considerable confusion.

6.99 The issue of abolishing the immunity doctrine has been on the agenda of the Standing Committee of Attorneys-General since March 2005. A paper prepared by the Victorian Attorney-General's Department of the Standing Committee[37] presented a number of arguments that the abolition of the immunity doctrine would be unlikely to compromise the finality of judgments.[38] It also said that in England the abolition had not resulted in any increase in insurance premiums.[39] In this Paper, the following three options are explored extensively:

OPTION 1: Leave the Immunity to the Common Law — 18. … [It] involves doing the least: leave the question of advocates' immunity to the courts, and consequently leave the recent decision of the High Court in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 to govern the position in Australia until such time as the High Court re-considers the matter.

…

OPTION 2: Abolish the immunity — 47. At the other end of the spectrum of possible reforms is to abolish the common law immunity in its entirety. This would enable clients to

bring proceedings against advocates for all negligent work, including work that is performed in court and work that is intimately connected with court work; and would apply equally to criminal and civil proceedings. …

OPTION 3: Modify the Operation of the Common Law Immunity — 108. Various options for modification of the current operation of advocates' immunity have been identified. These options reflect the competing interests of individual litigants and the justice system: the desire to provide litigants with an avenue for redress where they have suffered loss due to their advocate's conduct, tempered by concern to ensure that the administration of justice is not undermined.

109. Officers have considered whether the immunity could be retained in limited circumstances, either based on the nature of the proceedings or the nature of the work being performed by the advocate, to ensure that the client is provided a means of seeking redress unless the risks to the justice system are regarded as so significant that they should take precedence over individual rights.

The options are:

(i) Confining the immunity to criminal proceedings;
(ii) Restricting the immunity to work done in court;
(iii) Restricting the immunity to 'the presentation and testing of evidence' and the 'advancement and answering of argument' rather than 'work done in court';
(iv) Clarifying through statute the limits of the common law immunity in terms of what is meant by 'work done out of court which is intimately connected with the conduct of a case in court'; and
(v) Preserving an immunity for prosecutors and possibly public defenders. …

6.100 Are the re-litigation arguments sufficient to maintain the immunity, or are these arguments in reality only a means to maintain the *status quo*?

6.101 The adoption by the High Court of the re-litigation (finality) reason for maintaining the immunity doctrine has resulted in a narrower use of the 'intimately related to litigation' test. If finality is not involved, the immunity doctrine will not be applied.[40] *Francis v Bunnett* [2007] VSC 527 and *Alpine Holdings Pty Ltd v Feinauer* [2008] WASCA 85 are two recent cases involving allegations of negligence in relation to settlements before the cases were in court, where the immunity doctrine was again held not to be applicable because there was no re-litigation issue present. In *Alpine Holdings*, the Western Australian Court of Appeal said at [84] that when trying to apply the present authorities, it is difficult to know 'where the line is to be drawn as to the application of the immunity in relation to advice given in connection with the settlement of legal proceedings'.

6.102 If there is statutory removal of the doctrine, would this be in breach of the Constitution? As Kane[41] asks, can the High Court invalidate any legislation 'on the basis that negligence

liability of advocates for protected work would undermine an essential feature of judicial power as embodied in Ch III of the Constitution'?

6.103 A recent decision dealing with the scope of the immunity was that of the Full Federal Court in *Sims v Chong* [2015] FCAFC 80. The court upheld the appeal from striking out of the appellant's claim in the Supreme Court concerning the statement claim because of the immunity doctrine. The court said:

> In our view, the narrow characterisation of the appellant's claims against the respondent as being confined to the process of the pleading and the inadequacy of the pleading … does not fully reflect the statement of claim. … [T]he statement of claim exposes the potential need for an inquiry beyond the quality of the pleading about the existence of the asserted contract. … It asserted that the respondent mislead the appellant by claiming she had the capacity to conduct a claim of the general character presented or (to use the appellant's words) in the 'brief ' provided to her. It asserted that the 'brief ' exposed claims or potential claims that Suda [the defendant in appellant's original WA action] was 'unjustly profiting' from his inventions. It is fair to say that the material may have required the respondent to consider a claim other than one based on contract. The allegation is then specifically made that none of the statements of claim in the WA claim addressed all the issues the appellant raised with the respondent. In our view, the statement of claim arguably asserts conduct on the part of the respondent (however it is characterised) which arguably falls outside the scope of advocate's immunity. … Indeed, some of the conduct alleged against the respondent, concerning her representations as to her competence to be retained by the appellant to plead and then commence the WA claim, occurred before any litigation was filed. Again, because the

> allegations in the statement of claim give rise to alleged conduct which is arguably outside that covered by the immunity, the application of the immunity should be determined in the light of findings as to the precise nature of the conduct on the part of the respondent which might expose her to liability to the appellant.

The court then referred to the difficulty in 'drawing the line', as established in the *D'Orta-Ekenaike* case, and remitted the case to the primary judge.

6.104 The most recent case dealing with this issue by the High Court is *Attwells v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16. The facts of the case are that Attwells had been a co-guarantor for a $1.5 million loan made by the ANZ Bank to Wilbidgee Beef Pty Ltd. ANZ commenced guarantee proceedings against Attwells for $3.4 million in the Supreme Court of New South Wales, following defaults on the loan. Attwells retained Jackson Lalic Lawyers to represent him. After the trial began, the ANZ offered to settle the claim for $1.75 million, if Attwells and/or his guarantors agreed to pay within six months. If he failed to do so, he was liable for the full amount and this provision was included in the settlement agreement. Attwell's solicitors failed to point out this requirement to him. Attwells later brought actions against his solicitors, alleging that they had given negligent advice to settle the claim with ANZ on terms that judgment would be entered against the guarantors and the company for almost $3.4 million if not paid within six months. When the guarantors failed to meet their payment obligations under the settlement, Attwells brought negligence proceedings against Jackson Lalic Lawyers. The court unanimously found that the immunity did not cover negligent advice given

out of court that lead to civil settlements. The majority of the court still upheld the immunity doctrine in situations where the 'finality' of the decision is brought into question, but limited its use. They said[42] that 'the public policy protective of finality, which justifies immunity, at the same time limits the scope so that protection can only be invoked where the advocate's work has contributed to the judicial determination of the litigation'. The majority further said[43] that 'the rationale of the immunity does not extend to advice which does not move the case in court toward a judicial determination'. This conclusion was reached because the judge made no finding of fact or law which resolved the controversy between the parties. Nettle and Gordon JJs agreed with the decision, but argued that the immunity doctrine should be abolished. In this decision, the High Court still left open questions concerning the 'finality doctrine' that will likely be litigated in the future.

6.105 The use of the immunity doctrine has led to many unfair results. For example, in *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87, the judge found that negligence took place during a settlement. Bell J said he was bound by the immunity doctrine, and that if there had not been immunity, he would have awarded the plaintiff $675,000. The unfairness was extreme, considering that the plaintiff was a 64-year-old pensioner war veteran with a mental illness. His Honour found that the practitioner was negligent in his preparation of the case and in taking and acting on instructions to settle the case, when he should have known the client lacked mental capacity.

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1. See also Legal Practitioners Act 1981 (SA) ss 68 and 69; Legal Profession Act 2007 (Qld) ss 418–420; Legal Profession Uniform Law 2015 (NSW) ss 296–298; Legal Profession Uniform Law Application Act 2014 (Vic)

Sch 1 ss 296–298; Legal Profession Act 2007 (Tas) ss 420–422; Legal Profession Act 2006 (NT) ss 464–466; Legal Profession Act 2006 (ACT) ss 386–389.

2. See **6.6**–**6.10**.

3. All jurisdictions require that a practitioner complete 10 continuing professional development (CPD) points per year. See South Australia, Rules of the Legal Practitioners Education and Admission Council 2004 Appendix CA r 2 (which are enforceable pursuant to the Legal Practitioners Act 1981 (SA) ss 14C, 14J, and 17A); New South Wales and Victoria, the Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015 r 6 (which is enforceable pursuant to the Legal Profession Uniform Law); Queensland, the Queensland Law Society Admission Rules 2005 r 47 (which is enforceable pursuant to the Legal Profession Act 2007 (Qld)); the Australian Capital Territory Law Society, Continuing Professional Development Guidelines 2015; Western Australia, Legal Profession Rules 2009 r 8; Northern Territory, Legal Profession Regulations 2007 Sch 2; Law Society of Tasmania, Continuing Professional Development Scheme Practice Guideline 4, 16 March 2015.

4. See **6.6**–**6.10**.

5. See **6.23**–**6.50**.

6. See **6.51**–**6.71**.

7. See **6.72**–**6.105**.

8. In relation to the Barristers' Rules of the various jurisdictions, see Bar Association of Queensland, Barristers' Conduct Rules 2011; in respect of New South Wales, the Legal Services Council, Legal Profession Uniform Conduct (Barristers) Rules 2015; in respect of Victoria, the Legal Services Council, Legal Profession Uniform Conduct (Barristers) Rules 2015; South Australian Bar Association, Barristers' Conduct Rules 2013; Western Australian Bar Association, Barristers' Rules 2012; Northern Territory Bar Association, Barristers' Conduct Rules 2002. The Law Society of Tasmania, Rules of Practice 1994, define a 'practitioner' as a person practising as a barrister or legal practitioner; Pt 8 applies solely to those who practise as a barrister.

9. Legal Profession Uniform Law Australian Solicitors' Conduct Rules

2015 (NSW).

10. Law Society of South Australia, Australian Solicitors' Conduct Rules 2015.
11. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Vic).
12. Law Society of the Australian Capital Territory, Legal Profession (Solicitors) Conduct Rules 2015.
13. These rules apply to barristers and solicitors. See also Pt 8 of the Rules, which applies only to barristers.
14. See also **Chapter 5** 'The Representation of Clients', **Chapter 7** 'Confidentiality and Privilege', and **Chapter 8** 'Conflicts of Interest'.
15. Chief Justice de Jersey AC, 'Negligence — The Impact of Specialisation', presented at the Specialist Accreditation Conference, 8 April 2005, at pp 5–6.
16. At [12], [309], [364], and [417].
17. In *Secure Funding Pty Ltd v Bee* [2016] NSWSC 521 (28 April 2016), Wilson J noted at [79] that the power to order costs under s 99 is plainly a power to be exercised only where there is serious professional misconduct. See also *Nadarajapillai v Naderasa (No 2)* [2015] NSWCA 209 (21 July 2015). See also Civil Procedure Act 2010 (Vic) s 29, which gives the court the power to sanction legal practitioners and parties who fail to meet their overarching obligations in this regard. In *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 (27 November 2013), the court held that each applicant's solicitor indemnify the applicant for 50 per cent of the respondent's costs incurred as a consequence of the excessive or unnecessary content of the application books. See also s 43 of the Federal Court of Australia Act 1976 (Cth), which has been used as a vehicle for awarding costs against solicitors personally. Order 62 r 9(1)(c) of the Federal Court Rules 1979 (Cth) provides that the court or judge may order a solicitor to repay to his client costs which have been ordered to be paid by the client to another party, where those costs had been incurred by that party in consequence of delay or misconduct on the part of the solicitor. The authorities guiding the exercise of the court's discretion in this area were reviewed and explained by Mansfield J in *Kumar v Minister for Immigration & Multicultural & Indigenous*

Affairs (No 2) [2004] FCA 18; (2004) 133 FCR 582 at [2]–[17].

18. For example, in Western Australia, the Legal Profession Conduct Rules 2010 (WA) r 7(h). See also Order 62 r 9(1)(c) of the Federal Court Rules 1979 (Cth), which provides that the court or judge may order a solicitor to repay to his client costs which have been ordered to be paid by the client to another party, where those costs had been incurred by that party in consequence of delay or misconduct on the part of the solicitor.

19. See *Rogers v Whitaker* (1992) 175 CLR 479.

20. See the Civil Liability Act 2003 (Qld) ss 20–22; Civil Liability Act 1936 (SA) ss 40, 41; Civil Liability Act 2002 (Tas) s 22; Wrongs Act 1958 (Vic) ss 58–60, which at s 5O(2) uses the word 'unreasonable' rather than 'irrational'. See also the decision of Macaulay J in *Brakoulias v Karunaharan* (Ruling) [2012] VSC 272 (20 June 2012). In the Australian Capital Territory, s 42 of the Civil Law (Wrongs) Act 2002 (ACT) defines the 'standard of care' as that of 'a reasonable person in the defendant's position' — for example, a legal practitioner. The Western Australian legislation does not specifically refer to professionals, other than health care professionals: Civil Liability Act 2012 (WA) ss 5PA and 5PB. However, s 5B of the Civil Law (Wrongs) Act 2002 (ACT) does contain a general reference to the principles governing liability for negligence, including a reference to 'a reasonable person [for example a legal practitioner] in the person's position'. In the Northern Territory there is no specific legislation concerning the standard of care of professionals, and cases would be determined in accordance with the common law.

21. There is little doubt that a lawyer engaged in the provision of legal services is a 'professional' for the purposes of the legislation.

22. See, for example, s 5O(2) of the Civil Liability Act 2002 (NSW).

23. This decision overturned the earlier case of *Cook v Cook* (1986) 162 CLR 376, which held that the standard of care of the unqualified and inexperienced driver was 'that which is reasonably to be expected of an unqualified and inexperienced driver in the circumstances in which the pupil is placed'. In *Imbree v McNeilly* (2008) 236 CLR 510, Gummow, Hayne, and Kiefel JJ noted at [27]: 'These reasons will show that the standard of care which the driver … owed the passenger … was the

same as any other person driving a motor vehicle — to take reasonable care to avoid injury to others. … *Cook v Cook* should no longer be followed.' In fact, the decision in *Cook* had been removed in New South Wales before the High Court's decision in the *Imbree* case, under the Motor Accidents Compensation Amendment Act 2007 (NSW).

24. 'Unreasonable' in Victoria.

25. Civil Liability Act 2002 (NSW) s 5O(3) and (4). For other jurisdictions, see the Civil Liability Act 2003 (Qld) ss 20–22; Civil Liability Act 1936 (SA) ss 40, 41; Civil Liability Act 2002 (Tas) s 22; Wrongs Act 1958 (Vic) ss 58–60.

26. *Yates v Boland* was reversed on appeal, but without criticism of the statements of principle concerning the solicitor-counsel relationship: see comments of the Full Federal Court in *Wakim v McNally* (2002) 121 FCR 162 at 174 [46].

27. Demutualisation is the process through which a member-owned organisation becomes a shareholderowned company.

28. *WCP Ltd v Gambotto* [1993] NSWCA 285.

29. *WCP Ltd v Gambotto* [1993] NSWCA 285.

30. See *San Sebastian Pty Ltd v Minister Administering Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340 at 354, 369; 68 ALR 161.

31. For an article that discusses the *Queensland Art Gallery Board of Trustees* case in detail and criticises the view of the majority that there is a duty to a beneficiary even if it is only a 'hope of benefit' if the will is not finalised because of the solicitor's culpable delay, see R Mortensen, 'Solicitors' Will-Making Duties' (2002) 26 *MULR* 60.

32. The appeal to the High Court of the *Keefe* case was abandoned when the parties settled the action.

33. See 'Unsatisfactory Professional Conduct in Respect of a Barrister' (1998) 3 Legal Profession Reports 1.

34. See **6.91**.

35. See *May v Pettman Smith (a firm)* [2005] 1 All ER 903. Another English case showing the application of this view is *McFaddens (a firm) v Platford* [2009] EWHC 126, where Judge Toulmin at [374]–[378] rejected a claim for negligence because the barrister had been asked for

advice on very short notice.

36. P Cane, 'Case Note — The New Face of Advocates' Immunity' (2005) 13 *Torts Law J* 93 at 101–2.
37. Standing Committee of Attorneys-General, 'Advocates' Immunity from Civil Suit', Options Paper, March 2005, at <www.lawlink.nsw.gov.au/advocatesimmunity>.
38. At [47] *et seq*.
39. At [77].
40. See *Noori v Leerdam* [2008] NSWSC 515, which involved allegations of misfeasance of a solicitor in a public office.
41. See P Kane, 'Case Note — The New Face of Advocates' Immunity' (2005) 13 *Torts Law J* 93 at 98.
42. At [5].
43. At [38].

7

CONFIDENTIALITY AND PRIVILEGE

INTRODUCTION

7.1 There is a close relationship between protecting an individual's confidences and legal professional privilege. Legal professional privilege is a privilege which is not held by the lawyer, but by the client, and is sometimes referred to as lawyer-client privilege. The two concepts represent different aspects of the same issue. Legal professional privilege however, unlike confidentiality, does not depend on any contractual or other obligation — rather, it is grounded in public policy and the common law.[1] Thus, while it can be said that all privileged communications are confidential, it is not the case that all confidential communications are privileged. The basis for distinguishing between the two concepts rests upon the nature of the relationship between the parties. Communications between clients and their lawyers are protected by legal professional privilege. At common law, communications between a doctor and a patient, or a bank and a client, are protected by the duty of confidentiality.

7.2 As noted above, the duty of confidence that a lawyer owes to a client can be founded on various principles of law. It can be an express or implied term of the retainer or contract. In *Parry-Jones v Law Society* [1969] 1 Ch 1 at 9, Diplock LJ noted:[2]

> What we are concerned with here is the contractual duty of confidence, generally implied though sometimes expressed between a solicitor and client.

7.3 The duty of confidence can also be seen as one aspect of the overall obligations arising from the relationship between a lawyer and their client, such that a breach of that duty would be actionable in negligence. In *Furniss v Fitchett* [1958] NZLR 396, Barrowclough CJ held that a duty of care existed between a doctor and patient to protect confidential information. Although his Honour stopped short of importing this duty into every professional relationship, he did liken the fiduciary relationship between a doctor and patient to that between a solicitor and client.[3]

7.4 The legal basis for maintaining a confidence might also arise in equity. In *Seager v Copydex Ltd* [1967] 1 WLR 923, Lord Denning stated at 931:

> The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it.

7.5 In *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, Deane J said at 437 [28]:

> It is unnecessary, for the purposes of the present appeal, to attempt to define the precise scope of the equitable jurisdiction to grant relief

against an actual or threatened abuse of confidential information not involving any tort or any breach of some express or implied contractual provision, some wider fiduciary duty or some copyright or trademark right. A general jurisdiction to grant such relief has long been asserted and should, in my view, now be accepted.

7.6 In *Prestige Lifting Services Pty Ltd v Williams* [2015] FCA 1063 (30 September 2015), Beach J noted at [214]:

> The elements of an action for breach of an equitable duty of confidence are the following:
>
> (a) The information the subject of the claim must have the necessary attribution or quality of confidence and have been identified with specificity rather than generally or globally;
> (b) The information has to be obtained or imparted in circumstances identifying or importing an obligation of confidence; this could arise by reason of the nature of the relationship between the parties or the circumstances applying to the particular occasion when the information was obtained or imparted;
> (c) There has been an unauthorised use of that information (*Dart Industries Inc v David Bryar & Associates Pty Ltd* [1997] FCA 481; (1997) 38 IPR 389 at 405 and 406 per Goldberg J; *Commonwealth of Australia v John Fairfax & Sons Ltd* [1980] HCA 44; (1980) 147 CLR 39 at 50 and 51 per Mason J).

7.7 Finally, the duty of confidence might arise by virtue of an obligation imposed by a statute. There are many examples of this. One example is the Mental Health Act 2007 (NSW),[4] which prohibits disclosure of information except under certain circumstances.

7.8 Apart from a possible remedy in damages for breach of the retainer or for a breach of the duty of care owed by a solicitor to their client, or the imposition of some other penalty,[5] a client may also seek an injunction to restrain the solicitor from acting against

their client or former client.[6] In *McDonald v South Australia; McDonald v Minister for Education and Child Development (No 2)* [2015] SASC 188 (1 December 2015), Nicholson J noted at [16]:[7]

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> In *Coppola v Nobile* [2012] SASC 42 (22 March 2012) Stanley J has summarised the principles that govern an application to restrain a solicitor from acting, in terms which I gratefully adopt. There are three categories of cases in which a court will restrain solicitors from acting in a matter. First, where a solicitor seeks to act, or acts against a former client, creating a risk that the solicitor might use, or be bound to use, information which he or she holds subject to a duty of confidence to the former client. Second, where a solicitor seeks to act, or acts against a former client in circumstances which would give rise to a breach of the duty of loyalty owed by the solicitor to his or her former client as a fiduciary. Third, in circumstances where the court considers, having regard to the supervisory jurisdiction it exercises over solicitors as officers of the court, that it is necessary to restrain a solicitor from acting in a matter, irrespective of whether or not to do so would infringe any legal or equitable right of the solicitors to act, where the conduct of the solicitors was so offensive to common notions of fairness and justice that they should, as officers of the court, be restrained from acting. The first category, namely, breach of confidence, involves a claim to enforce a contractual or equitable right, namely, the protection of a confidence which the solicitor is bound to maintain even after the termination of his or her retainer pursuant to the contract of retainer and/or in equity. The second category, the breach of the fiduciary duty of loyalty, depends on ordinary equitable principles derived from a solicitor's fiduciary duty. The third category is different, depending not upon legal or equitable rights of the parties, but on the court's inherent supervisory jurisdiction over its officers. …

7.9 In *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSC 287 (17 August 2001),[8] Warren J noted at [28]:

> Broadly speaking, there are three principles. First, the relationship between a solicitor and client is one of confidence that obliges a solicitor not to disclose information obtained during the course of the relationship without the express or implied approval and consent of the client. Second, the relationship between solicitor and client is a fiduciary one imposing obligations of confidence, trust and integrity. Third, in the proper administration of justice clients are entitled to the expectation that their confidence and trust with their solicitor will be maintained.

7.10 In *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222,[9] Lord Millett observed at 235 that, whether founded on contract or equity, the duty to preserve confidentiality is unqualified. He described the duty in the following terms:

> It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It

> is a duty not to misuse it, that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it by others otherwise than for his benefit.

7.11 In *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2007] NSWSC 350, Bergin J noted at [35]:

> The exposure of a breach of a confidentiality undertaking in relation to an information barrier is rare. Counsel advised that they could find no case in which such an occurrence had been exposed. There have been instances where legal practitioners have inadvertently breached

their obligations to their clients: for instance by the production of privileged documents to an opposing party: *Hooker Corporation Ltd v Darling Harbour Authority* (1987) 9 NSWLR 538, but this is a different situation. The structure of the practising profession is that the more senior solicitors supervise the more junior solicitors. The consequence of this regime is that the experience and judgment of the more senior lawyer is observed by and communicated to the junior lawyer as that lawyer develops in the practice of the profession.

7.12 The relevant legal principles concerning confidentiality were noted by Young J in *Geelong School Supplies Pty Ltd v Dean* [2006] FCA 1404 (31 October 2006) at [32] and [33]:

> Apart from the common law and the law of equity, statutory provisions may require that certain information not be disclosed. Whatever the legal foundations, it is clear that a breach of confidence is actionable by the client and would also be a breach of professional ethics which may result in disciplinary action against the practitioner.

7.13 In view of the relationship between the duty of confidence (for example not compromising a former client's information), and avoiding a conflict of interest (for example acting against a former client), there is a close nexus between this chapter and **Chapter 8**. For the most part, a conflict of interest will arise because of the possibility of confidential information given by a client being used in later proceedings in a way that is adverse to their interests.

7.14 Uniform Evidence Legislation has been introduced at the Commonwealth level and in New South Wales, Victoria, Tasmania, the Australian Capital Territory, the Northern Territory, and Norfolk Island,[10] although there are some differences between jurisdictions.[11] The Uniform Evidence Legislation also applies in Federal Courts. While the common law only recognised legal professional privilege, the provisions in the Evidence Act 1995 (Cth) have introduced

a statutory privilege for journalists in relation to their sources,[12] and in respect of religious confessions.[13] Privilege is discussed later in this Chapter.[14]

7.15 The following table sets out a summary of the provisions of the Evidence Act 1995 (Cth) relating to confidentiality and privilege.[15]

Section	Provision
117	Defines 'confidential communication' to mean a communication made in such circumstances that, when it was made: (a) the person who made it; or (b) the person to whom it was made; was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.
118	Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of: (a) a confidential communication made between the client and a lawyer; or (b) a confidential communication made between 2 or more lawyers acting for the client; or (c) the contents of a confidential document (whether delivered or not) prepared by the client or a lawyer; for the dominant purpose of the lawyer, or one or more lawyers, providing legal advice to the client.
119	Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of: (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or (b) the contents of a confidential document (whether delivered or not) that was prepared; for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

Section	Provision

120	(1) Evidence is not to be adduced if, on objection by a party who is not represented in the proceeding by a lawyer, the court finds that adducing the evidence would result in disclosure of: (a) confidential communication between the party and another person; or (b) the contents of a confidential document (whether delivered or not) that was prepared, either by or at the direction or request of, the party; for the dominant purpose of preparing for or conducting the proceeding.
121	Disclosure of a privileged communication can be adduced in relation to a question concerning the intentions, or competence in law, of a client or party: Who has died.
122	(2) and (3) allow for the admission of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence, including where the client or party knowingly and voluntarily disclosed the substance of the evidence to another person.
123	In a criminal proceeding, this Division does not prevent a defendant from adducing evidence unless it is evidence of: (a) A confidential communication made between an associated defendant and a lawyer acting for that person in connection with the prosecution of that person; or (b) The contents of a confidential document prepared by an associated defendant or by a lawyer acting for that person in connection with the prosecution of that person. *Associated defendant*, in relation to a defendant in a criminal proceeding, means a person against whom a prosecution has been instituted, but not yet completed or terminated, for: (a) An offence that arose in relation to the same events as those in relation to which the offence for which the defendant is being prosecuted arose; or (b) An offence that relates to or is connected with the offence for which the defendant is being prosecuted.
124	Disclosure of a privileged communication can be adduced where 2 or more parties have, before the commencement of the proceeding, jointly retained a lawyer in relation to the same matter and one of those parties wishes to adduce evidence of a communication made by any one of them to the lawyer or the contents of a confidential document.
125	Disclosure of a privileged communication can be adduced where the communication or document was prepared in furtherance of a fraud or an act that renders a person liable to a civil penalty or was prepared in furtherance of a deliberate abuse of a power (s 125).
126	Disclosure of a privileged communication can be adduced where the adducing of evidence of another communication or document is reasonably necessary to enable a proper understanding of a related communication or document.
126J	In this Division: *'informant'* means a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium. *'journalist'* means a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be

	published in a news medium. *'news medium'* means any medium for the dissemination to the public or a section of the public of news and observations on news.

Section	Provision
126K	(1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained. (2) The court may, on the application of a party, order that subsection (1) is not to apply if it is satisfied that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs: (a) any likely adverse effect of the disclosure on the informant or any other person; and (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts. (3) An order under subsection (2) may be made subject to such terms and conditions (if any) as the court thinks fit.
127	(1) A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy. (2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose. (3) This section applies even if an Act provides: (a) that the rules of evidence do not apply or that a person or body is not bound by the rules of evidence; or (b) that a person is not excused from answering any question or producing any document or other thing on the ground of privilege or any other ground. (4) In this section: *'religious confession'* means a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the church or religious denomination concerned.
128	(1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness:

	has committed an offence against or arising under an Australian law or a law of a foreign country; or (a) (b) is liable to a civil penalty. (2) The court must determine whether or not there are reasonable grounds for the objection.
128A	(1) In this section: *'disclosure order'* means an order made by a federal court in a civil proceeding requiring a person to disclose information, as part of, or in connection with a freezing or search order, but does not include an order made by a court under the Proceeds of Crime Act 2002. *'relevant person'* means a person to whom a disclosure order is directed. (2) If a relevant person objects to complying with a disclosure order on the grounds that some or all of the information required to be disclosed may tend to prove that the person: (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or

Section	**Provision**
	(b) is liable to a civil penalty; the person must: (c) disclose so much of the information required to be disclosed to which no objection is taken; and (d) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken (the ***privilege affidavit***) and deliver it to the court in a sealed envelope; and (e) file and serve on each other party a separate affidavit setting out the basis of the objection. (3) The sealed envelope containing the privilege affidavit must not be opened except as directed by the court. (4) The court must determine whether or not there are reasonable grounds for the objection.
129	(1) Evidence of the reasons for a decision made by a person who is: (a) a judge in an Australian or overseas proceeding; or (b) an arbitrator in respect of a dispute that has been submitted to the person, or to the person and one or more other persons, for arbitration; or the deliberations of a person so acting in relation to such a decision, must not be given by the person, or a person who was, in relation to the proceeding or arbitration,

	under the direction or control of that person. (2) Such evidence must not be given by tendering as evidence a document prepared by such a person. (3) This section does not prevent the admission or use, in a proceeding, of published reasons for a decision. (4) In a proceeding, evidence of the reasons for a decision made by a member of a jury in another Australian or overseas proceeding, or of the deliberations of a member of a jury in relation to such a decision, must not be given by any of the members of that jury. (5) This section does not apply in a proceeding that is: (a) a prosecution for one or more of the following offences: (i) an offence against or arising under Part III of the Crimes Act 1914; (ii) embracery; (iii) attempting to pervert the course of justice; (iv) an offence connected with an offence mentioned in subparagraph (i), (ii) or (iii), including an offence of conspiring to commit such an offence; or (b) in respect of a contempt of a court; or (c) by way of appeal from, or judicial review of, a judgment, decree, order or sentence of a court; or (d) by way of review of an arbitral award; or (e) a civil proceeding in respect of an act of a judicial officer or arbitrator that was, and that was known at the time by the judicial officer or arbitrator to be, outside the scope of the matters in relation to which the judicial officer or arbitrator had authority to act.
130	Section 130(1) provides that if the public interest in admitting into evidence information or a document that relates to matters of State is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.

Section	**Provision**
131	(1) Evidence is not to be adduced of: (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute. (2) Subsection (1) does not apply if:

(a) the persons in dispute consent to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document in evidence in another Australian or overseas proceeding, all the other persons so consent; or

(b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute; or

(c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced; or

(d) the communication or document included a statement to the effect that it was not to be treated as confidential; or

(e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or

(f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue; or

(g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or

(h) the communication or document is relevant to determining liability for costs; or

(i) making the communication, or preparing the document, affects a right of a person; or

(j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or

(k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.

(3) For the purposes of paragraph (2)(j), if commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:

(a) the fraud, offence or act was committed; and

(b) a communication was made or a document was prepared in furtherance of the commission of the fraud, offence or act;

the court may find that the communication was so made or the document so prepared.

(4) For the purposes of paragraph (2)(k), if:

(a) the abuse of power is a fact in issue; and

(b) there are reasonable grounds for finding that a communication was made or a document was prepared in furtherance of the abuse of power;

the court may find that the communication was so made or the document was so prepared.

Section	Provision
	(5) In this section: (a) a reference to a dispute is a reference to a dispute of a kind in respect of which relief may be given in an Australian or overseas proceeding; and (b) a reference to an attempt to negotiate the settlement of a dispute does not include a reference to an attempt to negotiate the settlement of a criminal proceeding or an anticipated criminal proceeding; and (c) a reference to a communication made by a person in dispute includes a reference to a communication made by an employee or agent of such a person; and (d) a reference to the consent of a person in dispute includes a reference to the consent of an employee or agent of such a person, being an employee or agent who is authorised so to consent; and (e) a reference to commission of an act includes a reference to a failure to act. (6) In this section: *'power'* means a power conferred by or under an Australian law.

THE NATURE OF CONFIDENTIAL INFORMATION

7.16 In *H Stanke & Sons Pty Ltd & Cape Banks Processing Company Pty Ltd v Von Stanke* [2006] SASC 308 (5 October 2006), White J noted at [38]:

> In order to obtain relief against a breach of confidence, an applicant must show that the information has the necessary quality of confidence about it, that the information was imparted in circumstances importing an obligation of confidence, and that there was, or is threatened, an unauthorised use of that information to the detriment of the party communicating it.

7.17 The Uniform Evidence Legislation[16] defines 'confidential communication' to mean a communication made in such circumstances that, when it was made: (a) the person who made it; or (b) the person to whom it was made; was under an express or implied obligation not to disclose its contents, whether or not the

obligation arises under law. The ending of the lawyer-client relationship does not mean that the information loses its confidential status.[17]

7.18 It is a basic requirement that before material will be recognised as having the character of confidential information, the information in question must be identified with precision, and not merely in global terms.[18]

7.19 Apart from the express wishes of the client, a means of showing that the document or information is one that gives rise to a duty of confidence is to consider the consequences

of use of the material. In *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118, Bryson J noted at 124:

> In particular it must be shown that the information was confidential to the plaintiff when it was communicated, involving the plaintiff in the necessity of showing facts and circumstances which show that it should then have been kept confidential or secret.

7.20 In *Rapid Metal Developments (Aust) Pty Ltd v Anderson Formrite Pty Ltd* [2005] WASC 255 (17 November 2005), Johnson J discussed the relevant authorities and noted at [68]–[69]:

> Although the courts have had difficulty in identifying a test to be applied in determining whether the circumstances import an obligation of confidence, Ungoed-Thomas J in *Duchess of Argyll v Duke of Argyll* (at 330) made the following observation (approved and applied by Megarry J in *Coco v AN Clark (Engineers) Ltd* at 48):
>
> > 'It may well be that that hard-worked creature, the

> reasonable man, may be pressed into service once more; for I do not see why he should not labour in equity as well as at law. It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence.'

7.21 Thus the test is an objective one and can be summarised in the following terms: An obligation of confidentiality arises when a reasonable person in the shoes of the recipient of the information would have realised that the information was being provided in confidence.[19]

PROFESSIONAL RULES OF CONDUCT CONCERNING CONFIDENTIALITY

7.22 Apart from being actionable under the general law of contract, tort, or equity, a failure by the practitioner to maintain the confidences of clients can give rise to disciplinary proceedings for misconduct. For solicitors, this ethical obligation is reflected in the various Professional Conduct Rules, which are extracted below.[20]

7.23 The following extract is r 2 of the Law Society of the Northern Territory's Rules of Professional Conduct and Practice 2005:

2 Confidentiality

2.1 A practitioner must not, during or after termination of, a retainer, disclose to any person, who is not a partner or employee of the practitioner's firm, any information, which is confidential to a client of the practitioner, and acquired by the practitioner during the currency of the retainer, unless—

2.1.1 the client authorises disclosure;

2.1.2 the practitioner is permitted or compelled by law to disclose; or

2.1.3 the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a felony.

2.2 A practitioner's obligation to maintain the confidentiality of a client's affairs is not limited to information which might be protected by legal professional privilege, and is a duty inherent in the fiduciary relationship between the practitioner and client.

…

7.24 The following extract is r 9 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, applicable in Queensland,[21] New South Wales,[22] South Australia,[23] Victoria,[24] and the Australian Capital Territory:[25]

9 ***Confidentiality***

9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not:

9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor's law practice, or

9.1.2 a barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or

administering legal services in relation to the client,

EXCEPT as permitted in Rule 9.2.

9.2 A solicitor may disclose information which is confidential to a client if:

9.2.1 the client expressly or impliedly authorises disclosure,

9.2.2 the solicitor is permitted or is compelled by law to disclose,

9.2.3 the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations,

9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence,[26]

9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person, or

9.2.6 the information is disclosed to the insurer of the solicitor, law practice or associated entity.

…

7.25 The Tasmanian Rules of Practice 1994 r 11(1) provides:[27]

11. Disclosure of information and interest

(1) A practitioner must not disclose any information obtained in the course of handling a client's matter without the consent of the client other than to the administrator of a scheme relating to legal assistance in accordance with rule 16 [dealing with legal aid clients].

…

7.26 The Law Society of Western Australia's Legal Profession Conduct Rules 2010 r 9 provides:[28]

> **9.** ***Confidentiality***
>
> (1) In this rule —
> *associated entity*, in relation to a law practice, means an entity, including a service trust or corporation, that is not part of the law practice but which provides legal or administrative services exclusively to the law practice;
>
> *client information* means information confidential to a client of which a practitioner becomes aware in the course of providing legal services to the client.
>
> (2) A practitioner must not disclose client information to a person other than the client unless the person is —
> (a) an associate of the practitioner's law practice; or
> (b) a person engaged by the practitioner's law practice for the purposes of providing legal services to the client; or

> (c) a person employed or otherwise engaged by an associated entity of the practitioner's law practice for the purposes of providing administrative services to the client.
>
> (3) Despite sub-rule (2), a practitioner may disclose client information to a person if —
> (a) the client expressly or impliedly authorises the disclosure of the information to that person or the practitioner believes, on reasonable grounds, that the client has authorised the disclosure of the

information to that person; or

(b) the practitioner is permitted or compelled by law to disclose the information to that person; or

(c) the practitioner discloses the information to the person in a confidential setting, for the sole purpose of obtaining advice from that person in connection with the first-mentioned practitioner's legal or ethical obligations; or

(d) the practitioner discloses the information for the purpose of avoiding the probable commission of a serious offence; or

(e) the practitioner discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person; or

(f) the information is disclosed on a confidential basis to a person who is the insurer of the practitioner, the practitioner's law practice or associated entity for the purposes of obtaining or claiming insurance or notifying the insurer of potential claims; or

(g) the disclosure of the information is necessary to respond to a complaint or a proceeding brought against any of the following —

(i) the practitioner;

(ii) the practitioner's law practice;

(iii) an associated entity of the practitioner's law practice;

(iv) a person employed by one of the persons referred to in subparagraphs (i) to (iii).

…

GROUNDS FOR THE DISCLOSURE OF CONFIDENTIAL INFORMATION

7.27 The grounds that justify the disclosure of confidential

information are, for the most part, reflected in the Professional Conduct Rules[29] and the common law.[30] They are based on the 'public interest' in protecting the public from harm and making available to a court all the relevant evidence. Confidentiality militates against these 'interests'.

7.28 Examples of cases involving the disclosure of confidential information based on the public interest often involve circumstances where health care professionals have released

information to the police or other agencies.[31] In *W v Edgell* [1990] 1 All ER 835, the Court of Appeal (UK) held that a medical practitioner who had highly relevant information about a patient's psychological condition, was justified in passing on that information to those responsible for making decisions concerning the patient's future, where the suppression of that information would have denied the psychiatric institution and other authorities access to information relevant to questions of public safety.[32]

7.29 Other cases based on public interest disclosure involving lawyers, include cases where the solicitor disclosed the information for the sole purpose of avoiding the probable commission of a serious criminal offence,[33] or where the solicitor disclosed the information for the purpose of preventing imminent serious physical harm to the client or to another person. In these circumstances, the various Professional Conduct Rules[34] entitle the lawyer to disclose what would otherwise amount to a breach of confidence.[35] At common law, disclosure on the grounds of public interest can also be justified where it can be established that the

failure to disclose would obstruct the course of justice and be contrary to the public interest. In *A v Hayden (No 2)* (1984) 156 CLR 532, Gibbs CJ noted at 547:

> Similarly, where an obligation of confidentiality has arisen, whether as a result of express contract or because the relationship between the parties gave rise to a duty of confidence, the party who alleges facts which show that the obligation does not extend to the circumstances of the case must prove his allegations. That means that in the present case the defendants must establish, at least prima facie, that the failure to disclose the information would tend to obstruct the course of justice and would be contrary to the public interest. It would not be enough to justify the disclosure of the confidential information in the present case that the police have requested it. It would be necessary to show, at the very least, that there is reasonable ground to believe that any plaintiff whose identity it is sought to disclose is implicated in the commission of an offence. Put in another way, at least what has to be shown prima facie is that there is 'a bona fide and reasonably tenable charge of crime' against any plaintiff whose identity is sought to be disclosed. The bona fides of the police in the

> present case is not in doubt, but it is a question whether any charge against each plaintiff is reasonably tenable.

7.30 Another 'public interest' ground justifying disclosure concerns compliance with the law. In *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1, the High Court approved the view that the duty of confidence is subject to and overridden by the duty of any party to comply with the law — for example, a rule of court or a court order may compel disclosure.

7.31 However, there is a competing 'public interest' that justifies

the non-disclosure of confidential information, namely, the need for a client to be able to talk freely to their legal advisers, including the admission of facts that might be contrary to their interests. In *Carter v Managing Partner, Northmore, Hale, Davy and Leak* (1995) 183 CLR 121, McHugh J noted at 161:

> By protecting the confidentiality of communications between lawyer and client, the doctrine protects the rights and privacy of persons including corporations by ensuring unreserved freedom of communication with professional lawyers who can advise them of their rights under the law and, where necessary, take action on their behalf to defend or enforce those rights. The doctrine is a natural, if not necessary, corollary of the rule of law and a potent force for ensuring that equal protection under the law is a reality.

7.32 The Evidence Act 1995 (Cth)[36] also specifically excludes certain evidence on the grounds of 'public interest', including the exclusion of evidence of reasons for judicial decisions,[37] the exclusion of evidence of matters of State,[38] and the exclusion of evidence of settlement negotiations.[39]

7.33 Apart from public interest disclosure, the law also recognises an exception to the duty of confidentiality based on consent. Confidentiality is an obligation owed by a lawyer to their client. It is therefore open to the client to waive the right of confidence by consenting to the disclosure of the information. Consent may be express or implied. Express consent arises where the client, verbally or in writing, agrees to the confidence being communicated. An example of implied consent would be where the disclosure is consistent with the terms of the retainer — for example, where the lawyer discloses confidential information to another member of their firm in order to progress or assist the client's case.[40]

7.34 Further examples of implied consent (or waiver) would be where the lawyer seeks advice in relation to their ethical obligations,[41] or where the lawyer is seeking to defend themself from proceedings by the client for professional negligence.[42]

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7.35 *Richards v Ankur Kadian by his Tutor Janak Kadian* [2005] NSWCA 328 concerned the issue of waiver in the context of an action in negligence against a pediatrician. The decision of Beazley J provides a comprehensive analysis of the law concerning waiver so far as confidentiality is concerned. In this case, the opponents/plaintiffs (Kadian) brought proceedings against the claimant/defendant (Richards), alleging negligence in failing to diagnose a congenital heart condition. In the course of pre-trial preparation, Richards sought to interview the infant plaintiff 's treating medical specialists. Richards had already had access to the treating specialist's medical records. The request was resisted on the basis that the infant plaintiff 's relationship with his treating specialist was confidential. Richards brought an application claiming that the plaintiff had waived confidentiality by the commencement of the proceedings, or alternatively seeking a stay of the proceedings unless and until confidentiality was waived. Beazley J noted at [8], [88]:

> [8] Three specific issues emerged in the way the matter was argued on the appeal: first whether the opponents' insistence on the right of confidentiality with Ankur's treating doctors, Dr Sholler and Dr Lewis, had the effect of interfering with the administration of justice so that the confidential relationship, in the circumstances, is void (the confidentiality issue); secondly, whether the confidential relationship

had been waived by the commencement of proceedings against the claimant (the waiver issue); thirdly, whether, in this case, the proceedings ought to be stayed unless and until the opponent, the patient in question, waives his right to confidentiality (the stay issue). There is a further subsidiary issue, whether the treating doctors whom the claimant wishes to interview are necessary parties to the proceedings.

…

[88] The claimant's waiver argument accepted as its premise that the consultations with, and communications between the first opponent and his parents, and Dr Sholler and Dr Lewis were confidential. The claimant submitted, however, that confidentiality had been waived when the first opponent commenced proceedings in which he put in issue the medical condition for which he was consulting Dr Sholler. It followed, on this submission, that a party could not prevent a treating doctor from disclosing the observations made, and opinions formed in relation to the patient's medical condition, to an opposing party's solicitor during the pre-trial phase of the litigation.

7.36 The Court held that there was no waiver in this case, on the basis that the defendant had a variety of means whereby he could be fully informed and advised so as to be able to properly defend the proceedings. Hodgson JA noted, in relation to the waiver issue at [169]–[171]:

[169] In my opinion, these matters could not at present support a declaration that confidentiality has been waived. …

[170] However, if the matter is squarely put to the plaintiff, my tentative view is that the plaintiff must then either abandon any reliance on the reports and observations of Dr Sholler and Dr Lewis as part of its case of negligence against the claimant, including reliance on the items identified above, or else be taken to have waived confidentiality.

> [171] While it is not inconsistent with maintenance of confidentiality for the plaintiff to make assertions about the plaintiff 's medical condition at the time of consultation with these doctors, my tentative view is that it would be inconsistent for the plaintiff to make assertions against the claimant about what these doctors observed and what information these doctors obtained on those occasions, and yet maintain that the information they obtained on those occasions is confidential from the claimant. That stance would involve the inconsistency arising from unfairness identified in *Attorney-General for the Northern Territory v Maurice* [1986] HCA 80; (1986) 161 CLR 475.

GENERAL PRINCIPLES IN RELATION TO LEGAL PROFESSIONAL PRIVILEGE

7.37 In its report entitled *Privilege in Perspective: Client Legal Privilege and Federal Investigatory Bodies*, the Australian Law Reform Commission noted:[43]

> At common law legal professional privilege (now characterised as client legal privilege under the Uniform Evidence Act) protected confidential communications between a lawyer and their client from compulsory production in the context of court and similar proceedings.

7.38 In *Mitic v Oz Minerals Ltd* [2015] FCA 1152, Edelman J, under the heading 'Legal principles concerning legal professional privilege', set out the following statements of law, originally summarised by Young J in *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30 at 44–7; [2006] FCA 1234 at [44]:

1. The party claiming the privilege carries the onus of proving that

the communication was undertaken, or the document was brought into existence, for the dominant purpose of giving or obtaining legal advice. …

2. The purpose for which a document is brought into existence is a question of fact that must be determined objectively. …
3. The existence of legal professional privilege is not established merely by the use of verbal formula. …
4. Where communications take place between a client and his or her independent legal advisers, or between a client's in-house lawyers and those legal advisers, it may be appropriate to assume that legitimate legal advice was being sought, absent any contrary indications. …
5. A 'dominant purpose' is one that predominates over other purposes. …
6. An appropriate starting point when applying the dominant purpose test is to ask what was the intended use or uses of the document which accounted for it being brought into existence.
7. The concept of legal advice is fairly wide. …
8. Legal professional privilege protects the disclosure of documents that record legal work carried out by the lawyer for the benefit of the client, such as research memoranda,

collations and summaries of documents, chronologies and the like, whether or not they are actually provided to the client. …

9. Subject to meeting the dominant purpose test, legal professional privilege extends to notes, memoranda or other documents made by officers or employees of the client that relate to information sought by the client's legal adviser to enable him or her to advise. …
10. Legal professional privilege is capable of attaching to communications between a salaried legal adviser and his or her employer, provided that the legal adviser is consulted in a

professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client.

11. Legal professional privilege protects communications rather than documents, as the test for privilege is anchored to the purpose for which the document was brought into existence. Consequently, legal professional privilege can attach to copies of non-privileged documents if the purpose of bringing the copy into existence satisfies the dominant purpose test. …
12. The court has power to examine documents over which legal professional privilege is claimed. Where there is a disputed claim, the High Court has said that the court should not be hesitant to exercise such a power. … [case citations omitted]

7.39 In *Re Forge Group Construction Pty Ltd (in liq) (rec and mngrs appntd); Ex parte Jones (No 2)* [2016] WASC 87 (18 March 2016), Tottle J at [20] referred to *AW v Raney* [2010] WASCA 161, where similar principles had been expressed by McLure P at [17]–[20] and [23]–[25].

7.40 Legal privilege is a privilege given to a client, not to their lawyer. Thus, the terms 'legal professional privilege' or 'lawyer-client privilege' are somewhat misleading. Legal professional privilege can be in the form of 'advice privilege' or 'litigation privilege'. Advice privilege is the privilege between a client and their lawyer in respect of confidential communications between the client and lawyer, or communications where the client, or the lawyer on behalf of the client, seeks the advice of a third party for the purpose of obtaining or giving legal advice. Litigation privilege is in respect of confidential communications made in relation to existing or anticipated litigation.

7.41 As noted at 7.1, at common law it is only the relationship between the client and the lawyer that is protected by privilege,[44]

with the effect that communications between the client and the lawyer for the purposes of obtaining and giving legal advice cannot be disclosed unless the privilege is waived or has been abrogated by law — for example, by some statutory provision.

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7.42 In relation to journalists and their sources, s 126K of the Evidence Act 1995 (Cth) provides that:

> (1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained.
> (2) The court may, on the application of a party, order that subsection (1) is not to apply if it is satisfied that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs: (a) any likely adverse effect of the disclosure on the informant or any other person; and (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.
> (3) An order under subsection (2) may be made subject to such terms and conditions (if any) as the court thinks fit.

7.43 In relation to confessions made to a member of the clergy, s 127 of the Evidence Act 1995 (Cth) provides:

> (1) A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.

(2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose.

(3) This section applies even if an Act provides: (a) that the rules of evidence do not apply or that a person or body is not bound by the rules of evidence; or (b) that a person is not excused from answering any question or producing any document or other thing on the ground of privilege or any other ground.

(4) In this section: '*religious confession*' means a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the church or religious denomination concerned.

7.44 Sections 128 and 128A of the Evidence Act 1995 (Cth) also make provision for a privilege in relation to self-incrimination.

7.45 Some of the jurisdictions that have adopted the Uniform Evidence Legislation have introduced certain other statutory privileges in addition to those provided for in respect of journalists in relation to their sources and the clergy in relation to confessions under the Uniform Evidence Legislation.[45] For example, in New South Wales, the Evidence Act 1995 (NSW) makes provision for 'professional confidential relationship privilege' (which would

include the relationship between doctor and patient),[46] 'sexual assault communications privilege',[47] and a privilege in respect of self-incrimination.[48] In addition, the Government Information (Public Access) Act 2009 (NSW), which deals with authorising and encouraging the proactive public release of government information by New South Wales government agencies, provides in Sch 1 cl 5:[49]

(1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information that would be privileged from production in legal proceedings on the ground of client legal privilege (legal professional privilege), unless the person in whose favour the privilege exists has waived the privilege.
(2) If an access application is made to an agency in whose favour legal professional privilege exists in all or some of the government information to which access is sought, the agency is required to consider whether it would be appropriate for the agency to waive that privilege before the agency refuses to provide access to government information on the basis of this clause.
(3) A decision that an agency makes under subclause (2) is not a reviewable decision under Part 5.

7.46 Under the provisions of the Evidence Act 2001 (Tas), s 126B provides for the exclusion of evidence in respect of a 'protected confidence'.[50] Sections 126C and 126D provide for situations where professional confidential relationship privilege will be lost, namely, where there is consent or misconduct; s 127A provides for a privilege in respect of medical communications;[51]

s 127B provides for a privilege in respect of communications with a counsellor; ss 128 and 128A provide for a privilege in respect of self-incrimination.

7.47 In respect of those jurisdictions that have not adopted the Uniform Evidence Legislation — South Australia, Queensland, and Western Australia — there are various provisions in their Evidence Acts and other legislation which provide a statutory exclusion of

the disclosure of information. For example, s 34L of the South Australian Evidence Act 1929 states in subs (1) that 'in proceedings in which a person is charged with a sexual offence, no question may be asked or evidence admitted: (a) as to the sexual reputation of the alleged victim of the offence; or (b) except with the permission of the judge — as to the alleged victim's sexual activities before or after the events of and surrounding the alleged offence (other than recent sexual activities with the accused).'[52] Section 67C states that 'evidence of a communication made in connection with an attempt to negotiate the settlement of a civil dispute, or of a document prepared in connection with such an attempt, is not admissible in any civil or criminal proceedings'. Section 67E provides for the protection of communications on the grounds of public interest immunity, namely, a communication relating to a victim or alleged victim of a sexual offence if made in a therapeutic context.[53]

7.48 In Western Australia, s 18 of the Evidence Act 1906 (WA) provides a privilege in relation to communications during marriage.[54] However, the section does not apply in any proceeding in the Supreme Court in its divorce and matrimonial causes jurisdiction, or to any husband and wife who are both parties to any proceeding in the Family Court of Western Australia. Sections 19A–19G of the Evidence Act 1906 (WA) relate to the non-disclosure of information in relation to 'protected communications'[55] in criminal proceedings, except with leave of the court (s 19C). Sections 20A–20C relate to the exclusion of evidence concerning 'protected confidences',[56] although these provisions do not prevent the giving or adducing of evidence with the consent of the protected confider concerned, or where there has been misconduct on the part of the confider who makes a communication in confidence to another person. A prohibition on the admission of evidence concerning the sexual reputation of a

complainant in proceedings for a sexual offence, or their sexual disposition, or their sexual experience, is found

in ss 36B, 36BA, and 36BC of the Act. Section 32A(3) of the Act also provides that, in relation to civil proceedings, there shall be a derogation or loss of privilege to the extent that rules of court applicable to expert evidence so provides.

7.49 In Queensland, s 10 of the Evidence Act 1977 (Qld) relates to privileges and the obligations of witnesses. This includes the privilege against self-incrimination. Section 12 provides for the inadmissibility of evidence as to whether marital intercourse took place between that person and their wife or husband, or whether any child is their legitimate child. Section 38 relates to the privileges of witnesses.

7.50 In relation to client legal privilege generally, in *Krok v Szaintop Homes Pty Ltd (No 1)* [2011] VSC 16 (8 February 2011), Judd J noted at [17] that 'the evidence advanced in support of a claim for client legal privilege attaching to a document must at least establish the purpose for which the document was made, identify the maker and the party for whom the document was prepared, and establish the elements of confidentiality'.

7.51 The party claiming privilege bears the onus of establishing the basis of the claim and the facts from which the court can determine that the privilege is capable of being asserted.[57] In *Hancock v Rinehart (Privilege)* [2016] NSWSC 12, Brereton J noted at [7]:

> In order to sustain a claim of privilege, the claimant must not merely assert it; but must prove the facts that establish that it is properly made. Thus a mere sworn assertion that the documents are privileged does not suffice, because it is an inadmissible assertion of law; the claimant must set out the facts from which the court can see that the assertion is rightly made, or in other words 'expose … facts from which the [court] would have been able to make an informed decision as to whether the claim was supportable'. The evidence must reveal the relevant characteristics of each document in respect of which privilege is claimed and must do so by admissible direct evidence, not hearsay.

7.52 It has been held that the name and perhaps the address of the client do not generally attract privilege unless they are more than collateral to the relationship.[58] In *Z v New South Wales Crime Commission* (2007) 233 ALR 17 (28 February 2007), the High Court considered whether the communication of a client's name or their contact details was a privileged communication. The appeal by Z was dismissed by the majority on the grounds that s 18B(4) of the New South Wales Crime Commission Act 1985 (NSW) required legal practitioners to furnish such information to the Commission. In his judgment, Gleeson CJ noted at [4]–[5]:

> [4] As a general rule, a requirement that a lawyer disclose the identity of a client will not necessitate disclosure of a confidential communication. There are, however, exceptional

> circumstances in which there is such a connection between a confidential communication and a retainer that disclosure by a lawyer of the identity of a client will disclose that confidential communication. …

> [5] It is unnecessary to pursue that matter because s 18B(4) of the Act qualifies a legal practitioner's entitlement to refuse to answer a question on the ground that the answer would disclose a privileged communication by providing that the legal practitioner must, if required, 'furnish to the Commission the name and address of the person to whom or by whom the communication was made'. …

7.53 Hayne and Crennan JJ also dismissed the appeal, but held that the details concerning the client were not privileged communications as between lawyer and client, and thus s 18B(4) was not engaged.

7.54 Kirby and Callinan JJ at [12] and [13] were of the view that:

> In light of the peculiar circumstances of his [the legal practitioner's] retainer and its dominant purposes in this case, legal professional privilege attached to disclosure of his client's name and address. … However, allowing this to be the case, s 18B(4) of [the Act] presents an insuperable obstacle to the maintenance of the privilege.

7.55 Legal professional privilege also extends to communications and documents passing between the party's solicitor and a third party, if they are made or prepared when litigation is anticipated or commenced with a view to obtaining advice as to it, evidence to be used in it, or information which may result in the obtaining of such evidence.[59] In *Baker v Campbell* (1983) 153 CLR 52, Gibbs CJ noted at 60:

> The nature of legal professional privilege is described as follows in *Halsbury's Laws of England* (4th ed), vol 13, par 71: '… communications made to and from a legal adviser for the purpose of obtaining legal advice and assistance are protected from disclosure in the course of legal proceedings, both during discovery and at the trial. … Any other communications as are reasonably necessary in order that the legal advice may be safely and sufficiently obtained are also protected, but in the case of communications to or from a non-

> professional agent or third party, such as a person who witnessed some event, the privilege only arises if litigation is threatened or contemplated.'

7.56 Section 133 of the Evidence Act 1995 (Cth) provides that where a question arises in relation to a claim of privilege over a document, the court may order that the document be produced to it and may inspect the document for the purposes of determining the question. It is also of little significance as to how the parties describe the document. In *Rankilor v City of South Perth* [2016] WASCA 28, Buss, Newnes, and Murphy JA noted at [30]:

> As the primary judge correctly observed, whether the report is described by the respondent as an 'investigator's report' or an 'assessor's report', or from time to time by those descriptions interchangeably, is of no significance. So far as the report itself is concerned, the question

> of privilege turns on the contents of the report, not which of those descriptions was used to refer to it.

7.57 Privilege also attaches to a copy of a document for which the original attracts privilege.[60]

7.58 In some Australian jurisdictions, a privilege has been extended by statute (Commonwealth and State legislation) to cover the relationship between doctor and patient, journalist and informant, and penitent and priest. In South Australia, s 67E of the Evidence Act 1929 (SA) provides public interest immunity in relation to a communication by a victim or alleged victim of a sexual offence, if made in a therapeutic context. Should these

relationships be regarded in the same way as the lawyer-client relationship? What are the public policy reasons for and against extending privilege to cover such relationships?

THE RATIONALE FOR THE PRIVILEGE

7.59 In *Attorney General for the Northern Territory v Maurice* (1986) 161 CLR 475, Gibbs CJ noted at 480:

> The rule which recognises legal professional privilege goes back at least to the time of Elizabeth I (see *Wigmore on Evidence*, McNaughton rev, vol VIII, para 2290) but that does not mean that it is archaic, technical or outmoded. Without the privilege, no one could safely consult a legal practitioner and the administration of justice in accordance with the adversary system which prevails at common law would be greatly impeded or even rendered impossible. This has been recognised in many cases: see, for example, *Grant v Downs* [(1976) 135 CLR 674)] at p 685; *R v Bell; Ex parte Lees* [1980] HCA 26; (1980) 146 CLR 141 at 152; [1980] HCA 26; 30 ALR 489; *Baker v Campbell* (1983) 153 CLR 52 at 66, 94, 114; 49 ALR 385. In the last-mentioned case, the majority of the court described the rule as fundamental or essential (see (CLR) at pp 88, 95, 116–7, 131–2) and held that it was not confined to judicial or quasi-judicial proceedings. However, like every privilege properly so called it can be waived, although only by the person entitled to claim it, that is the client, and not the client's legal representative.

7.60 In *Baker v Campbell* (1983) 153 CLR 52, Gibbs CJ noted at 65–6:

> The reason why privilege is extended to confidential communications made by a client to his solicitor, and not to confidential communications made, eg by a patient to a doctor, a penitent to a priest, or a customer to a banker, is that the view has been taken that in the first mentioned case the public interest requires that the private obligation of confidentiality be fulfilled, for a reason which has been

explained in many cases, of which *Grant v Downs* [(1976) 135 CLR 674)], is one of the most recent in Australia. It is necessary for the proper conduct of litigation that the litigants should be represented by qualified and experienced lawyers rather than that they should appear for themselves and it is equally necessary that a lawyer should be placed in full possession of the facts to enable him to give proper advice and representation to his client. The privilege is granted to ensure that the client can consult his lawyer with freedom and candour, it being thought that if the privilege did not exist 'a man

would not venture to consult any skilful person, or would only dare to hell his counsellor half his case'.

7.61 In the same case, Deane J noted at 114:

From at least the eighteenth century however, it has been generally accepted that the explanation of the privilege is to be found in an underlying principle of the common law that, subject to the above-mentioned qualifications, a person should be entitled to seek and obtain legal advice in the conduct of his affairs and legal assistance in and for the purposes of the conduct of actual or anticipated litigation without the apprehension of being thereby prejudiced (see Wigmore, par 2291). The fact that the privilege is not restricted to the particular legal proceedings for the purposes of which the relevant communication may have been made or, for that matter, to proceedings in which the party entitled to the privilege is a party plainly indicates that the underlying principle is concerned with the general preservation of confidentiality. That is also made clear by the rationale of the underlying principle which was explained by Stephen, Mason and Murphy JJ in *Grant v Downs* (1976) 135 CLR 674, at p 685 in words which I would respectfully adopt: 'The rationale of this head of privilege, according to traditional doctrine, is that it promotes the

public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision'.

7.62 Dawson J noted at 127:

> The law came to recognize that for its better functioning it was necessary that there should be freedom of communication between a lawyer and his client for the purpose of giving and receiving legal advice and for the purpose of litigation and that this entailed immunity from disclosure of such communications between them.

7.63 In *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121; 129 ALR 593, the High Court referred to the privilege as being 'of fundamental importance in the administration of justice';[61] that it allows for 'the public interest in facilitating the application of the rule of law';[62] that it provides 'a practical guarantee of fundamental, constitutional or human rights';[63] and that it 'plays an essential role in protecting and preserving the rights,

dignity and freedom of the ordinary citizen — particularly the weak, the unintelligent and the ill-informed citizen — under the law'.[64] Brennan J noted at 596:

> There is, of course, a public interest in having available all evidence relevant to the issues in litigation. And that public interest encompasses the public interest in achieving fairness in the trial of a person charged with a criminal offence. Although the public interest in having all relevant evidence available is, to an extent, defeated by the privilege, there is no occasion for the courts to undertake a balancing of public interests: the balance is already struck by the allowing of the privilege. … Of course, an individual charged with a criminal offence has his own interest in securing evidence that may tend to assist in his defence. But if there be no public interest which defeats the privilege, there can be no individual interest which does so. … The privilege facilitates the giving of legal advice on any subject and consultations on legal problems of all kinds. An exception created in order to serve the interests of a person charged with a criminal offence would create, at least potentially, a right in such a person to destroy any privileged communication between legal adviser and client and perhaps to publish the contents of the privileged communication to the public generally by disclosing the communication in court.[65]

7.64 In *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49, the majority noted at 64:

> The privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers.

7.65 In *Watkins v State of Queensland* [2007] QCA 430 (30 November 2007), Dean J noted at [78]:

> The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and

> enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision.

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7.66 In *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No 2)* [2014] FCA 481 (13 May 2014), Bromberg J noted at [47]:

> … [t]he rationale for legal professional privilege is based upon the protection of lawyer/client confidentiality. As Goldberg J said in *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1988) 81 FCR 526 and 562 'it is an integral component of the claim for privilege from production on the ground of legal professional privilege that the relevant documents be confidential'. The Full Court in *Cadbury Schweppes* identified the nature of the confidentiality relevant to legal professional privilege as being 'that of preventing one's opponent from seeing the confidential communications between a client and his or her legal representative or otherwise brought into existence for the dominant purpose of litigation'. A document created to enable its deployment for a use which is inconsistent with the maintenance of lawyer/client confidentiality is not a document to which legal privilege attaches

because the purpose for creating the particular document is inconsistent with the rationale of litigation privilege.

7.67 Legal professional privilege is a rule of substantive law and not merely an evidentiary rule. In *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, Gleeson CJ, Gaudron, Gummow, and Hayne JJ noted at [10]–[11]:

> [10] Being a rule of substantive law and not merely a rule of evidence, legal professional privilege is not confined to the processes of discovery and inspection and the giving of evidence in judicial proceedings. Rather and in the absence of provision to the contrary, legal professional privilege may be availed of to resist the giving of information or the production of documents in accordance with investigatory procedures of the kind for which s 155 of the Act provides. Thus, for example, it was held in *Baker v Campbell*, that documents to which legal professional privilege attaches could not be seized pursuant to a search warrant issued under s 10 of the Crimes Act 1914 (Cth).
>
> [11] Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect. … [footnotes omitted]

7.68 However, there is also a competing public interest. As noted by Brennan J at 596 in *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121; 129 ALR 593, the fact that client information is protected by the law of confidentiality and the doctrine of legal professional privilege means that crucial evidence may not be made available to law enforcement or other agencies involved in the investigation and

prosecution of criminal conduct. As a consequence, a court hearing a matter may be deprived of information (perhaps the most critical information) relevant to the case. It can also mean that an accused person in a criminal trial might be deprived of documents or evidence which may establish their innocence, due to the fact that this evidence is protected by legal professional privilege. Deane J noted at 604–5:

> Clearly, there is force in the argument that legal professional privilege should, as a matter of policy, give way in any case, particularly a criminal case, in which a conclusion is reached

> that the considerations favouring the disclosure of privileged material in the particular circumstances of the particular case outweigh the considerations favouring the preservation of confidentiality. …
>
> Accordingly, the question arises whether there are any compelling legal considerations which would justify this court in curtailing the protection afforded by legal professional privilege by holding that the privilege is unavailing in any case where compulsory disclosure of the privileged communication or document is sought by a person charged with a criminal offence and it appears that such disclosure might materially assist in his or her defence. In my view, the answer to that question is that there are not. It is true that one's instinctive reaction to the question whether an accused person should be given access to any material which might materially assist in his or her defence is an affirmative 'of course'. The more general considerations relating to the administration of justice which have been identified above and which have led the common law to reject that instinctive reaction are, however, extremely strong.
>
> Quite apart from those more general considerations, including the

> essential function served by legal professional privilege in our adversarial system of administering justice, there is the practical consideration that, if legal professional privilege were not completely secure, the likelihood is that the privileged communication or document would not be made or would not come into existence in the first place. Ultimately, much depends upon one's assessment of the extent of the detriment to the efficacy of legal professional privilege which would be likely to result from the proposed curtailment of the protection which it affords. In my view, that detriment could well be significant. As has been seen, such a curtailment would reduce the conclusive and unqualified protection afforded by legal professional privilege to a provisional and qualified protection. Even more important, it would, in the administration of criminal justice, to some extent undermine the rationale of the privilege by precluding the removal of apprehension of compulsory disclosure which is its focus.

7.69 What are some of the factors which go to determine the question of 'competing public interest' so far as it relates to the disclosure of information? How can we reconcile the importance of a court having access to all information in order to do justice, with the notion of legal professional privilege? Discuss the competing views expressed by Gibbs CJ and Murphy J in *Baker v Campbell* (1983) 153 CLR 52.

PRIVILEGE IN RELATION TO GOVERNMENT AND CORPORATE LAWYERS

7.70 The issue that arises in relation to government and in-house lawyers is the extent to which they are independent of their employer so far as the giving of legal advice is concerned.[66] Legal professional privilege extends to professional communications between government

agencies or officers and their salaried legal officers.[67] Section 117 of the Uniform Evidence Legislation defines 'client' to include the following:

> (a) A person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service);
> (b) An employee or agent of a client;
> (c) An employer of a lawyer if the employer is:
> (i) the Commonwealth or a State or Territory; or
> (ii) a body established by a law of the Commonwealth or a State or Territory;
> (d) If under a law of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a client — a manager, committee or person so acting;
> (e) If a client has died — a personal representative of the client;
> (f) A successor to the rights and obligations of a client, being rights and obligations in respect of which a confidential communication was made.

7.71 Concerning government lawyers, in *Oztech Pty Ltd v The Public Trustee of Queensland (No 5)* [2016] FCA 333 (24 March 2016), one of the questions for determination by the court was whether the Public Trustee was entitled to resist production of certain confidential communications on the basis of legal professional privilege, where those communications took place between his staff and his chief in-house lawyer (Mr Crofton). This raised the issue whether the in-house lawyer to the Public Trustee was sufficiently independent from the managerial or executive functions of the Public Trustee. Perrim J concluded at [44]:

> I do not accept as a matter of fact that it has been demonstrated that Mr Crofton's independence was compromised in relation to the matters which are the subject of the present applications. I have no reason to think that the advice he proffered in this case was anything other than independent. No basis therefore exists to think that his communications did not attract privilege.

7.72 In *Telstra Corporation Ltd v Minister for Communications, Information Technology and the Arts (No 2)* [2007] FCA 1445, Graham J, in denying the privilege, stated at [35]–[36]:

> [35] In my opinion an in-house lawyer will lack the requisite measure of independence if his or her advice is at risk of being compromised by virtue of the nature of his employment relationship with his employer. On the other hand, if the personal loyalties, duties and interests of the in-house lawyer do not influence the professional legal advice which he gives, the requirement for independence will be satisfied.
>
> [36] In the case presently before the Court, there is no evidence, as I have earlier remarked, going to the independence of the internal legal advisers involved in the communications said to have been brought into existence for the dominant purpose of providing or receiving

> legal advice. There is nothing to indicate from the description of the six documents with which the Court is presently concerned that they must be documents for which privilege is properly claimed.

CLASSES OF DOCUMENTS THAT ATTRACT LEGAL PROFESSIONAL PRIVILEGE

7.73 In *Mitic v OZ Minerals Ltd* [2015] FCA 1152 (28 October

2015), Edelman J noted at [8]:[68]

> Legal professional privilege protects the disclosure of documents that record legal work carried out by the lawyer for the benefit of the client, such as research memoranda, collations and summaries of documents, chronologies and the like, whether or not they are actually provided to the client.

7.74 In *Trade Practices Commission v Sterling* [1979] FCA 33; (1979) 36 FLR 244 (15 June 1979), Lockhart J at 245–6 and 248 sets out the various classes of documents that attract legal professional privilege:[69]

> Legal professional privilege extends to various classes of documents including the following:
>
> (a) Any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance; notwithstanding that the communication is made through agents of the party and the solicitor or the agent of either of them. See *Wheeler v Le Marchant* [(1881) 17 Ch D 675]; *Smith v Daniell* [(1874) LR 18 Eq 649]; *Bullivant v Attorney-General for Victoria* [(1901) AC 196]; *Jones v Great Central Railway Co* [(1910) AC 4] and *O'Rourke v Darbishire* [(1920) AC 581].
> (b) Any document prepared with a view to its being used as a communication of this class, although not in fact so used. See *Southwark Water Co v Quick* [(1878) 3 QBD 315].
> (c) Communications between the various legal advisers of the client, for example between the solicitor and his partner or his city agent with a view to the client obtaining legal advice or assistance. See *Hughes v Biddulph* [(1827) 4 Russ 190; 38 ER 777].
> (d) Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves

privileged, or containing a record of those communications, or relate to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation on his behalf. See *Woolley v North London Railway Co* [(1869) LR 4 CP 602]; *Greenough v Gaskell* [(1833) 1 My & K 98; 39 ER 618]; *Corporation of Bristol v Cox* [(1884) 26 Ch D 678]; *Woolley v Pole* [(1863) 14 CBNS 538; 143 ER 556]; *Seabrook v British Transport Commission* [(1959) 1 WLR 509]; *Grant v Downs* [(1976) 135 CLR 674], and Bray, *Principles and Practice of Discovery* (1885) pp 388–389.

(e) Communications and documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence. See *Wheeler v Le Marchant* [(1881) 17 Ch D 675]; *Laurenson v Wellington City Corporation* [(1927) NZLR 510], and *O'Sullivan v Morton* [[1911] VLR 70].

(f) Communications passing between the party and a third person (who is not the agent of the solicitor to receive the communication from the party) if they are made with reference to litigation either anticipated or commenced, and at the request or suggestion of the party's solicitor; or, even without any such request or suggestion, they are made for the purpose of being put before the solicitor with the object of obtaining his advice or enabling him to prosecute or defend an action. See *Wheeler v Le Marchant* [(1881) 17 Ch D 675]; *Cork v Union Steamship Co* [(1904) 23 NZULR 933], and *In Re Holloway* [(1887) 12 PD 167].

(g) Knowledge, information or belief of the client derived from privileged communications made to him by his solicitor or his agent. See *Kennedy v Lyell* [(1883) 23 Ch D 387] and *Lyell v Kennedy (No 2)* [(1883) 9 AC 81].

It is not open to doubt that the court has power, in a proper case, to inspect documents where a claim of privilege is made to resist an application for inspection of documents by the opposite party. …

Having inspected the documents, which were not numerous, I am satisfied that they are privileged from inspection by the respondent. …

THE SOLE AND DOMINANT PURPOSE TESTS

7.75 Until the case of *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49, the Australian common law had adopted the 'sole purpose test' as the basis for deciding which lawyer-client communications should be protected by the privilege. Under this test, a communication or document was protected by privilege if the reason for it coming into existence was for the 'sole purpose' of giving legal advice. This test was extremely narrow, such that if there was any other purpose for bringing the document into existence (apart from the purpose of giving legal advice) then, regardless of how relatively unimportant the additional purpose may be, the document would not be protected by privilege.[70]

7.76 In *Esso Australia Resources Ltd*, the majority (Gleeson CJ, Gaudron and Gummow JJ, and Callinan J in a separate judgment) put the test in terms of documents which are brought into existence for the 'dominant purpose' of submission to legal advisers for advice or for use in legal proceedings.[71] Gleeson CJ, Gaudron and Gummow JJ in their joint judgment noted at [56]–[60]:

[56] The sole purpose test enunciated by Stephen, Mason and Murphy

JJ did not rest upon a principle that had been worked out in a succession of cases. On the contrary, it overturned what was, until then, accepted principle. In so far as the question was whether there should be a sole purpose or a dominant purpose test, that question was not important to the parties to the appeal, and was not the subject of argument save to the extent that what was said about the point in issue in the case, which was whether the pre-existing test should prevail, indirectly reflected on the matter. The reasons given in the joint judgment for rejecting the pre-existing test do not, as a matter of logic or of policy, require a preference for the sole purpose test over the dominant purpose test, and nowhere do those reasons address a possible choice between those two tests. The House of Lords in England, and the Court of Appeal in New Zealand, with the benefit of the reasoning in *Grant v Downs* available to them, subsequently preferred the dominant purpose test, and the law in Australia is now out of line with other common law jurisdictions. The parliaments of the Commonwealth and New South Wales have adopted the dominant purpose test for their Evidence Acts. All those circumstances, in combination, lead to the conclusion that this court should now reconsider the matter.

[57] The search is for a test which strikes an appropriate balance between two competing considerations: the public policy reflected in the privilege itself, and the public policy that, in the administration of justice and investigative procedures, there should be unfettered access to relevant information. Additionally, whatever test is adopted must be capable of being applied in practice with reasonable certainty and without undue delay and expense in resolving disputed claims.

[58] At first sight, sole purpose appears to be a bright-line test, easily understood and capable of ready application. Many disputes as to its application could be resolved simply by examining the documents in question. However, there is reason to believe that the position is not quite as it appears. The main objection to the test is what was described in the Court of Appeal in New Zealand as its extraordinary narrowness. If it is to be taken literally, one other purpose in addition to the legal purpose, regardless of how relatively unimportant it may

be, and even though, without the legal purpose, the document would never have come into existence, will defeat the privilege. This has led some judges to apply the *Grant v Downs* test in a manner which might suggest that it is not to be taken literally. For example, in *Waterford v Commonwealth* [[1987] HCA 25; (1987) 163 CLR 54], Deane J said the test of whether a document is to be protected is whether 'the cause of its existence, in the sense of both *causans* and *sine qua non*, must be the seeking or provision of professional legal advice'. That may be closer to dominant purpose than sole purpose. At the least, it seems to involve a reformulation aimed at avoiding the use of 'purpose' and also at avoiding the

conclusion that the existence of any purpose in addition to the legal purpose, albeit minor and subsidiary, will mean that no privilege attaches. In argument in the present case, counsel for the respondent endeavoured to explain the meaning of the sole purpose test in a manner that equated it with the test expounded by Jacobs J in *Grant v Downs*. While seeking to uphold a sole purpose test, they submitted that 'if a document is created for the purpose of seeking legal advice, but the maker has in mind to use it also for a subsidiary purpose which would not, by itself, have been sufficient to give rise to the creation of the document, the existence of that subsidiary purpose will not result in the loss of privilege'. That appears close to a dominant purpose test. If the only way to avoid the apparently extreme consequences of the sole purpose test is to say that it should not be taken literally, then it loses its supposed virtue of clarity.

[59] One of the considerations prompting rejection of the pre-existing test was that it was unduly protective of written communications within corporations and bureaucracies. The sole purpose test goes to the other extreme. Such organisations necessarily conduct a large proportion of their internal communications in writing. If the

circumstance that a document primarily directed to lawyers is incidentally directed to someone else as well means that privilege does not attach, the result seems to alter the balance too far the other way. This may be the kind of result Deane J was intending to avoid in his reformulation of the privilege, but it seems to follow unless one puts a gloss upon the sole purpose test.

[60] A dominant purpose test was sufficient to defeat the claims for privilege in *Grant v Downs* and *Waugh*. The reason why Barwick CJ, the House of Lords, and the New Zealand Court of Appeal preferred that test was that they were unable to accept, as either necessary or desirable, the apparent absoluteness and rigidity of a sole purpose test. If the only way to avoid that absoluteness and rigidity is to water down the sole purpose test so that, in its practical application, it becomes more like the dominant purpose test, then it should be abandoned. Either the test is too strict, or it lacks the clarity which the respondent claims for it.[72]

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7.77 The dominant purpose test is also reflected in ss 118 and 119 of the Uniform Evidence Legislation:[73]

118 Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

(a) A confidential communication made between the client and a lawyer; or
(b) A confidential communication made between 2 or more lawyers acting for the client; or
(c) The contents of a confidential document (whether delivered or not) prepared by the client or a lawyer;

for the dominant purpose of the lawyer, or one or more lawyers, providing legal advice to the client.

> 119 Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:
>
> (a) A confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
> (b) The contents of a confidential document (whether delivered or not) that was prepared;
>
> for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

7.78 This section does not determine whether a communication between lawyer and client is in fact privileged. In *Gaynor v Chief of the Defence Force (No 2)* [2015] FCA 817, Katzmann J noted at [11]:

> [11] Section 118 is only concerned with what happens if an attempt is made to adduce evidence the effect of which would disclose legal advice in those circumstances. Whether or not the claims the respondent makes are to be upheld depend on whether it can show that the documents or the communications in them are subject to legal professional privilege at common law. …

7.79 Compare and contrast the views of McHugh and Kirby JJ with the views of the majority in the *Esso* case. Which view do you think should be applied when determining the issue of legal professional privilege?

CIRCUMSTANCES WHERE PRIVILEGE CAN BE LOST

7.80 The law has recognised a number of circumstances where, although a lawyer-client relationship has been established, legal professional privilege will not apply or will be lost.

In broad terms, the areas which limit or exclude the application of lawyer-client privilege are abrogation by statute, waiver, and improper or illegal purpose.

7.81 In respect of a claim for legal professional privilege or client legal privilege, the court may inspect the relevant documents in order to determine whether it attracts privilege. In *X Corporation Pty Ltd & Jess* [2016] FamCAFC 43 (24 March 2016), Strickland, Aldridge, and Cronin JJ noted at [53]–[56]:

> In *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674 Stephen, Mason and Murphy JJ said at 689:
>
> > … The court has power to examine the documents for itself, a power which has perhaps been exercised too sparingly in the past, springing possibly from a misplaced reluctance to go behind the formal claim of privilege. It should not be forgotten that in many instances the character of the documents the subject of the claim will illuminate the purpose for which they were brought into existence.

This is reflected in s 133 of the Evidence Act 1995 (Cth).

7.82 The onus of proving that privilege has been lost lies on the party who makes that assertion.[74]

Abrogation by Statute

7.83 In a speech given to the Law Society of New South Wales in February 2016, Bathurst CJ of the New South Wales Supreme Court noted that there were 162 statutory provisions that abrogated the right to legal professional privilege. The Chief Justice noted that

of these, 70 per cent created an obligation to provide information subject to a 'reasonable' or 'lawful' excuse; a further 36 provisions created a strict obligation with no excuse or exception; and 13 specifically removed the entitlement to privilege or prevented it from applying.[75] In one sense, abrogation of legal professional privilege by statute is not an exception to privilege, because the removal of the privilege by statute means that, for the purposes of the statute, it never existed. Although legal professional privilege is a valued part of the lawyer-client relationship, it must sometimes yield to a statutory obligation of disclosure.

7.84 If Parliament's intention is to abrogate the privilege, then it must do so in clear and unambiguous terms. In *Baker v Campbell* (1983) 153 CLR 52, Deane J noted at 116:

> It is a settled rule of construction that general provisions of a statute should only be read as abrogating common law principles or rights to the extent made necessary by express words or necessary intendment. … Both logic and authority support the present-day acceptance of … confidentiality as a fundamental and general principle of common law. It is to be

> presumed that if the Parliament intended to authorise the impairment or destruction of that confidentiality by administrative action it would frame the relevant statutory mandate in express and unambiguous terms.

7.85 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] 213 CLR 543 (7 November 2002), concerned the issue of whether certain documents required to be produced to the ACCC pursuant to the

Trade Practices Act (1974) (Cth), included documents over which there was a claim of legal professional privilege. On appeal, the High Court set aside the orders of the Full Court and declared that s 155 of the Trade Practices Act did not require the production of documents to which legal professional privilege attached. In a joint judgment, Gleeson CJ, Gaudron, Gummow, and Hayne JJ noted at [32]:

> [32] It is necessary now to turn to the terms of s 155 of the Act. Sub-sections (1) and (2) are expressed in general terms and, save to the extent that they serve to indicate that a significant purpose of that section is the investigation of contraventions of the Act, they provide no basis, standing alone, for an implication, much less a necessary implication, that they abrogate legal professional privilege. On the contrary, if s 155(2) is construed consistently with the decisions in *Baker v Campbell* and *Propend*, as in our view it should be that sub-section does not abrogate legal professional privilege. And if s 155(2) is so construed, it would be incongruous for s 155(1) to be construed differently. …

7.86 An example of where the terms of the statute were sufficiently clear to abrogate the privilege is *Z v New South Wales Crime Commission* (2007) 233 ALR 17 (28 February 2007). In that case, the High Court held that, while furnishing X's name and address would be to disclose a confidential communication made for the dominant purpose of obtaining legal advice, the appellant was nevertheless required by virtue of s 18B(4) of the New South Wales Crime Commission Act 1985, to furnish that information. The words of the Statute were that the legal practitioner must, if required, 'furnish to the Commission the name and address of the person to whom or by whom the communication was made'. According to Kirby and Callinan JJ at [5]–[7], this presented 'an insuperable obstacle to the maintenance of privilege. That sub-section could not be clearer or more explicit.'[76]

7.87 As noted in the speech given by Bathurst CJ,[77] there are (in New South Wales alone) a large number of statutory provisions that limit or abrogate legal professional privilege.[78] Sections 121–126 of the Uniform Evidence Legislation detail circumstances where client legal privilege will be lost, namely:

- Section 121: Where the client or party has died or if, were the evidence not adduced, the court would be prevented, or it could reasonably be expected that the court would be prevented, from enforcing an order of an Australian court;

- Section 122: Where there is consent by the client or party concerned, or where the client or party concerned has acted in a way that is inconsistent with them objecting to the adducing of the evidence;[79]
- Section 123: In a criminal proceeding, unless it is evidence of (a) a confidential communication made between an associated defendant and a lawyer acting for that person in connection with the prosecution of that person, or (b) the contents of a confidential document prepared by an associated defendant or by a lawyer acting for that person in connection with the prosecution of that person;[80]
- Section 124: In relation to civil proceedings in connection with which two or more parties have, before the commencement of the proceeding, jointly retained a lawyer in relation to the same matter, in which event either of the parties is not prevented from adducing evidence of (a) a communication made by any one of them to the lawyer, or (b) the contents of a

confidential document prepared by or at the direction or request of any one of them; in connection with that matter;

- Section 125: In the event of the adducing of evidence of (a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty, or (b) a communication or the contents of a document that the client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power;[81]
- Section 126: Where, because of the application of sections 121, 122, 123, 124, or 125, this Division does not prevent the adducing of evidence of a communication or the contents of a document, those sections do not prevent the adducing of evidence of another communication or document if it is reasonably necessary to enable a proper understanding of the communication or document.

7.88 Documents which are the subject of a search warrant provide another example of how a statutory provision can abrogate client-legal privilege.[82] The issue here is whether the taking

of a document, for example from a solicitor's office pursuant to a valid search warrant, can be lawful, or is such a document protected by legal professional privilege.

7.89 In *Baker v Campbell* (1983) 153 CLR 52, a member of the

Australian Federal Police to whom a search warrant had been issued under s 10 of the Crimes Act 1914 (Cth), attempted to seize documents held by a firm of solicitors. The documents had been brought into existence for the purpose of obtaining or giving legal advice about certain aspects of a scheme the client had devised to minimise liability for payment of sales tax, and they included documents that had been created solely for that purpose. The question for the court was whether, in the event that legal professional privilege attached to the documents held by the firm, those documents could properly be made the subject of a search warrant issued under s 10 of the Commonwealth Crimes Act? The case (Murphy, Wilson, Deane, and Dawson JJ) confirmed the view that privilege is a substantive principle and not just a rule of evidence, and that it is not confined to judicial and quasi-judicial proceedings. The following extracts from the judgments of Murphy J and Gibbs CJ are representative of the differences in view between the majority (Murphy, Wilson, Deane, and Dawson JJ) and the dissenting judges (Gibbs CJ, Mason and Brennan JJ).

7.90 Murphy J said at 90:

> Parties should be able to prepare for litigation without that preparation being subject to search and seizure. This protection should apply not only to client-lawyer communications, but also to preparation by a litigant in person, and to communications between the litigant and others. In so far as client's legal privilege extends to material which was created for legal advice associated with pending or anticipated litigation, there is some force in the argument that legal advice should not be elevated above other professional evidence, such as medical or financial advice. However, in *Grant v Downs* [[1976] HCA 63; (1976) 135 CLR 674], the privilege was held to extend to communications for advice and the question whether it should so extend has not been agitated in the present case. Further the privilege is necessary so that persons may confidently seek and receive advice

about conduct which has, or may have, constituted crime, fraud or a civil offence.

…

The Crimes Act, s 10 should be interpreted so that it applies uniformly despite any differences in the various State laws which have arisen by statutory modification of the common law. The appropriate common law rule is one that attaches legal privilege to the statutory powers of search and seizure so as to protect those documents or other material created solely[83] and innocently for the purpose of legal advice or for use in existing or anticipated litigation.

7.91 By way of contrast, Gibbs CJ at 59, 65–6, 69, and 70 (Mason and Brennan JJ agreeing) would have allowed for the seizure of the documents pursuant to the warrant:

The words of s 10 are expressed quite generally; a warrant, when granted, authorizes the constable named therein to enter 'any … place' named or described in the warrant, and to

seize 'any such thing', ie 'anything' of the kind described in paras (a)–(c). The section does not exempt from its operation, or from the effect of a warrant granted under it, a solicitor's office or documents which would be privileged from production in legal proceedings. …

… The reason why privilege is extended to confidential communications made by a client to his solicitor, and not to confidential communications made, eg, by a patient to a doctor, a penitent to a priest, or a customer to a banker, is that the view has been taken that in the first-mentioned case the public interest requires that the private obligation of confidentiality be fulfilled, for a reason which has been explained in many cases, of which *Grant v Downs* [(1976) 135 CLR 674], is one of the most recent in Australia. It is

necessary for the proper conduct of litigation that the litigants should be represented by qualified and experienced lawyers rather than that they should appear for themselves, and it is equally necessary that a lawyer should be placed in full possession of the facts to enable him to give proper advice and representation to his client. The privilege is granted to ensure that the client can consult his lawyer with freedom and candour, it being thought that if the privilege did not exist 'a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case'. …

… It would seem to me impermissible to hold that the existing rules as to legal professional privilege should be given an entirely new operation, for the very purpose of reading down the words of a statutory provision. I am strengthened in that view by the consideration that the privilege is in conflict with another principle of equal importance, namely, that all evidence which reveals the truth should be available for presentation to the court, and by the further consideration that the privilege is not available without exception even in legal proceedings. There is nothing in the terms of s 10 which suggests that it was intended to recognize a privilege analogous to legal professional privilege. It seems clear enough that it could not have been intended that the things described in s 10(a) or s 10(c) (namely, things with respect to which an offence has been, or is suspected on reasonable grounds to have been, committed, and anything as to which there is reasonable ground for believing that it is intended to be used for the purpose of committing any offence) should be privileged from seizure. …

For these reasons, in my opinion, a constable acting under the authority of a proper search warrant issued under s 10 is entitled to seize documents which are covered by the authority of the warrant notwithstanding that they have been given to a solicitor in professional confidence and that they would have been privileged from production in legal proceedings.[84]

7.92 Apart from the various statutory provisions, there are a variety of guidelines that have been developed to assist police and

taxation officers regarding the execution of search warrants on lawyers' premises. These include:

- Guidelines as to the execution of search warrants on barristers' chambers in New South Wales;[85]

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- General Guidelines between the Australian Federal Police and the Law Council of Australia as to the execution of search warrants on lawyers' premises;[86]
- Australian Taxation Office Guidelines regarding legal professional privilege.[87]

Waiver

7.93 The common law test for waiver of legal professional privilege at common law was enunciated by the High Court in *Mann v Carnell* (1999) 201 CLR 1. In that case, Gleeson CJ, Gaudron, Gummow, and Callinan JJ noted at [28]–[29]:[88]

> [28] At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It has been observed that 'waiver' is a vague term, used in many senses, and that it often requires further definition according to the context. Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer

to give his or her account of the communication, or the institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received. …

[29] Waiver may be expressed or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. … What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large. [references omitted]

7.94 In *BrisConnections Finance Pty Ltd (Receivers and Managers appointed) v Arup Pty Ltd* [2016] FCA 438 (28 April 2016), Flick J noted at [16], in reference to paragraphs [28] and [29] above:

That which this formulation leaves open is the identification of that conduct which may be relied upon to make out any 'inconsistency between the conduct of the client and maintenance of the confidentiality … '. As noted by Sackville J in *Seven Network Ltd v News*

Ltd [2005] FCA 1721 at [46]; (2005) 227 ALR 704 at 715 the 'application of the principle stated in the High Court in Mann v Carnell is not free from difficulty … '.

7.95 His honour continued at [17]:

The conduct of the client that may found an argument as to a waiver of privilege may be found in a variety of sources, including the giving of evidence in a court proceeding as to (for example) the instructions

given to a barrister (*Benecke v National Australia Bank* (1993) 35 NSWLR 110); the institution of proceedings against a legal adviser for professional negligence; negotiating an agreed statement of facts for use in forthcoming proceedings (*Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 45 at [41] to [43] per Mortimer J); or the reference in pleadings to communications from legal advisers (e.g., *SA E.Med Pty Ltd v Calvary Health Care Adelaide Ltd (No 2)* [2011] FCA 835).

7.96 In *Osland v Secretary Department of Justice* (2008) 234 CLR 275, Gleeson CJ, Gummow, Heydon, and Kiefel JJ noted at [49]:

> [49] Whether, in a given context, a limited disclosure of the existence, and the effect, of legal advice is inconsistent with maintaining the confidentiality in terms of advice will depend upon the circumstances of the case. … [Q]uestions of waiver are matters of fact and degree. It should be added that we are here concerned with the common law principle of waiver, not the application of s 122 of the Evidence Act 1995 (Cth) which … has the effect that privilege may be lost in circumstances which are not identical to the circumstances in which privilege may be lost at common law.

7.97 That said, it has also been observed that there is little difference between the position at common law and the position under s 122 of the Uniform Evidence Legislation. In *Gillies v Downer EDI Ltd* [2010] NSWSC 1323 (3 December 2010), Garling J noted at [38] in relation to *Mann v Carnell* (1999) 201 CLR 1:

> Although the High Court of Australia was concerned in that case with the test for waiver of legal professional privilege at common law, the same principle has been applied in considering whether client legal privilege has been lost under s 122(2) of the Evidence Act: *Bailey v Director-General, Department of Land and Water Conservation* [2009] NSWCA 100; 74 NSWLR 1 at [81] and [135].

7.98 Section 122(2) of the Uniform Evidence Legislation provides that:[89]

> Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.

7.99 The notion of waiver concerns the giving up of the right to maintain the privilege. It may be express or intentional, or imputed or implied by the circumstances, for example, by conduct.[90] In *Hooker Corp Ltd v Darling Harbour Authority* (1987) 9 NSWLR 538,[91] Rogers J noted at 541:

> A litigant may waive privilege directly through intentionally disclosing protected material. … He can also lose that protection through a waiver by implication. An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege.

7.100 The conduct which, from time to time, has entailed this result has been the use by the privilege holder of some part of the privileged document.[92] In such circumstances, fairness may require that privilege should be held to have been waived in respect of the entirety of the document. The reference to fairness in *Hooker Corp Ltd* was considered by Connolly M in *Pigott v Walker* [2001] ACTSC 66 in relation to whether the partial disclosure of privileged material could be taken as a waiver of all privilege in the whole of the file, and by Harrison M in *Lampson v McKendry* [2001] NSWSC 373 in relation to documents prepared prior to the preparation of a medico-legal report. However, it is not some broad principle of fairness that gives rise to the principle of waiver. In

DSE (Holdings) Pty Ltd v Intertan Inc [2003] FCA 384 (30 April 2003), Allsop J noted at [14]:

> The overriding guiding principle is that stated in *Mann v Carnell*, *supra* at [29]. The expression of that principle and the subordination of the notion of 'fairness' to possible relevance in the assessment of the *inconsistency* between the act and the confidentiality of the communication produces, it seems to me, an important change to the existing law. In order to explain why I think this to be so it is necessary for me to examine the pre-existing authorities. This will also illuminate the operation of the principle as expressed in *Mann v Carnell* at [29], and the importance of the recognition that it is the inconsistency between the relevant act of the holder of the privilege and the maintenance of the confidence that is essential, not a broad balancing process based on fairness.

7.101 While there appears to have been some differences in approach in determining whether, in particular circumstances, legal professional privilege has been waived, there is a growing consensus that inconsistency of conduct as set out in *Mann v Carnell* should be the guiding principle, informed by considerations of fairness. In *Macquarie Bank Ltd v B* [2006] FamCA 1052 (26 June 2006) at [22]–[53], Le Poer Trench J at [52] set out a number of matters that need to be clear before a court would rule that implied waiver of legal professional privilege had occurred, requiring the disclosure of documents normally the subject of legal professional privilege.

7.102 The position regarding waiver was summarised in *Timothy Mills v Walter Wojcech* [2011] NSWSC 86 (17 February

2011), where Barr J noted at [28]–[29]:[93]

> [28] At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It has been observed that 'waiver' is a vague term, used in many senses, and that it often requires further definition according to the context. Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication, or the institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received.
>
> [29] Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is 'imputed by operation of law'. This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege.

7.103 In *Goldberg v Ng* (1995) 185 CLR 83, the High Court by a 3:2 majority (Deane, Dawson, and Gaudron JJ, with Toohey and Gummow JJ dissenting), held that, while a solicitor's documents were initially protected by legal professional privilege, that protection was lost (in respect of equity proceedings brought against the solicitor by former clients) by imputed waiver of the privilege. Imputed waiver arose because the solicitor voluntarily produced the documents to the Law Society for the purpose of answering a complaint made against him. In this case, the client

was seeking to demonstrate that the solicitor had, by his actions, waived any privilege over the documents. The majority noted at [18], [22], [29]:

> [18] The circumstances in which a waiver of legal professional privilege will be imputed by operation of law cannot be precisely defined in advance. The most that can be done is to identify a number of general propositions. Necessarily, the basis of such an imputed waiver will be some act or omission of the persons entitled to the benefit of the privilege. Ordinarily,

> that act or omission will involve or relate to a limited actual or purported disclosure of the contents of the privileged material. When some such act or omission of the person entitled to the benefit of the privilege gives rise to a question of imputed waiver, the governing consideration is whether 'fairness requires that his privilege shall cease whether he intended that result or not'. That does not mean, however, that an imputed waiver must completely destroy the privilege. Like an express waiver, it can be limited so that it applies only in relation to particular persons, materials or purposes.
>
> …
>
> [22] It follows that the critical question in the present case is whether Mr Goldberg's disclosure of the privileged documents to the Law Society gave rise to a situation where ordinary notions of fairness required that he be precluded from asserting that those documents were protected from production for inspection by the Ngs in the related equity proceedings between the Ngs and the Goldbergs. …[94]
>
> …
>
> [29] … In these circumstances, it would be unfair if the fact that Mr Goldberg saw fit to rely, in answer to Mr Ng's complaint to the Law

> Society, upon privileged communications to his solicitor in relation to the equity proceedings should have the effect that the Ngs were deprived of access to, and possible use of, the substance of that answer. That unfairness is heightened in the present case where, in the absence of access to the material before the Law Society, one can only speculate about why the Complaints Committee concluded that Mr Ng's complaint that Mr Goldberg had failed to account for $100,100 allegedly paid on account of professional costs did 'not involve a question of professional misconduct or unsatisfactory professional conduct'.[95]

7.104 In 2013, in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303; [2013] HCA 46 (6 November 2013), the High Court (French CJ, Kiefel, Bell, Gageler, and Keane JJ) again had the opportunity to consider the issue of waiver of privileged documents. The issue arose when the law firm Norton Rose Fulbright Australia (representing the Expense Reduction Group) voluntarily, but mistakenly, released certain privileged documents to the Armstrong solicitors (Marque Lawyers), who argued that the release of the document to them represented a waiver of the privilege — the actions being inconsistent with maintenance of the privilege.[96]

7.105 The following is a summary of the case.[97] The parties had been involved in commercial proceedings in the Supreme Court since 2010. In 2011, the Supreme Court ordered that the parties give verified, general discovery. During this process, a number of documents that were subject to client legal privilege, were

mistakenly listed in the non-privileged section of the appellants' verified Lists of Documents. Electronic copies of these documents were inadvertently disclosed to the respondents' solicitors, Marque Lawyers. Marque Lawyers refused to return the documents, asserting that their clients had no obligation to do so and that privilege in the documents had been waived by the disclosure. The appellants sought orders in the Supreme Court to the effect that Marque Lawyers return 13 of the inadvertently disclosed documents. The Supreme Court ordered the return of nine documents, but considered that privilege in the four remaining documents had been waived, and so declined to order the return of those documents.

7.106 The Court of Appeal overturned the Supreme Court's decision. It held that the Supreme Court did not have power to order the return of any of the 13 documents. According to the Court of Appeal, the orders sought could only be granted in the exercise of the Court's equitable jurisdiction on the basis of the law of confidential information. The Court of Appeal found that there was no equitable obligation of confidence upon Marque Lawyers, and so held that the orders sought by the appellants should have been refused.

7.107 By grant of special leave, the appellants appealed to the High Court. The High Court unanimously allowed the appeal. The Court held that the issue of waiver should never have been raised. There was no evidence that the appellants had acted inconsistently with the maintenance of their claims to privilege. There was also no need to resort to the Court's equitable jurisdiction. If a privileged document is inadvertently disclosed during discovery, the Supreme Court ordinarily has all powers necessary to permit the correction of that mistake and to order the return of the documents (if the

party receiving the documents refuses to do so). These powers exist by virtue of the Supreme Court's role in the supervision of the process of discovery and the express powers given to it by Pt 6 of the Civil Procedure Act 2005 (NSW) to ensure the 'just, quick and cheap resolution of the real issues' in proceedings. The High Court held that, in this case, the Supreme Court should have promptly exercised these powers to permit the appellants to correct their solicitors' mistake. On the issue as to whether Norton Rose (who were acting for the appellants) had waived privilege over the documents by acting in a way which was inconsistent with maintaining the privilege, the Court noted at [30]–[35]:[98]

> [30] According to its strict legal connotation, waiver is an intentional act done with knowledge whereby a person abandons a right (or privilege) by acting in a manner inconsistent with that right (or privilege). It may be express or implied. In most cases concerning waiver, the area of dispute is whether it is to be implied. In some cases waiver will be imputed by the law with the consequence that a privilege is lost, even though that consequence was not intended by the party losing the privilege. The courts will impute an intention where the

> actions of a party are plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect.
>
> …
>
> [34] Whatever doubts Marque Lawyers [representing the Armstrong parties] had about the claims for privilege were dispelled by the letter from Norton Rose [who were acting for the appellants] of 6 December 2011 advising that some privileged documents had been incorrectly listed as non-privileged. This action by Norton Rose was not

identified in the reasons of Campbell JA as relevant, yet it was important to convey the true position of the ERA parties. The letter was sent promptly once Norton Rose became aware that mistakes had been made. It was given before Ms Marshall had fully inspected the documents. The disks containing the documents remained with Mr Armstrong, although they should have been retrieved upon notification of the mistake. It is not evident that he came across the 13 documents in question himself.

[35] These circumstances are not indicative of an inconsistent position being taken by the ERA parties' lawyers such that waiver should be imputed to those parties. The issue of waiver should never have been raised. [footnotes omitted]

7.108 What is meant by 'waiver' in the context of confidentiality and privilege? Give two examples.

Improper or Illegal Purpose

7.109 At common law, legal professional privilege does not attach to communications made in the furtherance of an improper or illegal process — for example, to facilitate a crime or a fraud.

7.110 The Hon T F Bathurst AC, Chief Justice of New South Wales, in an address to the New South Wales College of Law in 2015, noted:[99]

[33] The main limitation upon when the right to legal professional privilege is said to apply is the qualification that the privilege only attaches to communications intended for a proper or lawful purpose. This thereby excludes communications tainted with a 'wide species of fraud' from the privilege's protection.

…

[38] In our modern day world this has led to exceptions to the privilege in cases of ad hoc legal investigations and the coercive

information gathering powers of federal investigatory bodies.

[39] Most recently, the Australian Law Reform Commission inquiry into encroachments on traditional rights and freedoms has identified that some of the laws abrogating this right

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'may warrant further review by an appropriate body, to ensure they do not unjustifiably abrogate' the privilege. [footnotes omitted]

7.111 In *Perazzoli v BankSA (No 2)* [2016] FCA 260 (16 March 2016), Mansfield J noted at [32]:

> The rationale behind the rule that legal professional privilege will not attach to communications made in the furtherance of an abuse of process is that the privilege exists for the advancement of the administration of justice, and it would run counter to the administration of justice to protect communications made in furtherance of an abuse of process. In *Players Pty Ltd (in liquidation) (receivers appointed) v Clone Pty Ltd* (2013) 115 SASR 547 *(Players v Clone)*, the Full Court of the Supreme Court of South Australia held that privilege did not attach to certain communications where there was a 'colourable case' of an abuse of process, namely the intentional concealment of relevant documents during trial.

7.112 In *Smith v Western Australia* (2014) 250 CLR 473; [2014] HCA 3 (12 February 2014), French CJ, Crennan, Kiefel, Gageler, and Keane JJ noted at [38]–[39]:

> [38] It is instructive to reflect that the considerations which favour the preservation of confidentiality of communications by legal professional privilege do not prevent the giving of evidence of the commission of an offence by a legal professional against his or her client. Relevantly, Gleeson CJ, Gaudron, Gummow and Hayne JJ said in *Daniels Corporation International Pty Ltd v Australian Competition*

and Consumer Commission [28] that:

> The notion that privilege attaches to communications made between client and lawyer for the purpose of engaging in contraventions of the Act should not be accepted. A communication the purpose of which is to 'seek help to evade the law by illegal conduct' is not privileged. (footnotes omitted)

[39] It may be acknowledged that legal professional privilege and the exclusionary rule serve different ends of public policy. The point is that, in the case of each rule, the strong considerations of public policy which justify preserving the secrecy of communications associated with the administration of justice may not be invoked to throw a protective cloak of secrecy over criminal conduct.

7.113 This is similar to the public interest exception concerning confidentiality. Thus, in the old case of *R v Cox and Railton*(1884) 14 QBD 153, the court held that a solicitor could testify concerning the defendant's intentions in relation to the carrying out of a fraud.

7.114 The Uniform Evidence Legislation also allows for adducing evidence in these circumstances:

125 (1) This Division does not prevent the adducing of evidence of:

(a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty, or

(b) a communication or the contents of a document that the client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power.

(2) For the purposes of this section, if the commission of the fraud, offence or act, or the abuse of power, is a fact in issue and there are reasonable grounds for finding that:
   (a) the fraud, offence or act, or the abuse of power, was committed, and
   (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power, the court may find that the communication was so made or the document so prepared.

(3) In this section: 'power' means a power conferred by or under an Australian law.

7.115 In *Day v Dalton* [1981] WAR 316,[100] the Western Australian Full Court held that documents the subject of a search warrant that were not brought into existence for the purpose of obtaining legal advice, but rather to defeat the cause of justice, were not subject to legal professional privilege.

7.116 In *AWB Ltd v Honourable Terence Rhoderic Hudson Cole* [2006] FCA 1234 (18 September 2006), Young J noted at [214]–[218]:

> Where a client is engaged in fraudulent conduct, communications with his or her lawyer in furtherance of the fraud are not privileged, regardless of whether the lawyer is a party to the fraud or not: *Clements* at 562 [213]. The principle applies to communications passing between a client and lawyer where the lawyer is innocent of the fraud or improper purpose: *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 145. Further, the fraud need not be that of the client or the lawyer; it may be that of a third party: *Capar v Commissioner of Police* (1994) 34 NSWLR 715; *R v Central Criminal Court; Ex parte Francis & Francis* [1989] AC 346, cited with approval in *Clements* at 562–565

[217]–[218].

7.117 It is important to bear in mind that the fraud exception is based on public policy grounds. The principle is sufficiently flexible to capture a range of situations where the protection of confidential communications between lawyer and client would be contrary to the public interest.

7.118 In *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, the Administrator of the Northern Territory made regulations specifying substantial areas near Darwin and Katherine that were to be treated as parts of those towns. If the regulations were valid, parts of the land claimed in both areas by the Northern Land Council under s 50(1) of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) could not be the subject of a claim under the section. The validity of the regulations was challenged by the Northern Land Council. When discovery of documents was given pursuant to orders made by the Aboriginal Land Commissioner, the Northern Territory claimed privilege for documents described as 'communications between

officers of the Northern Territory Government and the government's legal officers for the purpose of obtaining and giving legal advice relating to the making of the two sets of regulations'. The Northern Land Council established a *prima facie* case that the communications came into being as part of a scheme to defeat the land claims. Gibbs CJ noted at 515–16:

> In my opinion the present case comes within the principle which forms the basis of the rule that denies privilege to communications

> made to further an illegal purpose. It would be contrary to the public interest which the privilege is designed to secure — the better administration of justice — to allow it to be used to protect communications made to further a deliberate abuse of statutory power and by that abuse to prevent others from exercising their rights under the law. It would shake public confidence in the law if there was reasonable ground for believing that a regulation had been enacted for an unauthorized purpose and with the intent of frustrating legitimate claims, and yet the law protected from disclosure the communications made to seek and give advice in carrying out that purpose … The law strikes a balance between securing proper representation by encouraging full disclosure on the one hand, and requiring the production of all relevant evidence on the other, but the balance more readily inclines in favour of disclosure where privilege from disclosure might conceal an abuse of delegated powers to enact legislation, and thus obstruct a proper challenge to the validity of part of the law itself. The basis of the privilege is not endangered if it is held that it does not protect communications made by a public authority for the purpose of obtaining advice or assistance to exceed its statutory powers.

7.119 Mason, Wilson, and Brennan JJ agreed with the decision of Gibbs CJ. Dawson J dissented on the basis that the matters of which there was *prima facie* evidence did not bring the crime or fraud exception into play and the privilege should be upheld. His Honour found support in previous decisions, for the view that the exercise of a statutory power to make regulations with an ulterior purpose in mind does not involve fraudulent or illegal conduct within the meaning of the exception to legal professional privilege.

7.120 This aspect of the principle is reflected in the statement that '[t]he privilege takes flight if the relationship between lawyer and client is abused'.[101] In *Barclays Bank v Eustice* [1995] All ER 511, a client sought legal advice on the structuring of a transaction to be entered into at an undervalue for the purpose of prejudicing

the interests of a person making a claim against him under the Insolvency Act 1986 (UK). The court held at 523 that the transactions were void because they defrauded the creditor bank and were held to be 'sufficiently iniquitous for public policy' to require those communications to be discoverable. Schiemann LJ (with whom Aldous and Butler-Sloss LJJ agreed) stated at 524:

> If that view be correct, then it matters not whether either the client or the solicitor shared that view. They may well have thought that the transactions would not fall to be set aside … either because they thought that the transactions were not at an undervalue or because they thought that the court would not find that the purpose of the transactions was to prejudice the bank. But if this is what they thought then there is a strong prima facie case that they were wrong. Public policy does not require the communications of those who misapprehend

> the law to be privileged in circumstances where no privilege attaches to those who correctly understand the situation.

7.121 In order to apply the principle that denies privilege to communications made to further an illegal purpose, there must be more than a mere assertion or allegation of fraud or impropriety. In *Commissioner Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, Brennan CJ at 514 expressed the test as being one of 'reasonable grounds for believing' that the relevant communication was for an improper purpose.[102] The requirement has also been described as one of a 'prima facie case'.[103] *In Attorney-General (NT) v Kearney* (1985) 158 CLR 500, Gibbs CJ at 516 approved the test formulated in *O'Rourke v Darbishire* [1920] AC

581 at 604, namely, that 'there must be something to give colour to the charge', 'the statement must be made in clear and definite terms, and there must further be some *prima facie* evidence that it has some foundation in fact'.

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1. See, for example, *Baker v Campbell* (1983) 153 CLR 52.
2. See also *O'Reilly v Commissioners of State Bank of Victoria* (1983) 153 CLR 1 per Mason J at [22]; *Grego v Great Western Insurance Brokers Pty Ltd* [2006] WASC 284 (15 December 2006) per Blaxell J at [28].
3. See also *Breen v Williams* (1996) 186 CLR 71, referred to in *James v Hickling* [2004] WASC 235 (16 November 2004) per Sanderson M at [4]–[16].
4. Sections 91, 151, and 189.
5. For example, a breach of s 189 of the Mental Health Act 2007 (NSW) is a maximum of 50 penalty units.
6. See *Luthra & Betterley* [2015] FamCA 1080 (4 December 2015) at [26] per Johnston J.
7. See also *Alphapharm Pty Ltd v Department of Community Services and Health* (1990) 22 FCR 73; *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 per Gummow J at [87]; *World Medical Manufacturing Corp v Phillips Ormonde and Fitzpatrick Lawyers (a firm)* [2000] VSC 196 (18 May 2000) per Gillard J at [69]–[70]; *Sullivan, Sullivan v Scanders* [2000] SASC 273 (18 August 2000); *Rapid Metal Developments (Aust) Pty Ltd v Anderson Formrite Pty Ltd* [2005] WASC 255 (17 November 2005) per Johnson J at [57]–[79]; *British American Tobacco Australia Ltd v Peter Gordon* [2007] NSWSC 230 (16 March 2007) per Brereton J at [20]–[27].
8. *Spincode Pty Ltd* was discussed in *Belan v Casey* [2002] NSWSC 58 (4 February 2002) per Young CJ in Equity.
9. *Prince Jefri Bolkiah* was discussed in *Belan v Casey* [2002] NSWSC 58 (4 February 2002) per Young CJ in Equity.
10. See the Evidence Act 1995 (Cth); Evidence Act 1995 (NSW); Evidence Act 2001 (Tas); Evidence Act 2008 (Vic); Evidence Act 2011 (ACT); Evidence (National Uniform Legislation) Act (NT); Evidence Act 2004

(Norfolk Island).

11. See the table prepared by the Australian Government Attorney-General's Department, at https://www.ag.gov.au/LegalSystem/Documents/Uniform-Evidence-Acts-comparative-tables.pdf. The differences between the Commonwealth, New South Wales and Victorian Acts are also summarised in the standard annotation, Odgers, *Uniform Evidence Law*, 12th ed, Thomson Reuters, 2016.
12. Sections 126J, 126K.
13. Section 127. Apart from the provisions in the various Evidence Acts, there are many other statutory provisions that relate to the confidentiality and protection of a person's personal information. For example, under the provisions of the Privacy Act (1988) (Cth), if there is a breach of confidence to which the Act applies, the person whose privacy has been invaded has the right to seek damages (ss 25, 25A, 33F, 52, 80W, 93) or an injunction to restrain continuation of a breach of the Act (ss 55A, 98). Schedule 1 of the Act sets out the Australian privacy principles. The various Commonwealth and State Freedom of Information Acts also contain provisions which protect against disclosure of personal information. For example, Part IV of the Freedom of Information Act 1982 (Cth), and Part IV of the Freedom of Information Act 1982 (Vic), dealing with exempt documents. In New South Wales, Sch 1 of the Government Information (Public Access) Act 2009 (NSW) details information for which there is conclusive presumption of overriding public interest against disclosure. The provisions of this Act were discussed in *Kreutzer v University of Sydney* [2015] NSWCATAD 270 (23 December 2015).
14. See **7.37**–**7.121**.
15. See the following comparable legislation: Evidence Act 1995 (Cth); Evidence Act 1995 (NSW); Evidence Act 2001 (Tas); Evidence Act 2008 (Vic); Evidence Act 2011 (ACT); Evidence (National Uniform Legislation) Act (NT); Evidence Act 2004 (Norfolk Island). In relation to those jurisdictions that have not adopted the Uniform Evidence Act provisions, namely, SA, WA, and Qld, refer to the relevant State legislation, namely, the Evidence Act 1929 (SA), Evidence Act 1906

(WA), and the Evidence Act 1977 (Qld).

16. Evidence Act 1995 (Cth) s 117.
17. See *In the marriage of Griffiths* (1991) 14 Fam LR 782.
18. See *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307 at [31], discussed by Le Miere J in *Durban Roodepoort Deep Ltd v Mark David Reilly and Glenn Robert Featherby as Administrators of the Deed of Company Arrangement of Laverton Gold NL (Subject to Deed of Company Arrangement)* [2004] WASC 269 at [69]–[85].
19. See *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 at 96 and 98.
20. In relation to the Barristers' Rules of the various jurisdictions, see Bar Association of Queensland, Barristers' Conduct Rules 2011; in respect of New South Wales, Legal Services Council, Legal Profession Uniform Conduct (Barristers) Rules 2015; in respect of Victoria, Legal Services Council, Legal Profession Uniform Conduct (Barristers) Rules 2015; South Australian Bar Association, Barristers' Conduct Rules 2013; Western Australian Bar Association, Western Australian Barristers' Rules 2013; Northern Territory Bar Association, Barristers' Conduct Rules 2002. The Law Society of Tasmanian, Rules of Practice 1994 define a 'practitioner' as a person practising as a barrister or legal practitioner; Pt 8 applies solely to those who practise as a barrister.
21. Queensland Law Society, Australian Solicitors Conduct Rules 2012.
22. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW).
23. The Law Society of South Australia, Australian Solicitors' Conduct Rules 2015.
24. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Vic).
25. Council of the Law Society of the ACT, Legal Profession (Solicitors) Rules 2015.
26. In these circumstances, there is authority for the view that release of the information would not amount to a breach of confidence. See, for example, the comments by Dawson J in *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 521.

27. These Rules apply to barristers and solicitors. See also Pt 8 of the Rules, which applies only to barristers.
28. These Rules are made pursuant to the Legal Profession Act 2008 (WA) ss 577, 578, 579.
29. See, for example, the Queensland Australian Solicitors Conduct Rules 2012 r 9.2.
30. Although specific statutory provisions may allow for the disclosure of a confidence.
31. See, for example, in the medical context, A Abadee, 'The Medical Duty of Confidentiality and the Duty to Disclose: Can they co-exist?' (1995) 3 *Journal of Law and Medicine* 75.
32. See also *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513; *H v Associated Newspapers Ltd* [2002] All ER 371.
33. See, for example, the comments by Dawson J in *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 521.
34. The Rules in Tasmania do not include a specific provision of this kind.
35. See, for example, Queensland's Australian Solicitors' Conduct Rules 2015 r 9.2.4, 9.2.5. The Rules, however, do not allow the lawyer to inform a court of an intention on the part of a client to disobey a court order, unless there is a threat to the personal safety of others. Rule 20.3 provides: 'A solicitor whose client informs the solicitor that the client intends to disobey a court's order must:
    20.3.1 advise the client against that course and warn the client of its dangers;
    20.3.2 not advise the client how to carry out or conceal that course; and
    20.3.3 not inform the court or the opponent of the client's intention unless:
        (i) the client has authorised the solicitor to do so beforehand; or
        (ii) the solicitor believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.'
36. Sections 129–131.
37. Section 129.
38. Section 130. See, for example, *James v Chief Commissioner of State*

Revenue [2011] NSWSC 331 (20 April 2011).

39. Section 131.

40. This would be consistent with the Australian Solicitors' Conduct Rules 2015 — see r 9.1.1 and 9.1.2. It would also include the situation where the client has given consent to the solicitor seeking the advice of counsel.

41. See the Australian Solicitors' Conduct Rules 2015 r 9.2.3.

42. See, for example, *Lillicrap v Nadler & Son (a firm)* [1993] 1 All ER 724; [1993] 1 WLR 94 per Dillon CJ at 98.

43. The Australian Law Reform Commission, *Report 107 — Privilege in Perspective: Client Legal Privilege and Federal Investigatory Bodies*, 13 February 2008. See also the Australian Law Reform Commission, *Report 102 — Uniform Evidence Law*, 8 February 2006.

44. In relation to joint client privilege, see *Jess v Jess* [2015] FAMCA 822. Joint client privilege is where two or more parties have, before the commencement of the proceeding, jointly retained a lawyer in relation to the same matter. However, see also the Evidence Act 1995 (Cth) s 124: joint client legal privilege over evidence is lost where it is adduced by one of the joint privilege holders in connection with the same matter: *Jess v Jess* [2015] FAMCA 822 at [57]. At common law, privilege attaching to evidence of communications between one or more parties to civil litigation and a lawyer whom they have jointly retained can be waived only with the concurrence of all privilege holders: *Jess v Jess* [2015] FAMCA 822 at [57].

45. For the differences in legislation between the jurisdictions that have adopted the provisions of the Uniform Evidence Legislation, refer to the table prepared by the Australian Government Attorney-General's Department at https://www.ag.gov.au/LegalSystem/Documents/Uniform-Evidence-Acts-comparative-tables.pdf.

46. Sections 126A, 126B. Professional confidential relationship privilege provides that a 'court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:
    (a) a protected confidence, or
    (b) the contents of a document recording a protected confidence, or
    (c) protected identity information.'

'"protected confidence" means a communication made by a person in confidence to another person (in this Division called the "confidant"):

(a) in the course of a relationship in which the confidant was acting in a professional capacity, and

(b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.'

47. Section 126H.

48. Section 128.

49. For a discussion of Sch 1 cl 5, see *Hutchinson v Walcha Shire Council* [2015] NSWCATAD 1.

50. Evidence Act 2000 (Tas) s 126B: '"protected confidence" means a communication made by a person in confidence to another person (in this Division called the "confidant")—

(a) in the course of a relationship in which the confidant was acting in a professional capacity; and

(b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant;'

51. Evidence Act 2000 (Tas) s 127A: '(1) A medical practitioner, without the consent of his or her patient, must not divulge in any civil proceeding any communication made to him or her in a professional capacity by the patient that was necessary to prescribe or act for the patient unless the sanity of the patient is the matter in dispute.

(2) A person who has possession, custody or control of any communication referred to in subsection (1) or of any record of such a communication made to a medical practitioner by a patient, without the consent of the patient, must not divulge that communication or record in any civil proceeding unless the sanity of the patient is the matter in dispute.

(3) This section does not—

(a) protect any communication made for any criminal purpose; or

(b) prejudice the right to give in evidence any statement or

representation made at any time to or by a medical practitioner in or about the effecting by any person of an insurance on the life of that person or any other person.'

52. Section 34L(2) sets out the circumstances under which a judge can grant permission to admit such evidence.
53. See s 67E(2) for cases which do not attract this immunity — for example, a communication made for the purposes of, or in the course of, a physical examination of the victim or alleged victim of a sexual offence by a registered medical practitioner or registered nurse.
54. Subject to s 9, which relates to spouses and ex-spouses of accused persons in criminal cases.
55. For example, a communication made in confidence by a person upon or in respect of whom a sexual assault was committed or is alleged to have been committed to another person who is counselling the complainant in relation to any harm the complainant may have suffered.
56. This is subject to s 15 of the Act concerning the questioning of a person charged in a criminal proceeding as defined in s 20A of the Act.
57. See *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30 at [44]; *Blackrock Asset Management Australia Services Ltd v Waked (No 2)* [2011] FCA 479.
58. See *Cook v Leonard* [1954] VLR 591; *Southern Cross Commodities Pty Ltd (in liq) v Crinis* [1984] VR 697; *Ex parte Campbell; Re Cathcart* (1870) 5 LR Ch App 703; *Rosenberg v Jaine* [1983] NZLR 1; *R v Bell* (1980) 146 CLR 141; *Hamdan v Minister for Immigration, Multicultural & Indigenous Affairs* [2004] FCA 1267 (1 October 2004).
59. See *TJ (on behalf of the Yindjibarndi People) v Western Australia (No 4)* [2016] FCA 231 (9 March 2016) per McKerracher J at [18].
60. See *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.
61. Per Deane J at 600.
62. Per Brennan J at 595.
63. Per McHugh J at 622, quoting earlier decisions.
64. Per Deane J at 600.
65. Uniform Evidence Legislation s 123 provides: 'In a criminal proceeding, this Division does not prevent a defendant from adducing evidence unless it is evidence of:

(a) a confidential communication made between an associated defendant and a lawyer acting for that person in connection with the prosecution of that person; or
(b) the contents of a confidential document prepared by an associated defendant or by a lawyer acting for that person in connection with the prosecution of that person.'

'*Associated defendant*, in relation to a defendant in a criminal proceeding, means a person against whom a prosecution has been instituted, but not yet completed or terminated, for:
(a) an offence that arose in relation to the same events as those in relation to which the offence for which the defendant is being prosecuted arose; or
(b) an offence that relates to or is connected with the offence for which the defendant is being prosecuted.'

56. See *Waterford v Commonwealth* (1987) 163 CLR 54; 71 ALR 673; *NSW Council for Civil Liberties Inc v Classification Review Board (No 1)* [2006] FCA 1409 (3 November 2006); *Bayne v Department of Premier and Cabinet* [2016] NSWCATAD 69. See also The Law Society of New South Wales, *A Guide to Ethical Issues for Government Lawyers*, 2nd Edition, 2010, at <www.lawsociety.com.au/cs/groups/public/documents/internetcontent/(

57. See the Evidence Act 1995 (Cth) s 117(1). See also the Government Information (Public Access) Act 2009 (NSW) Sch 1 cl 5.

58. The following cases were cited as authority: *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [44] per McHugh J; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 550 per McHugh J; *Trade Practices Commission v Sterling* [1979] FCA 33; (1979) 36 FLR 244 at 245-6 per Lockhart J; *Kennedy v Lyell* (1883) 23 Ch D 387 at 407; *Lyell v Kennedy (No 3)* (1884) 27 Ch D 1 at 31 per Bowen LJ; *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 per Lindgren J. See also *Hamilton v State of New South Wales* [2015] NSWSC 1430 (21 October 2015), referred to by Harrison AsJ at [29]; and *Gaynor v Chief of the Defence Force (No 2)* [2015] FCA 817 (11 August 2015) per Katzmann J at [31].

69. A number of footnote references included in the case have been omitted.
70. See *Grant v Downs* (1976) 135 CLR 674.
71. McHugh and Kirby JJ favoured the sole purpose test.
72. For a discussion on this case, see the articles by M Legg, 'Legal Professional Privilege after *Esso* — Applying a Dominant Purpose Test' (2000) 20 *Aust Bar Rev* 40; A Lo Surdo, 'Evidence: A Quiet Revolution Has Been Happening in Legal Professional Privilege' (2001) 39(6) *LSJ* 50; M Harding & I Malkin, 'Overruling in the High Court of Australia in Common Law Cases' (2010) 34(2) *Melbourne University Law Review* 519. Since *Esso*, there have been a number of cases discussing the application of the 'dominant purpose test': see, for example, *QANTAS Airways Ltd v Portelli* [2011] VSC 162 (27 April 2011); *Archer Capital 4A Pty Ltd as trustee for the Archer Capital Trust 4A v Sage Group plc (No 2)* [2013] FCA 1098; (2013) 306 ALR 384 at [10]; *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No 4)* [2014] FCA 796 at [28]; *Hutchins Cap Coast Telecoms Pty Ltd (in liq), in the matter of Cap Coast Telecoms Pty Ltd (in liq)* [2015] FCA 945 at [11]; *Benjamin Charles Kupypersw v Ashton Coal Operations* [2015] NSWSC 898 at [19]; *Re Forge Group Construction Pty Ltd (in liq) (rec and mngrs app'ed); Gaynor v Chief of the Defence Force (No 2)* [2015] FCA 817 (11 August 2015) at [50]–[55]; *Mendicino & Mendicino (No 3)* [2015] FamCA 440 (12 June 2015) at [33]–[35]; *Mitic v OZ Minerals Limited* [2015] FCA 1152 (28 October 2015) at [6], [9], [11]; *Perazzoli v BankSA (No 2)* [2016] FCA 260 (16 March 2016) at [126]; *Ex parte Jones (No 2)* [2016] WASC 87 (18 March 2016); *Rankilor v City of South Perth* [2016] WASCA 28 at [36].
73. In *R v Rogerson; R v McNamara (No 31)* [2016] NSWSC 195, Bellew J discussed the issue of the dominant purpose test at [30].
74. *Gaynor v Chief of the Defence Force (No 2)* [2015] FCA 817 (11 August 2015) per Katzmann J at [47]; *New South Wales v Betfair Pty Ltd* [2009] FCAFC 160, referred to by Bellew J in *R v Rogerson; R v McNamara (No 11)* [2015] NSWSC 1066 at [57].
75. http://www.supremecourt.justice.nsw.gov.au/Documents/Speeches/2016 at [43].
76. See also the comments of Keane JJA in *Watkins v State of Queensland*

[2007] QCA 430 (10 December 2010) at [64]–[66].

77. Referred to at **7.83**.

78. This part of the Chapter considers provisions within the Uniform Evidence Legislation and the Crimes Act

79. In relation to the issue of consent (or waiver) of the privilege based on an inconsistency of there being an objection to the admission of the evidence and the actions of the party claiming the privilege, see *R v Rogerson; R v McNamara (No 11)* [2015] NSWSC 1066 at [58]–[62].

80. The Dictionary at the end of the Evidence Act 1995 (Cth) provides: '*associated defendant*, in relation to a defendant in a criminal proceeding, means a person against whom a prosecution has been instituted, but not yet completed or terminated, for: (a) an offence that arose in relation to the same events as those in relation to which the offence for which the defendant is being prosecuted arose; or (b) an offence that relates to or is connected with the offence for which the defendant is being prosecuted.'

81. See *Kaye v Woods (No 2)* [2016] ACTSC 87 (4 May 2016), where Mossop AsJ extensively discusses s 125(1) and the nature of 'a civil penalty'. Section 125(2) states that: 'For this section, if the commission of the fraud, offence or act, or the abuse of power, is a fact in issue and there are reasonable grounds for finding that: (a) the fraud, offence or act, or the abuse of power, was committed; and (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power, the court may find that the communication was made or the document was prepared as mentioned in paragraph (b).'

82. For the statutory provisions relating to search warrants in all jurisdictions, see the relevant State or Territory legislation.

83. The sole purpose test was overturned by the High Court in *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49, which adopted the 'dominant purpose test'. See **7.75**–**7.77**.

84. Section 10 of the Crimes Act 1914 (Cth), which is discussed in *Baker v Campbell*, has since been repealed. For the current provisions concerning legal professional privilege in relation to the execution of a

search warrant under the Crimes Act 1914 (Cth), see, for example, ss 3E (when a search warrant can be issued), 3F (things that are authorised by a search warrant).

35. Commissioner of Police for New South Wales and the Law Society of New South Wales, *Guidelines as to the Execution of Search Warrants on Barristers Chambers in NSW*, 21 January 2013, at http://www.police.nsw.gov.au/__data/assets/file/0009/254619/Guidlines_

36. Australian Federal Police and the Law Council Of Australia, *General Guidelines between the Australian Federal Police and the Law Council of Australia as to the Execution of Search Warrants on Lawyers' Premises*, March 1997, at https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/ExecutionofAFPSearchWarrantsonLawyers'Premises.pdf.

37. Australian Taxation Office, *Guidelines Regarding Legal Professional Privilege*, at https://www.ato.gov.au/forms/legal-professional-privilege-form-1---lpp1/https://www.ato.gov.au/about-ato/access,-accountability-and-reporting/in-detail/our-approach-to-information-gathering/.

38. See also *Commissioner of Taxation v Rio Tinto Ltd* [2006] FCAFC 86; (2006) 151 FCR 3341 at [61]; *Mullett v Nixon (Subpoena Application)* [2016] VSC 129 (4 April 2016) per Forrest J at [21].

39. See *Dowling v Dowling* [2015] VSC 412 (12 August 2015) at [43]–[46], where Ierodiaconou AsJ discussed s 122.

40. See *MAM Mortgages Ltd v Cameron Bros (No 2)* [2001] 1 Qd R 47 per Wilson J at 47.

41. See also *Bayne v Department of Premier and Cabinet* [2016] NSWCATAD 69 (13 April 2016) at [20]–[25].

42. Or where the person entitled to the privilege knowingly and voluntarily disclosed its substance. See, for example, *R v Rogerson; R v McNamara (No 31)* [2016] NSWSC 195 at [36]–[40].

43. See also the decision of the Victorian Supreme Court of Appeal in *Vic Hotel Pty Ltd v DC Payments Australasia Pty Ltd* [2015] VSCA 101 at 31 per Dixon AJA (with whom Mandie and Beach AJA agreed). See also the comments by Cowdroy J in *Australian Agricultural Co Ltd v AMP Life Ltd* [2006] FCA 371 (6 April) at [23]–[38]; Young J in *AWB Ltd v Cole (No 5)* [2006] FCA 1234 (18 September 2006) at [127]–[136]; *Szhwy v Minister for Immigration and Citizenship* [2007] FCAFC 62 (9 May

2007) at [58]–[61], [105]–[112], [164]–[175]; *Osland v Secretary to the Department of Justice* [2008] HCA 37 (7 August 2008) at [45]; *Watkins v State of Queensland* [2007] QCA 430 (30 November 2007); *Ewing International Ltd Partnership v Ausbulk Ltd* [2009] SASC 317 (6 October 2009) at [30]–[34]; *Tarong Energy Corporation Ltd v South Burnett Regional Council (formerly Nanango Shire Council)* [2009] QCA 265 (8 September 2009) per Fraser JA; *Conlan v Walker* [2011] FCA 347 (12 April 2011); *Bellenjuc Pty Ltd v Kentish Council* [2011] TASSC 12 (18 March 2011).

94. Refer to s 122(3) of the Uniform Evidence Legislation, which allows for the admission of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence, including where the client or party knowingly and voluntarily disclosed the substance of the evidence to another person.

95. *Goldberg v Ng* (1995) 185 CLR 83 has been referred to in a number of subsequent cases, for instance, Young J in *AWB Ltd v Honourable Terence Rhoderic Hudson Cole* [2006] FCA 1234 (18 September 2006) at [143]–[146], and applied in *Watkins v State of Queensland* [2007] QCA 430 (30 November 2007).

96. For a comment on the case, see the article by F Roughley & A Poukchanski, 'Who Said You Could Say "Waiver"? Inadvertent Disclosure of Privileged Communications' (2013) *NSW Bar Association News* 82; (2013 Summer) *Bar News: Journal of the NSW Bar Association* 22.

97. Issued by the High Court on 6 November 2013.

98. See also *Rankilor v City of South Perth* [2016] WASCA 28, where the court decided at [36] and [37] that disclosure of an insurance report to the solicitors for its insured, the respondent, did not constitute a waiver of privilege. The insurer and the respondent had a common interest in defeating the appellant's claim.

99. Speech given by the Hon TF Bathurst AC, Chief Justice of New South Wales, at the College of Law Judge's Series; Lawyer/Client Privilege, 29 October 2015, see http://www.supremecourt.justice.nsw.gov.au/Documents/Speeches/2015

100. See also Tobias JA in *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 (17 December 2009); *R v Connell (No 2)* (1992) 8 WAR 148; *Varawa v Howard Smith & Co Ltd* (1910) 10 CLR 382; *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 145 per Gibbs J, 151–2 per Stephen J, 161–2 per Wilson J; *Baker v Campbell* (1983) 153 CLR 52 at 86 per Murphy J; *Clements, Dunne and Bell v Commissioner Australian Federal Police* [2001] FCA 1858 (20 December 2001) per North J at [29]–[45].
101. See *Clark v United States* (1933) 289 US 1 at 15.
102. See also Dawson J at 521, Toohey J at 534, Gaudron J at 546, McHugh J at 556, and Kirby J at 592.
103. See *Butler v Board of Trade* [1971] 1 Ch 680 at 689.

8

CONFLICTS OF INTEREST

INTRODUCTION

8.1 In *Sharkey v Mayahi-Nissi (No 3)* [2016] NSWSC 537 (29 April 2016),[1] Kunc J noted at [92]:

> In *Kooky Garments Limited v Charlton* [1994] 1 NZLR 587, Thomas J said that the court had an inherent jurisdiction to supervise the conduct of counsel in court, which included the ability to intervene when counsel or solicitors appeared in a matter in which they had an actual or potential conflict of interest, or where, by reason of their relationship with the client their professional independence might be doubted — because the integrity of the judicial process is undermined if the lawyers do not have the independence and objectivity which they are presumed to have.

8.2 This inherent jurisdiction to supervise the conduct of practitioners is in addition to the regulatory provisions pursuant to the various jurisdictions' legal professional rules of conduct and the common law concerning breach of a fiduciary duty. In *Clark v Barter* (1989) NSW Conv R 55-483, Clarke JA stated at 58,504:

> It is well settled that a solicitor has a fiduciary duty to his or her client. That duty carries with it two presently relevant responsibilities. The

> first is the obligation to avoid any conflict between his duty to his client and his own interests — he must not make a profit, or secure a benefit, at his client's expense. The second arises when he endeavours to serve two masters and requires … full disclosure to both.

8.3 Conflict of interest is an area which is of great concern to lawyers and their clients. It has the potential to give rise to legal or disciplinary action.[2] More commonly, it can give rise to the issuing of an injunction restraining the practitioner from acting. It is an area that has been subject to considerable litigation, and is one of the things most commonly identified as a problem in practice. Conflicts of interest are not always easy to resolve because some interests will require that the lawyer *not* act for the person, while others will allow the practitioner to continue to act.

8.4 It is also an area that requires the balancing of two public interests — namely, on the one hand the interest in a client having full confidence in their lawyer, including the protecting of the clients' confidential information, and on the other hand the freedom of a client to be represented by the lawyer of their choice.[3] In *Zalfen v Gates* [2006] WASC 296 (21 December 2006), Newnes M noted, at [61]–[62]:

> [61] It is well-established that ordinarily litigants are entitled to solicitors and counsel of their choice and only where it is clearly necessary to do so will the Court make an order that would interfere with that right: *Tottle Christensen v Westgold Resources NL* [2003] WASCA 224 at [4]; *Fruehauf Finance Corporation Pty Ltd v Feez Ruthning* [1991] 1 Qd R 558 at 566; *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307 at 313; *Macquarie Bank Ltd v Myer*

[1994] 1 VR 350 at 352.

[62] In *Newman v Phillips Fox (a firm)* (1999) 21 WAR 309, Steytler J (as his Honour then was) said at [18] that the justification for intervention by the Court in applications of this nature has traditionally been founded on one or more of three grounds, namely:

(a) for the protection of confidential information;
(b) restraint from a breach of fiduciary duties in the context of a conflict of interest;
(c) to control the conduct of solicitors as officers of the Court and to ensure the administration of justice is not brought into disrepute.

8.5 In the case of an existing client, the jurisdiction to grant an injunction is based on the retainer and the fiduciary relationship between the client and the practitioner. Where the client is a former client, the jurisdiction to grant the injunction is based on the obligation to preserve the confidentiality of information imparted by the client during the relationship, and not the retainer or fiduciary relationship, which has come to an end.[4] In *PhotoCure ASA v Queen's University at Kingston* [2002] FCA 905 (22 July 2002), Goldberg J at [47], in approving the approach adopted in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222, referred to this distinction made by Lord Millett as follows:

[47] The principles upon which the jurisdiction to grant an injunction restraining the solicitor from acting against a party in a proceeding vary depending upon whether the person seeking to restrain the solicitor from acting in the proceeding is a present client or a former client of the firm of solicitors.

The distinction between the two situations was clearly drawn by the House of Lords in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 ('Bolkiah'). Lord Millett, with whom the other Law Lords agreed, drew a clear distinction between the basis of the court's jurisdiction to intervene on behalf of an existing client and the basis of the court's jurisdiction to intervene on behalf of a former client. The jurisdiction

> where the court's intervention is sought by an existing client is predicated upon the existence of a conflict of interest. … Where a former client is involved the jurisdiction is rather based upon the protection of confidential information. …[5]

8.6 In *Kallinicos v Hunt* (2005) 64 NSWLR 561; [2005] NSWSC 1181 (22 November 2005), Brereton J at [37]–[77] examined the relevant case law concerning the basis upon which a court can intervene to restrain a lawyer from acting and concluded at [76] that:

> During the subsistence of a retainer, where the court's intervention to restrain a solicitor from acting for another is sought by an existing client of the solicitor, the foundation of the court's jurisdiction is the fiduciary obligation of a solicitor, and the inescapable conflict of duty which is inherent in the situation of acting for clients with competing interests [*Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222].

8.7 In *Cleveland Investments Global Ltd v Evans* [2010] NSWSC 567 (1 June 2010), Ward J at [49] reviewed the relevant authorities and adopted the conclusions of Brereton J in *Kallinicos v Hunt* (2005) 64 NSWLR 561; [2005] NSWSC 1181 (22 November 2005), stating:

> Once the retainer is at an end, however, the court's jurisdiction is not based on any conflict of duty or interest, but on the protection of the confidences of the former client (unless there is no real risk of disclosure).[6]
>
> After termination of the retainer, there is no continuing (equitable or contractual) duty of loyalty to provide a basis for the court's intervention, such duty having come to an end with the retainer

[*Prince Jefri*; *Belan v Casey*; *Photocure*; *British American Tobacco*; *Asia Pacific Telecommunications*; contra *Spincode*; *McVeigh*; *Sent*].

However, the court always has inherent jurisdiction to restrain solicitors from acting in a particular case, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice.[7]

8.8 In relation to the inherent power of the court to ensure the due administration of justice, in *Kennedy v Secretary, Department of Industry* [2016] FCA 485 (11 May 2016), Flick J noted, at [37]–[50]:

[37] The power of the Court to restrain a legal representative of a party from future participation in a case is not in doubt.

[38] At its most fundamental, the power is founded upon the necessity to ensure the '*due administration of justice and to protect the integrity of the judicial process*': *Fonterra Brands (Australia) Pty Ltd v Viropolous* [2013] FCA 657 at [29], [2013] FCA 657; (2013) 304 ALR 332 at 336 to 337. Justice Robertson there referred with approval to the observations of Mandie J in *Grimwade v Meagher* [1995] VicRp 28; [1995] 1 VR 446 at 452 that the Court has '*jurisdiction to ensure the due administration of justice and to protect the integrity of the judicial process and as part of that jurisdiction, in an appropriate case, to prevent a member of counsel appearing for a particular party in order that justice should not only be done but manifestly and undoubtedly be seen to be done*'.

[39] The power is frequently invoked where a client or former client seeks to prevent a legal representative from appearing in circumstances where there is a conflict of interest (cf *Prince Jefri Bolkiah v KPMG (a firm)* [1998] UKHL 52; [1999] 2 AC 222) or where

there is a '*duty of loyalty owed by the solicitor to the former client*' (cf *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* [2014] FCA 1065 at [36]; (2014) 228 FCR 252 at 261 per Beach J).

[40] But the power is not confined to those circumstances in which there is an existing or former relationship: cf *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248, (2001) 4 VR 501. Nor is the power confined to those circumstances in which there is a danger of misuse of confidential information. In *Spincode*, Brooking JA observed at [38]:

> 'There is a good deal of authority for the view that a solicitor, as an officer of the court, may be prevented from acting against a former client even though a likelihood of danger of misuse of confidential information is not shown … '.

In *Grimwade v Meagher* [1995] VicRp 28; [1995] 1 VR 446 at 452 Mandie J observed:

> '… The objective test to be applied in the context of this case is whether a fair-minded reasonably informed member of the public would conclude that the proper administration of justice required that counsel be so prevented from acting, at all times giving due weight to the public interest that a litigant should not be deprived of his or her choice of counsel without good cause.'

No relevant difference is to be drawn for present purposes between the right to retain Counsel of one's choice as opposed to a solicitor, or firm of solicitors of one's choice. The use of the expression '*inherent jurisdiction*' may be inappropriate in the context of a statutory Court such as the Federal Court of Australia; but it matters not for present purposes whether the jurisdiction is characterised as part of an '*inherent jurisdiction*' of this Court or as a necessary incidental part of its statutory jurisdiction. The existence of the power cannot be

doubted.

[41] It is unnecessary for present purposes further to distil the basis upon which this Court may act in restraining a solicitor from acting in particular litigation. It is sufficient for present purposes to accept that the power may be exercised whenever it is necessary to '*protect the integrity of the judicial process … '.*

…

[50] But it matters not how this submission that the information was '*confidential*' may ultimately be resolved. More fundamentally important is the fact that the basis upon which

a Court may restrain a legal representative from further participating in a hearing is not confined to protecting confidential information or to prevent a conflict of interest The basis is more broadly expressed in terms of ensuring the '*due administration of justice and to protect the integrity of the judicial process*' (*Fonterra*). The disclosure to Ashurst of the information Mr Kennedy communicated (for example) to Ms Meier gives rise to no concern for the '*due administration of justice and … the integrity of the judicial process*'. Indeed, rather the reverse. A concern for the due administration of justice would arise if a litigant sought to have confidential communications with an Associate to either a Commissioner or any other member of the Fair Work Commission. There are sound reasons why an obligation of confidence should not be imposed upon Ms Meier. It is, with respect, antithetical to the open administration of justice for a party to have '*in-confidence*' communications with an Associate having a direct bearing on the issues in a proceeding: *John Holland Rail Pty Ltd v Comcare* [2011] FCAFC 34 at [23]; [2011] FCAFC 34; (2011) 276 ALR 221 at 227.

8.9 In *Frigger v Mervyn Jonathon Kitay in his capacity as*

Liquidator of Computer Accounting and Tax Pty Ltd (in liq) [No 10] [2016] WASC 63 (3 May 2016), Le Miere J noted at [23]:

> This court has power to restrain lawyers from acting for clients so as to ensure that the administration of justice is not brought into disrepute by the conduct of the practitioners. The justification for intervention by the court in applications of this kind has been put on a number of bases. The basis which is relevant in this application and is relied upon by the plaintiffs is the court's control over the conduct of solicitors as its officers. The court may restrain solicitors from acting for a client in proceedings when the court, acting under its inherent supervisory jurisdiction, considers that it is necessary to do so in order to ensure the due administration of justice. The court might exercise this control in the event of a lawyer proposing to act but having a personal interest, because for instance he or she is closely related to the client or has a financial or professional interest in the outcome of the proceedings or where he or she is likely to be called as a witness, such that he or she is unable to give the court the independent and uninvolved assistance which it expects. For example, in *Clay v Karlson* (1997) 17 WAR 493 Templeman J ordered a solicitor to cease acting for an executor and beneficiary supporting a will where there was an allegation that the firm had been negligent in drawing up a codicil to the will and where the partner involved was likely to be called as a witness.

8.10 As noted earlier,[8] the test to be applied in these cases is whether, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice, a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting. The timing of the application may also be relevant, in that the cost, inconvenience, or impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief.

8.11 In exercising its jurisdiction concerning the disqualification of a practitioner on the grounds of a conflict of interest, the court is not imposing a punishment on the practitioner for misconduct, but rather protecting the parties and the wider interests of justice.

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In *Hutchins v Cap Coast Telecoms Pty Ltd (in liq), in the matter of Cap Coast Telecoms Pty Ltd (in liq) ACN 128 716 030 (No 2)* [2015] FCA 946 (27 August 2015), Gleeson J noted at [28]:

> [28] In his oral submissions, Mr Herksope referred to the cases of *Kallinicos*, *Grimwade v Meagher* [1995] VicRp 28; [1995] 1 VR 446 and *Black v Taylor* [1993] 3 NZLR 403. In particular, he cited the following passage in *Kallinicos* at [44]:
>
> > 'In *Black v Taylor* [1993] 3 NZLR 403 Richardson J (at 408–409) said that the court had an inherent jurisdiction to control its own processes, which included determining who should be permitted to appear before it as advocates, one aspect of which was the control of a particular proceeding in the court. His Honour described the right to choice of counsel as an important but not an absolute value. After reference to *Everingham v Ontario*, his Honour held that where it was satisfied that the interests of justice so required, the High Court had an inherent jurisdiction to restrain a barrister from continuing to act as counsel for a particular party in proceedings before the court. His Honour agreed with the approach of the Ontario court, holding that disqualification (in a particular case) would ordinarily be the appropriate remedy where the integrity of the judicial process would be impaired by counsel's adversarial representation of one party against the other (at 412):

> "… The decision to disqualify is not dependent on any finding of culpable conduct on the lawyer's part. Disqualification is not imposed as a punishment for misconduct. Rather it is a protection for the parties and for the wider interests of justice. The legitimacy of judicial decisions depends in large part on the observance of the standards of procedural justice. Where the integrity of the judicial process is perceived to be at risk from the proposed or continuing representation by counsel on behalf of one party, disqualification is the obvious and in some cases the only effective remedy although considerations of delay, inconvenience and expense arising from a change in representation may be important in determining in particular cases whether the interests of justice truly demand disqualification."'

8.12 The increasing trend towards the establishment of large national and international firms raises the possibility of one firm (perhaps operating in a different jurisdiction) dealing with clients who have competing interests. This has also been an issue for practitioners in country towns, where one or two law firms might deal with the legal problems of the whole town. In *Village Roadshow Ltd v Blake Dawson Waldron* [2003] VSC 505, Byrne J noted at [49]:

> It is a notorious fact that a good deal of commercial litigation in this State is conducted by a handful of very large firms'. The difficult issue is this: which conflicts, if not resolved, give rise to a breach of professional ethics and which do not?

8.13 The law in relation to conflicts of interest is found not only in the inherent jurisdiction of the court, but also in the case law and the various rules of professional practice that govern the conduct of

legal practitioners.

8.14 There is a close relationship between 'conflicts of interest' and 'confidentiality and privilege'. This is because the law concerning the avoidance of a conflict of interest is, for the most part, to protect the confidences of clients.

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RULES OF PROFESSIONAL CONDUCT

8.15 Extracts from the Rules of Professional Conduct for the various jurisdictions in relation to conflicts of interest are reproduced below.[9]

8.16 The following extract is from the Northern Territory Rules of Professional Conduct and Practice 2005 rr 3 and 7–10:

> **3. Restraint on Acting Against a Former Client**
>
> Consistently with the duty which a practitioner has to preserve the confidentiality of a client's affairs, a practitioner must not accept a retainer to act for another person in any action or proceedings against, or in opposition to, the interest of a person—
>
> (a) for whom the practitioner or the firm, of which the practitioner was a partner, has acted previously; and
>
> (b) from whom the practitioner or the practitioner's firm has thereby acquired information confidential to that person and material to the action or proceedings; and
>
> that person might reasonably conclude that there is a real possibility the information will be used to the person's detriment.
>
> …

7. Acting for more than one party

7.1 For the purposes of Rules 7.2 and 7.3—

- 'proceedings or transaction' mean any action or claim at law or in equity, or any dealing between parties, which may affect, create, or be related to, any legal or equitable right or entitlement or interest in property of any kind.
- 'party' includes each one of the persons or corporations who, or which, is jointly a party to any proceedings or transaction.
- 'practitioner' includes a practitioner's partner or employee and a practitioner's firm.

7.2 A practitioner who intends to accept instructions from more than one party to any proceedings or transaction must be satisfied, before accepting a retainer to act, that each of the parties is aware that the practitioner is intending to act for the others and consents to the practitioner so acting in the knowledge that the practitioner:

(a) may be, thereby, prevented from—
  (i) disclosing to each party all information, relevant to the proceedings or transaction, within the practitioner's knowledge, or,
  (ii) giving advice to one party which is contrary to the interests of another; and

(b) will cease to act for all parties if the practitioner would, otherwise, be obliged to act in a manner contrary to the interests of one or more of them.

7.3 If a practitioner, who is acting for more than one party to any proceedings or transaction, determines that the practitioner cannot continue to act for all of the parties without acting in a

manner contrary to the interests of one or more of them, the practitioner must thereupon cease to act for all parties.

8. Avoiding Conflict of Interest Between a Client's and a Practitioner's Own Interest

8.1 A practitioner must not, in any dealings with a client—

8.1.1 allow the interests of the practitioner or an associate of the practitioner to conflict with those of the client;

8.1.2 exercise any undue influence intended to dispose the client to benefit the practitioner in excess of the practitioner's fair remuneration for the legal services provided to the client.

8.2 A practitioner must not accept instructions to act for a person in any proceedings or transaction affecting or related to any legal or equitable right or entitlement or interest in property, or continue to act for a person engaged in such proceedings or transaction when the practitioner is, or becomes, aware that the person's interest in the proceedings or transaction is, or would be, in conflict with the practitioner's own interest or the interest of an associate.

9. A Practitioner Receiving a Benefit under a Will or other Instrument

9.1 A practitioner who receives instructions from a person to draw a Will appointing the practitioner an Executor must inform that person in writing before the client signs the Will—

9.1.1 of any entitlement of the practitioner to claim commission;

9.1.2 of the inclusion in the Will of any provision entitling the practitioner, or the practitioner's firm, to charge professional fees in relation to the administration of the Estate, and;

9.1.3 if the practitioner has an entitlement to claim commission, that the person could appoint as Executor a person who might make no claim for commission.

9.2 A practitioner who receives instructions from a person to—

9.2.1 draw a will under which the practitioner or an associate will, or may, receive a substantial benefit other than any proper entitlement to commission (if the practitioner is also to be appointed executor) and the reasonable professional fees of the practitioner or the practitioner's firm; or

9.2.2 draw any other instrument under which the practitioner or an associate will, or may, receive a substantial benefit in addition to the practitioner's reasonable remuneration, including that payable under a conditional costs agreement,

must decline to act on those instructions and offer to refer the person, for advice, to another practitioner who is not an associate of the practitioner, unless the person instructing the practitioner is either:

9.2.3 a member of the practitioner's immediate family; or

9.2.4 a practitioner, or a member of the immediate family of a practitioner, who is a partner, employer, or employee, of the practitioner.

9.3 For the purposes of this rule:

'substantial benefit' means a benefit which has a substantial value relative to the financial resources and assets of the person intending to bestow the benefit.

10. Practitioner and Client — Borrowing Transactions

10.1 A practitioner must not borrow any money, nor permit or assist an associate to borrow any money from a person—

10.1.1 who is currently a client of the practitioner, or the

practitioner's firm;

10.1.2 for whom the practitioner or practitioner's firm has provided legal services, and who has indicated continuing reliance upon the advice of the practitioner, or practitioner's firm in relation to the investment of money; or

10.1.3 who has sought from the practitioner, or the practitioner's firm, advice in respect of the investment of any money, or the management of the person's financial affairs.

10.2 This Rule does not prevent a practitioner or an associate borrowing from a client which is recognised by the practitioner's professional association as a business entity engaged in money lending.

…

8.17 The following extract is from the Queensland Australian Solicitors Conduct Rules 2012 rr 10–12, which are mirrored for New South Wales,[10] South Australia,[11] Victoria,[12] and the Australian Capital Territory:[13]

10. Conflicts concerning former clients

10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients, except as permitted by Rule 10.2.

10.2 A solicitor or law practice who or which is in possession of confidential information of a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:

10.2.1 the former client has given informed written consent to the solicitor or law practice so acting; or

10.2.2 an effective information barrier has been established.

11. Conflict of duties concerning current clients

11.1 A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule.

11.2 If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the clients' interests are adverse and there is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act, except where permitted by Rule 11.

11.3 Where a solicitor or law practice seeks to act in the circumstances specified in Rule 11.2, the solicitor may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:

11.3.1 is aware that the solicitor or law practice is also acting for another client; and

11.3.2 has given informed consent to the solicitor or law practice so acting.

11.4 In addition to the requirements of Rule 11.3, where a solicitor or law practice is in possession of confidential information of a client (the first client) which might reasonably be concluded to be material to another client's current matter and detrimental to the interests of the first client if disclosed, there is a conflict of duties and the solicitor and the solicitor's law practice must not act for the other client, except as follows:

11.4.1 a solicitor may act where there is a conflict of duties arising from the possession of confidential information, where each client has given informed consent to the solicitor acting for another client;

11.4.2 a law practice (and the solicitors concerned) may act where there is a conflict of duties arising from the

possession of confidential information where an effective information barrier has been established.

11.5 If a solicitor or a law practice acts for more than one client in a matter and, during the course of the conduct of that matter, an actual conflict arises between the duties owed to two or more of those clients, the solicitor or law practice may only continue to act for one of the clients (or a group of clients between whom there is no conflict) provided that the duty of confidentiality to other client(s) is not put at risk and the parties have given informed consent.

12. Conflict concerning a solicitor's own interests

12.1 A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this Rule.

12.2 A solicitor must not exercise any undue influence intended to dispose the client to benefit the solicitor in excess of the solicitor's fair remuneration for legal services provided to the client.

12.3 A solicitor must not borrow any money, nor assist an associate to borrow money, from:

12.3.1 a client of the solicitor or of the solicitor's law practice; or

12.3.2 a former client of the solicitor or of the solicitor's law practice who has indicated a continuing reliance upon the advice of the solicitor or of the solicitor's law practice in relation to the investment of money,

UNLESS the client is:

(i) an Authorised Deposit-taking Institution;
(ii) a trustee company;
(iii) the responsible entity of a managed investment scheme registered under Chapter 5C of the Corporations Act 2001 (Cth) or a custodian for such a scheme;
(iv) an associate of the solicitor and the solicitor is able to discharge the onus of proving that a full written disclosure was made to the client and that the client's interests are protected in the circumstances, whether by legal representation or otherwise; or
(v) the employer of the solicitor.

12.4 A solicitor will not have breached this Rule merely by:

12.4.1 drawing a Will appointing the solicitor or an associate of the solicitor as executor, provided the solicitor informs the client in writing before the client signs the Will:
(i) of any entitlement of the solicitor, or the solicitor's law practice or associate, to claim executor's commission;
(ii) of the inclusion in the Will of any provision entitling the solicitor, or the solicitor's law practice or associate, to charge legal costs in relation to the administration of the estate; and
(iii) if the solicitor or the solicitor's law practice or associate has an entitlement to claim commission, that the client could appoint as executor a person who might make no claim for executor's commission.

12.4.2 drawing a Will or other instrument under which the solicitor (or the solicitor's law practice or associate) will or may receive a substantial benefit other than any proper entitlement to executor's commission and proper fees, provided the person instructing the solicitor is either:

(i) a member of the solicitor's immediate family; or
(ii) a solicitor, or a member of the immediate family of a solicitor, who is a partner, employer, or employee, of the solicitor.

12.4.3 receiving a financial benefit from a third party in relation to any dealing where the solicitor represents a client, or from another service provider to whom a client has been referred by the solicitor, provided that the solicitor advises the client:
(i) that a commission or benefit is or may be payable to the solicitor in respect of the dealing or referral and the nature of that commission or benefit;
(ii) that the client may refuse any referral, and
the client has given informed consent to the commission or benefit received or which may be received.

12.4.4 acting for a client in any dealing in which a financial benefit may be payable to a third party for referring the client, provided that the solicitor has first disclosed the payment or financial benefit to the client.

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8.18 The following extract is from the Tasmanian Rules of Practice 1994 rr 11–12A:

11. Disclosure of information and interest

(1) A practitioner must not disclose any information obtained in the course of handling a client's matter without the consent of the client other than to the administrator of a scheme relating to legal assistance in accordance with rule 16.

(2) A practitioner must disclose to a client—

(a) any interest that the practitioner has in any transaction in which he or she is acting for that client; and

(b) any matter which may reasonably be regarded as a conflict of interest on the part of the practitioner.

(3) Unless the client otherwise instructs, a practitioner must cease to act for a client if—

(a) that practitioner has an interest in the transaction in which the practitioner is acting for that client; and

(b) that interest is adverse to the interests of the client.

12. Acting for more than one party

(1) A practitioner may act for more than one party to any proceedings or transaction.

(2) A practitioner must not accept instructions from more than one party to any proceedings or transaction unless the practitioner is satisfied on reasonable grounds that—

(a) each of the parties is aware that the practitioner intends to act for another party or parties; and

(b) each of the parties is aware that as a result of acting for more than one party—

(i) the practitioner may be prevented from disclosing to any one of those parties the full knowledge that the practitioner has of matters relevant to the proceedings or transaction; and

(ii) the practitioner may be prevented from giving advice to any one of those parties if that advice is contrary to the interest of any other party; and

(iii) the practitioner must cease to act for all parties if the practitioner determines that he or she is not able to continue to act for all parties without acting in a manner contrary to the interests of one or more of those parties; and

(c) each of the parties, with full knowledge of the

matters referred to in paragraph (b), has consented to the practitioner acting for more than one party.

(3) A practitioner who is acting for more than one party to any proceedings or transaction must immediately cease to act for all parties if that practitioner determines that he or she is not able to continue to act for all parties without acting in a manner contrary to the interests of one or more of those parties.

12A. Practitioner member of statutory tribunal

(1) A practitioner must not undertake work on behalf of a client in relation to, or appear in, any proceedings before a statutory tribunal of which the practitioner is a member.

(2) A practitioner must not appear in any proceedings before a statutory tribunal on behalf of a client if a partner, employer or employee of the practitioner is sitting as a member of that statutory tribunal for the purposes of those proceedings.

(3) A practitioner must not undertake work on behalf of a client in relation to, or appear in, any proceedings before a statutory tribunal of which a partner, employer or employee of the practitioner is a member unless—

(a) the practitioner advises his or her client and any other party to the proceedings that a partner, employer or employee of the practitioner is a member of that statutory tribunal; and

(b) that advice is given as soon as practicable.

(4) A reference to a partner of a practitioner is a reference to —

(a) a partner of the firm of which the practitioner is a partner; or
(b) a director of the legal practitioner corporation of which the practitioner is a director.

(5) A reference to an employee of a practitioner includes a reference to—
(a) a practitioner employed by a legal practitioner corporation of which the first practitioner is a director; and
(b) any other practitioner employed in the firm or legal practitioner corporation of which the first practitioner is an employee.

(6) A reference to an employer of a practitioner includes a reference to a director of a legal practitioner corporation of which the first practitioner is an employee.

8.19 The Western Australian Legal Profession Conduct Rules 2010 rr 12–15 provide:

12. Conflict of interest generally

A practitioner must protect and preserve the interests of a client unaffected by the interest of—

(a) the practitioner; or
(b) the practitioner's law practice; or
(c) another client of the practitioner; or
(d) an affiliate of the practitioner; or
(e) any other person.

13. Conflict of interest concerning former clients

(1) In this rule—

former client, in relation to a practitioner, includes a person who—
(a) had previously engaged—
(i) the practitioner; or
(ii) the practitioner's law practice; or

(iii) a law practice of which the practitioner was an associate at the time of the previous engagement; or

(iv) a law practice of which a partner, director or employee of the practitioner's law practice was an associate at the time of the previous engagement; or

(b) provided confidential information to the practitioner, notwithstanding that the practitioner was not formally engaged and did not render an account.

(2) A practitioner must not provide, or agree to provide, legal services to a person if there is a real possibility that the practitioner would be required, in order to act in the best interests of the person—

(a) to use confidential information obtained from a former client to the detriment of the former client; or

(b) to disclose to the person confidential information obtained from a former client.

(3) Subrule (2) does not apply if—

(a) the former client has given informed written consent to the practitioner providing the legal service; or

(b) an effective information barrier has been established to protect the former client's confidential information.

14. Conflict of interest concerning current clients

(1) A practitioner and the practitioner's law practice must avoid conflicts between the duties owed to 2 or more clients of the practitioner or the law practice.

(2) A practitioner must not provide, or agree to provide, legal

services for a client if—

(a) the practitioner or the practitioner's law practice is engaged by another client in the same or a related matter; and

(b) the interests of the client and the other client are adverse; and

(c) there is a conflict or potential conflict of the duties to act in the best interests of each client.

(3) Subrule (2) does not apply if—

(a) each client is aware that the practitioner or the practitioner's law practice is also providing legal services to each other client; and

(b) each client has given informed consent to the practitioner or the practitioner's law practice providing the legal services to each other client; and

(c) an effective information barrier has been established to protect the confidential information of each client.

15. Conflicts concerning practitioner's own interests

(1) In this rule—

authorised deposit-taking institution has the meaning given in the *Banking Act 1959* (Commonwealth) section 5;

listed public unit trust means a unit trust that has one or more units listed for quotation on the official list of a stock exchange in Australia or elsewhere;

substantial benefit means a benefit which has a substantial value relative to the financial resources and assets of the person intending to bestow the benefit.

(2) A practitioner must avoid conflicts between the interests of a client and the interests of—

(a) the practitioner; or

(b) the practitioner's law practice; or

(c) an affiliate of the practitioner.

(3) A practitioner must not provide, or agree to provide, legal services to a client if the practitioner knows or ought reasonably to know that the interests of a person referred to in subrule (2)(a) to (c) may conflict with the interests of the client.

(4) Subrule (3) does not apply if the client—

(a) is fully informed of the conflict of interests; and

(b) has received independent written legal advice about the effect of the conflict; and

(c) agrees to the practitioner providing the legal services.

(5) Nothing in this rule prevents a practitioner—

(a) drawing a will appointing the practitioner or an affiliate of the practitioner as executor, if the practitioner informs the client in writing before the client signs the will—

(i) of any entitlement of the practitioner or the affiliate to claim executor's commission; and

(ii) of the inclusion in the will of any provision entitling the practitioner or the affiliate to charge legal costs in relation to the administration of the estate; and

(iii) if the practitioner or the affiliate has an entitlement to claim executor's commission, that the client could appoint as executor a person who might make no claim for executor's commission; or

(b) if the client is an affiliate of the practitioner, drawing a will or other instrument under which the practitioner or an affiliate of the practitioner will or

may receive a substantial benefit other than a proper entitlement to executor's commission or legal costs.

(6) Subject to subrule (7A), a practitioner must not borrow money or assist an affiliate of the practitioner to borrow money from—

(a) a client of the practitioner or of the practitioner's law practice; or

(b) a former client of the practitioner or of the practitioner's law practice who has indicated a continuing reliance upon the advice of the practitioner or of the practitioner's law practice in relation to the investment of money.

(7A) Subrule (6) does not apply in respect of a client who is—

(a) an authorised deposit-taking institution; or

(b) a listed public unit trust; or

(c) the responsible entity of a managed investment scheme registered under the Corporations Act Chapter 5C or a custodian for that scheme; or

(d) an affiliate of the practitioner who has received—

(i) full written disclosure regarding the proposed loan; and

(ii) independent legal or financial advice regarding the proposed loan; or

(e) an employer of the practitioner.

(7B) The onus of establishing the requirements in subrule (7A)(d)(i) and (ii) rest with the practitioner.

(7) A practitioner must not become a surety or guarantor for a client.

8.20 Finally, legislation in each jurisdiction concerning the

admission to and the practice of law, as well as the membership of certain committees, contains provisions in relation to conflicts of interest and requirements as to disclosure.[14]

AREAS OF POTENTIAL CONFLICT AND 'CHINESE WALLS'

8.21 There are four broad areas of potential conflict so far as the client and the practitioner are concerned. These are discussed separately in this chapter. For the most part, they are covered by the various professional conduct rules and by a large body of case law.

8.22 The first and most obvious example of conflict is where a firm or practitioner is approached by the opposite party to an action, requesting that the firm or practitioner act for them. This will sometimes occur because it is perceived by the parties to be more convenient and less costly to have one practitioner deal with the matter. However, it might also be that one of the parties is unaware of the fact that the other party has instructed the same firm (perhaps an interstate or overseas office) to act for them.

8.23 The second situation is where there may be a conflict between the interests (financial or otherwise) of the lawyer and those of the client. Examples include cases where a solicitor guarantees a loan made to the client,[15] or where the solicitor has business dealings with the client.[16]

8.24 Third is the situation where the lawyer is a potential witness. Examples include *Yamaji v Westpac Banking Corp (No 1)* (1993) 42 FCR 431; 115 ALR 235, where the solicitor was likely to be a witness regarding a contentious issue, and *Sheahan v Northern Australia Land and Agency Co Pty Ltd* (1994) 176 LSJS 257, which

considered whether a practitioner may appear as a witness and continue to represent a party in the same case.

8.25 Finally, there is the situation of a lawyer opposing a former client. In order to overcome a conflict of interest in these cases, firms will often attempt to put in place arrangements

(information barriers) to quarantine information — for example, the information concerning a previous client against whom they now wish to take instructions. These arrangements are sometimes referred to as 'Chinese walls', although this terminology has been subject to some criticism — for instance, per Justice Low in *Peat, Marwick, Mitchell & Co v Superior Court* (1988) 200 Cal App 3d 272; 245 Cal Rptr 873:

> [A] 'Chinese Wall' is one such piece of legal flotsam which should be emphatically abandoned. The term has an ethnic focus which many would consider a subtle form of linguistic discrimination.

8.26 In 2006, the NSW Law Society and the Victorian Law Institute published guidelines on this matter. These have also now been endorsed by the Queensland Law Society. By way of example, the Law Society of New South Wales notes in its *Information Barrier Guidelines*:[17]

> By providing guidance on the factors typically taken into account in constructing an effective barrier these guidelines may assist to reduce the occurrence of successful challenges in the courts and otherwise to the effectiveness of information barriers.
>
> An information barrier, properly constructed taking into account the issues set out in these guidelines, is an important element in ensuring

that the duty of confidentiality is maintained and allowing a law practice to act against a former client without breaching its duty to preserve the confidences of that client. It may also present an effective rebuttal of the presumption of imputed knowledge.

These guidelines are intended to provide a fair and objective basis upon which to assess the adequacy of measures taken by a law practice. It is important to note that whether an information barrier will be effective depends on the facts of each individual case.

8.27 Put simply, 'Chinese walls' involve the firm taking steps to ensure that different lawyers within the firm act for each client, that the legal staff acting for the respective clients do not come into contact with confidential information given to the firm by that client for whom their section of the firm is not acting, and that the integrity of the client's information in terms of their right to confidentiality is not compromised.[18]

8.28 In *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 at 228, Lord Millett referred to the 'Consultation Paper on Fiduciary Duties and Regulatory Rules' prepared by the Law

Commission in England in 1992, which described Chinese walls as normally involving some combination of the following organisational arrangements:

(i) the physical separation of the various departments in order to insulate them from each other — this often extends to such matters of detail as dining arrangements;
(ii) an educational programme, normally recurring, to emphasise the importance of not improperly or inadvertently divulging confidential information;

(iii) strict and carefully defined procedures for dealing with a situation where it is felt that the wall should be crossed and the maintaining of proper records where this occurs;
(iv) monitoring by compliance officers of the effectiveness of the wall;
(v) disciplinary sanctions where there has been a breach of the wall.

8.29 The concern of the courts over the adequacy of 'Chinese walls' to protect client information was expressed by Ipp J in *Mallesons v KPMG Peat Marwick* (1990) 4 WAR 357, when he noted:

> Even with the best will in the world the [confidential] information would colour, at least subconsciously, the approach of the solicitors and influence them in the performance of the tasks.

8.30 Newnes M in *Zalfen v Gates* [2006] WASC 296, observed at [76]–[78]:

> [76] There is, I think, also a strong body of authority to the effect that in circumstances where there is a real risk of disclosure it will rarely be the case that a 'Chinese wall' will be sufficient justification for allowing a firm to act: see, for example, *D & J Constructions Pty Ltd v Head* (*supra*), *Effem Foods Pty Ltd v Trade Consultants Ltd* (1989) 15 IPR 45, *David Lee & Co (Lincoln) Ltd v Coward Chance (a firm)* [1991] Ch 259, *Re a firm of Solicitors* [1992] QB 959.
>
> [77] In *D & J Constructions Pty Ltd v Head (supra)*, Bryson J (at 122–123) said that the Court would not usually undertake attempts to build walls around information in the office of a partnership, even a very large partnership, by accepting undertakings or imposing injunctions as to, among other things, communications among partners and their employees. His Honour noted that among the difficulties involved in attempting to contain information in that way:
>
> > '[e]nforcement by the court will be extremely difficult and it is not realistic to place reliance on such arrangements in

> relation to people with opportunities for daily contact over long periods, as wordless communication can take place inadvertently and without explicit expression, by attitudes, facial expression or even by avoiding people one is accustomed to see, even by people who sincerely intend to conform to control.'

[78] Similarly, in *David Lee & Co (Lincoln) Ltd v Coward Chance (a firm) (supra)*, Browne-Wilkinson VC said (at 674):

> 'When one has sensitive information in a firm or in any other group of people, there is the element of seepage of that information through casual chatter and discussion,

> the letting slip of some information which is not thought to be relevant but may make the link in a chain of causation or reasoning.'

8.31 A somewhat unusual example of a finding of a conflict of interest was the case where the daughter of counsel representing the husband in a matter — the daughter being a fourth year law student — was undertaking work experience at the firm of solicitors, who were acting for the wife.[19] An urgent application was made by the wife for her husband to be restrained from engaging Mr Mort as counsel. The solicitors for the wife wrote to the solicitors for the husband, raising concerns about a perceived conflict of interest, alleging that the daughter of counsel for the husband had been exposed to confidential information regarding the wife's case. The letter included the following at [6]:

> [6] Mr Mort's daughter, [Ms] Mort, is currently completing a two

> week work experience placement with our office. During this placement, she has been exposed to confidential information relevant to our client's case. Given the size of our office, it is not possible to construct an effective Chinese Wall or to ensure that [Ms Mort] will not be further exposed to confidential information during the preparation of our client's case for final hearing.
>
> As you are aware, Ms Alice Carter of Counsel will be appearing on behalf of our client [the wife] at the final hearing. Ms Carter has spoken with the Bar Association's Ethics Committee who has advised her that it would be a conflict of interest for Mr Mort to appear in this matter at the final hearing.
>
> Our client has been made aware of the circumstances and perceives that a conflict of interest would exist if Mr Mort appeared at the final hearing and that this conflict of interest could be to her detriment.

The court adopted a test based on whether there was 'a theoretical risk of the misuse of the confidential information',[20] and concluded, on this test, that it was appropriate to restrain the husband from continuing to engage Mr Mort, and to grant the wife's application.

8.32 To what extent (if at all) should factors such as the size of the legal firm, whether it is a city or country firm, the nature of the original and current proceedings (criminal or civil), and the nexus between these proceedings and the time delay between the original and current proceedings be taken into account when determining whether a conflict of interest can be accommodated by use of 'Chinese walls'? You are an employed solicitor in a large firm with interstate offices, which regularly acts for one of the leading Australian financial institutions and which has instructed you in a high fee-earning takeover matter. You find out that the Sydney office of the firm is acting for the target company in the takeover, which is a small client and not a regular one. The senior partner tells you that a 'Chinese wall' has been put in place to avoid any exchange of information. You regularly see documents in the

course of the matter which compromises you and the firm, as they

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must have come from the Sydney office. These documents are advantageous to your client and disadvantage the target company in the takeover. What should you do? What are the possible consequences for a legal practitioner when a court finds that the practitioner has acted against a former client?

ACTING FOR MORE THAN ONE PARTY

8.33 Scrutton LJ in *Moddy v Cox* [1917] 2 Ch 71, said at 91:

> It may be that a solicitor who tries to act for both parties puts himself in a position that he must be liable to one or the other whatever he does. … [It] would be his fault for mixing himself with the transaction in which he has two entirely inconsistent interests and solicitors who try to act for both vendors and purchasers must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them.

8.34 In *Thompson v Mikkelsen* (SC(NSW), No 584/74, Wootten J, 3 October 1974, unreported), Wootten J noted that '[i]t seems to me that the practice of a solicitor acting for both parties cannot be too strongly deprecated'.

8.35 The principle behind the law in this area is that 'no man can serve two masters'.[21] This is reflected in *Blackwell v Barroile Pty Ltd* (1994) 51 FCR 347, where Davies and Lee JJ noted at [52]:

> A firm is in no better position than a sole practitioner if it purports to act for separate clients whose interests are in contention. If it purports

> to continue to act for both clients by imposing a qualification on the duties of partnership it thereby denies the respective clients the services the clients have sought from the firm, namely the delivery of such professional skill and advice as the partnership is able to provide. In such a circumstance the appearance provided to the public is that the interests of the solicitors as partners are in conflict with, and may be preferred to, the interests of one or both clients.

8.36 Apart from the fact that acting against a current client may be actionable as a breach of duty on the part of the solicitor, giving rise to an injunction restraining the practitioner from acting for either party, such action may also amount to a breach of professional ethics, which could potentially give rise to charges of misconduct.

8.37 The matter can often arise in relation to Family Law proceedings. In these cases, apart from the Professional Conduct Rules concerning conflicts of interest, r 8.03 of the Family Court Rules 2014 (Cth) requires that a lawyer acting for a party in a case must not act in the case for any other party who has a conflicting interest.[22] In *Rilak & Tsocas* [2015] FamCA 425 (5 June 2015),[23] Loughnan J noted in reference to the aforementioned rule at [46]–[47]:

> [46] There is a provision of the *Family Law Rules* that requires that lawyers cease to act when there is a relevant conflict of interest. The principle involved was not established by the Rules. The provision in the Rules is just a statement of the legal position. The concern arises as a by-product of the professional obligations undertaken by legal representatives. If it appears that a solicitor would be in a position of conflict as a result of their professional duty to parties who have

different interests in proceedings, then the solicitor should cease to act.

[47] A solicitor has an obligation to use his or her knowledge and skill for the benefit of a client. If the solicitor is in a position whereby he or she has knowledge received as a solicitor from two clients who are in a different interest, it will be impossible to discharge his or her obligation to both clients. That situation was the subject of decisions in *Thevenaz & Thevenaz* (1986) FLC 91-748 and *McMillan & McMillan* [2000] FamCA 1046; (2000) FLC 93-048. The authorities have traversed whether there needs to be any evidence that there was actually a confidence passed between solicitor and client and it has been found that that need not be established, just the risk. Mullane J in a decision of *Griffis & Griffis* (1991) FLC 92-233 agreed that all that was necessary was that a party swore that confidential information was provided. There can be a risk of transmission of information through the firm. The authorities canvass a number of examples. Even a clerk engaged by the firm who has confidences of one party, where the firm continues to act for another party, has been found to warrant a solicitor ceasing to act. Similarly, where a partner, or a former partner, has access to confidences as a solicitor for the opposing party, the firm has been required to cease to act. It has been found that in relation to family law, greater care is needed to avoid the risk of conflict of interests than would be the case in other jurisdictions. The test is a broad one rather than a narrow one, in other words, the default position is to avoid the risk of such a conflict of interest.

8.38 In *Greco & Greco* [2008] FamCA 501 (20 June 2008), Collier J concluded at [33]–[44]:

[33] In this present case the conflict alleged is not the conflict arising where a lawyer or other person has changed sides. Rather, the wife's case here is that the firm of solicitors has a current and ongoing conflict in acting for the husband on the one hand, and the companies,

> Greco, R and D and the partnership on the other hand. I am satisfied that the firm has acted and continues to act for all of those entities.
>
> [34] I must therefore determine whether the firm continuing to act, or having acted in the past, places the wife at a perceived forensic disadvantage that requires intervention by the Court.
>
> …
>
> [44] I am satisfied that this is a case where a fair minded observer being reasonably informed would conclude that the proper administration of justice require that legal practitioners, in this case the firm of Marsdens Law Group, or any member or employee of that firm, should be prevented from acting for the husband, in the interests of the protection of the integrity of the Judicial process and the due administration of justice, including the appearance of justice, in this case.

8.39 As noted in *Blackwell v Barroile Pty Ltd* (1994) 51 FCR 347,[24] a firm acting for both parties is in no better position than an individual practitioner. The general rule is that lawyers (and their firms) need to give full and effective representation to their clients, and this may not be possible if the interests of the two clients actually or potentially clash.

8.40 An area that can commonly give rise to a conflict of interest of this kind is where the same practitioner or the firm of that practitioner acts for both vendor and purchaser in a commercial transaction. In *Holdsworth v MR Anderson & Associates* (SC(Vic), 26 August 1994, unreported), Phillips J noted in relation to such cases:

> It is surely part of the contract of retainer that the solicitor will use his best endeavours in the interests of his client and he does not do that

> by placing his own particular knowledge of events in which he took part as the agent of both at the disposal of one to the exclusion of the other. It is on that basis that I think that (at least in the ordinary case) a Court of equity would restrain the solicitor from acting for either vendor or purchaser in the dispute between them. Nor do I think that anything turns on whether that dispute first arose before or after the formal conclusion of the work that the solicitor had been engaged to transact on behalf of both.

8.41 In *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390; 102 ALR 453, Davies, Sheppard, and Gummow JJ, at FCR 393; ALR 478, put the matter bluntly:

> We pause to say that various courts in a number of jurisdictions have decried the practice of the one solicitor acting for both vendor and purchase; cf *Jennings v Zilahi-Kiss* (1972) 2 SASR 493 at 511–12; *Spector v Ageda* [1973] Ch 30 at 47; *Fox v Everingham* (1983) 50 ALR 337 at 345; 76 FLR 170 at 178; *Farrington v Rows McBride & Partners* [1985] 1 NZLR 83 at 90–1, 96. It is an undesirable practice and it ought not to be permitted.

8.42 The case of *Thomson v Golden Destiny Investments Pty Ltd* [2015] NSWSC 1176 (21 August 2015) emphasises the importance of there being fully informed consent where the

practitioner seeks to continue to act for more than one party in respect of the same transaction.[25] In that case, Sackar J noted at [83]–[85]:

> [83] In *Clark Boyce v Mouat* [1994] 1 AC 428 at 435–6 it was said that:
>
> > '[i]nformed consent means consent given in the knowledge that there is a conflict between the parties and that as a

> result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of others.'
>
> [84] Fully informed consent (by the person to whom the fiduciary duty is owed) is a defence to breach of fiduciary duty: see *Chan v Zacharia* (1984) 154 CLR 178, 204 (Deane J). Where there is a conflict of duties, it is necessary that informed and effective assent be demonstrated in order 'to escape the stigma of an adverse finding of breach of fiduciary duty, with consequent remedies': *Makaronis* at 466 (Brennan CJ, Gaudron, McHugh and Gummow JJ).
>
> [85] The onus of proof lies on the fiduciary: see *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 398 (Isaacs J) and the cases cited therein.

8.43 The Professional Rules of Conduct indicate the ethical obligations of practitioners where they intend to act for more than one party in a proceeding or transaction.[26] As noted above,[27] in these circumstances it is important that there is full and frank disclosure to both clients of the difficulties that arise — for example, that certain information may not be able to be used to support the case or position of one of the clients, and that if the matter becomes contentious involving the practitioner having to act in a manner contrary to the interests of one or more of the clients, then the practitioner must cease to act for all parties.

THE LAWYER, THE CLIENT AND VESTED INTERESTS

8.44 Apart from the obligations imposed on practitioners under the various Professional Rules of Conduct, there have been a number of cases that have discussed the competing loyalties lawyers may have in terms to their duty to their client and their own

personal or vested interests. Examples include where solicitors borrow from a client, or have business dealings which may impact on the client and where they fail to make adequate disclosure or advise the client of the need for independent advice. The fact that the client suffers no loss is irrelevant to the question of whether, in these circumstances, there has been misconduct on the part of the lawyer.[28]

8.45 So far as these conflicts are concerned, the most obvious involve those where the lawyer mixes their own financial or personal interests with those of their client. In *Maguire and Tansey*

v Makoronis [1997] HCA 23; (1997) 188 CLR 449 (1997) 144 ALR 729, Brennan CJ, Gaudron, McHugh, and Gummow JJ noted at 465–7:

> The classic case of the [fiduciary] duty arising is where a solicitor acts for a client in a matter in which he has a personal interest. In such a case there is an obligation on the solicitor to disclose his interest and, if he fails so to do, the transaction, however favourable it may be to the client, may be set aside at his instance'. …
>
> In the present case, the trial judge found that there had been a conflict between the duty of the appellants to the respondents and their personal interests in the transaction, in particular as mortgagee under the Mortgage. The conflict meant that the loyalty of the appellants to their clients had not remained undivided, with the result that they could not properly discharge their duties to their clients. …
>
> … [In] the circumstances disclosed above, if the appellants were to escape the stigma of an adverse finding of breach of fiduciary duty, with consequent remedies, it was for them to show, by way of defence,

> informed consent by the respondents to the appellants' acting, in relation to the Mortgage, with a divided loyalty. … On no footing could it be maintained that the appellants had taken the necessary steps of this nature to answer the charge of breach of fiduciary duty. However, it should be noted that, contrary to what appeared to be suggested by the respondents in argument, there was no duty as such on the appellants to obtain an informed consent from the respondents. Rather, the existence of an informed consent would have gone to negate what otherwise was a breach of duty.
>
> Fourthly, the breach of fiduciary duty having been established without satisfactory answer by the appellants, it then became necessary to determine the appropriate remedy. The nature of the case will determine the appropriate remedy available for selection by a plaintiff. Here the range of remedies was exclusively equitable in nature, the obligation which had been broken, that of a fiduciary, having been equitable in nature. Where the breach of duty was in a solicitor acting for a client in a transaction in which the solicitor had a personal interest, the court may order the solicitor 'to replace property improperly acquired from the client' and achieve this by an order for rescission, unless it be shown that *restitutio in integrum* is no longer possible. [references omitted]

8.46 In *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, the defendant was a solicitor who was also a director and shareholder in three companies in the business of property investment.[29] Over a period of years, clients of the defendant lent money to these companies at the suggestion of the defendant. The investments undertaken by the companies were very high

risk and the clients stood to lose substantially in the event of failure.

In some cases the client was only informed that their money had been lent to the companies after this had occurred. The investments turned bad and the clients lost money. This was an appeal on the point of whether the professional misconduct of the defendant was serious enough to warrant him being struck from the roll of solicitors. Street CJ noted at 155, 171–4:

> On 10th September, 1974, the Law Society of New South Wales by summons moved this Court for a declaration that the defendant, Ian James Harvey, had been guilty of professional misconduct as an attorney, solicitor and proctor of the Court, and sought inter alia, an order that the defendant be struck off the roll of solicitors or for such other orders the Court deemed fit.
>
> …
>
> … Where there is any conflict between the interest of the client and that of the solicitor, the duty of the solicitor is to act in perfect good faith and to make full disclosure of his interest. It must be a conscientious disclosure of all material circumstances, and everything known to him relating to the proposed transaction which might influence the conduct of the client or anybody from whom he might seek advice. To disclose less than all that is material may positively mislead. Thus for a solicitor merely to disclose that he has an interest, without identifying the interest, may serve only to mislead the client into an enhanced confidence that the solicitor will be in a position better to protect the client's interest. The conflict of interest may, and usually will, be such that it is not proper, or even possible, for the solicitor to continue to act for or advise his client. A solicitor, who deals with his client while remaining his solicitor, undertakes a heavy burden. Where a solicitor discovers that continuing to act for his client will, or may, bring the interests of his client and his own interests into conflict, it will be a rare case where he should not, at least, advise his client to take independent legal advice. It may well happen that the conflict arises fortuitously, and has not been anticipated when the solicitor undertook to act for the client. This

circumstance does not alter the duty of the solicitor already referred to. …

… In the absence of very special circumstances, a solicitor who promotes himself as the dealer with his client misuses his position. A solicitor who constantly promotes dealings with various clients clearly misuses his position, and puts it beyond his capacity to observe his primary duty to his clients. The price of being a member of an honourable profession, whose duty to his client ought not to be prejudiced in any degree, is that a solicitor is denied the freedom to take the benefit of any opportunity to deal with persons whom he has accepted as clients. Therefore, he ought neither to promote, suggest nor encourage a client to deal with him, but rather should take all reasonable steps positively to avoid dealing directly, or indirectly, with his client. There are of course exceptional cases where the transaction may be in the special interest of a particular client, but such cases will be isolated and need to be dealt with with conscientious regard for the procedures already referred to.

…

The defendant acted repeatedly and continuously as a mortgagee or loanbroker. A solicitor is a professional adviser, not a business consultant. The two roles are not, of course, mutually exclusive. But, if a solicitor does occasionally act in the role of a loanbroker, he will need to

take special care to ensure that the relationship of confidence engendered by the solicitor/client relationship does not cloud the client's judgment. The client must not be encouraged to assume that the solicitor has necessarily any special expertise in the commercial, as distinct from the legal concomitants, of the transaction under consideration.

In this context, and in accordance with what we have earlier said, a solicitor who does act as a loanbroker ought to regard himself as precluded, by the very relationship between him and his client, from commending to his client to a loan to a company, or for a venture, in which the solicitor has an interest. A solicitor ought not to intermingle his personal affairs, in a sense including the affairs of companies, ventures or others with whose financial position he has a personal connection, with the affairs of his client.

Upon an examination of the general course of the defendant's conduct, and that in relation to particular clients, we come to the inescapable conclusion that, on a grand scale, extending over some years, the defendant, deliberately and for his own benefit, caused the affairs of his clients to be intermingled with his affairs and that, while supposedly acting for them he grossly preferred his own interests to those of his clients. He used his position as solicitor to channel the money of his clients for use as the risk money in his own ventures, into which he put very little, and which involved substantial speculations in land. He recklessly disregarded the need to protect his clients' property, by failing to provide adequate securities. Moneys were invested in ventures, upon securities, or with the lack of them and upon terms that no reputable solicitor acting independently could have contemplated. So investing clients' moneys and advising and permitting clients to so invest was not due to any lack of commercial or legal experience, but to the pressure of his own self interest. The clients concerned were mostly persons inexperienced in matters of investment and business, and some were completely lacking in understanding of these affairs. In the case of many, to their trust in him as a solicitor was added their trust in him because of his connection with church organizations. …

… The defendant's professional misconduct was serious and sustained involving many clients and large amounts of money. His conduct was motivated by greed and self interest in deliberate and flagrant disregard of his duty to his clients, and demonstrates that he is unfitted to be a solicitor, or to be employed in a solicitor's office in any capacity, and that his name should be removed from the roll of

solicitors. The question then arises as to whether any ancillary orders, such as are referred to in *Ex parte Law Society of New South Wales; Re Demer* [[1967] 1 NSWLR 167], should be made. As in that case, the solicitor's wrongful conduct was in relation to a large number of his clients. However, some different considerations arise in the present case, so that any ancillary orders should be moulded to meet these considerations …

The orders of the Court, therefore, are that the name of the defendant Ian James Harvey be removed from the roll of solicitors; that such defendant shall not hereafter practise as a solicitor; that such defendant shall not hereafter be employed by or as a solicitor for the purpose of performing any legal work; that such defendant shall not for or without fee, remuneration or reward, directly or indirectly, canvass, solicit, persuade or advise any client or former client of his, including any client of his former partnership, to employ any particular solicitor or solicitors to act for any such client.

[Moffitt P and Hutley JA agreed.]

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8.47 In *BRJ v Council of the New South Wales Bar Association* [2016] NSWSC 146 (29 February 2016), the issue concerned the conflicting interests of the practitioner with those of the client regarding certain property. Adamson J noted at [26], [38], [104]:

[26] …

> 'On or about 31 May 2011, the respondent (as landlord) entered into a residential tenancy agreement with her client (as tenant), in respect of [certain] premises (the Premises) in breach of the respondent's fiduciary duties owed to her client and in breach of rule 16 of the New South Wales Barristers' Rules (as then applicable).

> 'From at least 5 October 2011 until 22 November 2011, the respondent acted for [that client] in proceedings under the Children and Young Persons (Care and Protection) Act 1998 (NSW) (the Care and Protection Proceedings) in circumstances where the client's interest in the matter was in conflict with the respondent's interest in regaining possession of the Premises. The respondent's conduct in acting for [the client] in these circumstances was in breach of her fiduciary duties owed to her client and in breach of rule 95 of the New South Wales Barristers' Rules.'
>
> …

[38] Having addressed the submissions of the parties, the Tribunal made findings to record its satisfaction pursuant to s 562 of the 2004 Act, as follows: …

> '[51] The Tribunal is of the view that the facts recorded in paragraphs 10–19 of the statement of agreed facts for ground B, show that the respondent's conduct in entering into the lease notwithstanding the conflict of interest, breached her fiduciary duties owed to her client; breached rule 16 of the NSW Barristers' Rules (as applicable as at 31 May 2011) and thus fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. The Tribunal is of the view that the admission made in paragraph 19 of the statement of agreed facts for ground B was properly made. Paragraph 19 is in the following terms:
>
> 'The Respondent admits that she engaged in unsatisfactory professional conduct by entering into the Lease in breach of her fiduciary duties and in breach of Rule 16. …
>
> '[52] The Tribunal is of the view that the facts recorded in paragraphs 21–34 of the statement of agreed facts for ground C show that the respondent's conduct in continuing to act for her client notwithstanding the conflict of interest during the period from 5

October to 22 November 2011 breached her fiduciary duties owed to her client; breached rule 95(b) of the New South Wales Barristers' Rules (as then applicable) and thus fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. The Tribunal is of the view that the admission made in paragraph 34 of the statement of agreed facts for ground C was properly made. Paragraph 34 is in the following terms:

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> 'By acting for [her client] during that period in breach of her fiduciary duties and in breach of Rule 95(b), the Respondent admits that she engaged in unsatisfactory professional conduct.'

…

[104] In my view, no error has been shown in the Tribunal's approach.

8.48 In these cases, it is important that the person to whom the duty is owed has full knowledge of the precise nature of the practitioners' interest in a certain transaction, or the existence and scope of the potential conflict to the fiduciary's duty of undivided loyalty to the client.[30]

THE LAWYER AS A POTENTIAL WITNESS

8.49 It is clear that a lawyer who is likely to be a witness in legal proceedings will have a conflict of interest with their role as a legal adviser. In *Corporate Systems Publishing Pty Ltd v Lingard* [2004] WASC 24 (24 February 2004), Jenkins J noted at [36]:

> The court will also intervene to prevent a solicitor from acting for a party in proceedings in which the solicitor has an interest. Such an interest exists where a solicitor is aware that he or she may be called as a material witness in the proceedings: *Clay v Karlson* (*supra*). An interest also exists where, because of allegations made in the pleadings, the solicitor would be required to defend his or her professional conduct. Thus the solicitor's independence from the interests of their client is compromised: *Afkos Industries Pty Ltd v Pullinger Stewart* [2001] WASCA 372 at [31]–[32]. In such a situation the client's view that the legal practitioner should continue to act will not generally persuade a court not to restrain the solicitor by injunction where otherwise it thinks it is necessary to do so.

8.50 This is not to say that a solicitor may not be called in support of some matter concerning the instructions given,[31] but clearly legal representatives cannot act where their evidence is, as a real possibility, material to the matter at hand — although some of the cases have allowed a practitioner to continue to act, even where he was to be a witness, on the basis that he had not acquired confidential information from the other party and was not to act as that client's legal representative in the matter.[32] Even if not acting as the client's legal representative, there

may still be an issue with the practitioner's firm accepting instructions, where one of the firm's partners or employees is likely to be called as a material witness.

8.51 The case of *Sexton and Barton* [2015] FCWA 38 (3 June 2015) involved a dispute between husband and wife. Throughout the parties' relationship, the wife had viewed Law Firm A as lawyers

for her and her husband. Her will was prepared by Law Firm A in 2008; she had referred a friend to the firm for matrimonial advice; she was also invited to firm events as its client. Her husband wanted to make changes to a trust agreement, one of the changes being that his wife be removed as trustee of the trust, and for the appointment of a corporation in her stead. At the time, the wife viewed Law Firm A as her solicitors and, as the document was prepared by them, she thought it acceptable to sign the document and did not seek independent legal advice. She was not advised to do so. After she signed the new Deed, the husband increased the debt of the trust by $452,000. On the question of a conflict of interest, the husband contended that there was no valid reason that would prevent Law Firm A from continuing to represent him in these proceedings. In his decision, Crisford J referred as follows to the possibility of the likelihood of a solicitor having to give evidence at [37]–[53]:

> [37] As a general statement in relation to the issues here Brereton J observed in *Mitchell v Burell* [2008] NSWSC 772, at [3]:
>
> > '… The test to be applied is whether a fair minded, reasonably informed member of the public — a concept substantially equivalent to the reasonably informed lay observer used in the context of applications for disqualification of judicial officers for apprehended bias — would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in order to protect the integrity of the judicial process and the]due administration of justice, including the appearance of justice.'
>
> [38] His Honour deals at [20] with the possibility of the likelihood of a solicitor giving evidence and observed:

> '… I do not accept that the mere circumstance that a solicitor will be a material witness, even on a controversial matter, of itself justifies restraining the solicitor from continuing to act … that the line is crossed only when the solicitor has a personal stake in the outcome of the proceedings or in their conduct, beyond the recovery of proper fees for acting, albeit that the relevant stake may not necessarily be financial, but involves the personal or reputational interest of the solicitor, as will be the case if his or her conduct and integrity come under attack and review in the proceedings. The presence of such circumstances will be a strong indication that the interests of justice — which in this field involve clients being represented by independent and objective lawyers unfettered by concerns about their own interest — require the lawyer to be restrained from continuing to act.'

[39] The authorities are at one in affirming that the jurisdiction to exclude a practitioner from acting should be exercised with caution.

[40] In a case dealing with courts restraining legal practitioners from acting where to do so would be contrary to the broader interests, Justice Heenan in *Holborow v Macdonald Rudder* [2002] WASC 265 said. …

> '[29] From the wider view point, including the perspective of the legal practitioner's duty to the court, it can readily be perceived that this situation justifies intervention by the court because of an actual or sufficiently material threatened conflict of interest by the practitioner, as an officer bearing fiduciary obligations, between his obligations to the court, and his obligations to the client or to some other interest. So

> it has long been accepted that a legal practitioner, who is likely to be a witness in a case should not act as counsel, or continue to act as counsel if a situation arises where he is unexpectedly required to give evidence. The reason being is that the personal integrity of the practitioner may be put in issue if his credibility is at stake as a witness, and that this will, or may, constitute a personal interest inconsistent with the practitioner's duty to the court or to the client. Other similar conflicts of interest can arise if, for example, the counsel or solicitor had a substantial personal stake in the litigation such as, for example, if he or she were to be a partner in a firm which was a party to the litigation, or a substantial shareholder in a corporation which was a party.'

[41] This matter was also dealt with by Justice Templeman in *Clay v Karlson* (1997) 17 WAR 493 where it was held that the court has power to restrain a solicitor from continuing to act as part of its jurisdiction to supervise the conduct of legal practitioners. His Honour said that it was undesirable for a practitioner who is aware he is likely to be called as a witness in proceedings to continue to represent his client especially where he has a personal interest in the outcome of the action and thus is more than simply a witness. In such a case the argument was even stronger against the solicitor continuing in the action.

…

[50] There is no doubt that the court relies on lawyers exercising an independent judgement in conducting and managing litigation. Such independence may not be present if the lawyer has an actual or potential conflict of interest. Such conflict may arise where the lawyer is likely to be called as a witness in a client's case, or otherwise has an interest in the outcome of the case.

[51] The wife says that solicitors she thought were acting on her behalf prepared documents excluding her from certain entities in which she had an interest. She has some justification for that view. Although I

am unsure if the solicitors had confidential information relating to her, when I consider all the matters together I find it proper for the husband to obtain alternate legal representation.

[52] I also add that in my opinion a reasonably informed and fair minded member of the public would conclude that Law Firm A, by Mr M, was compromised by the manner in which the previous dealings with both parties had been conducted.

[53] I will hear from Counsel in relation to any further programming orders. Otherwise I make an order in the following terms: 1. Law Firm A be restrained and an injunction

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is hereby granted restraining them from acting for the Applicant, [Mr Sexton], in these proceedings.

8.52 The role of a lawyer as a witness was considered in an article by Ipp J (as he then was):[33]

> It is undesirable for a lawyer to appear as a witness in the same case as he is instructing solicitor (and, *a fortiori*, counsel). Similarly, it is undesirable that, when an affidavit has been filed by a lawyer in support of an application by a client, the lawyer appear as solicitor or counsel. The reason for this is that the lawyer would be in a position of apparent conflict between the duty to advance the interests of the client and the duty to the court to give impartial evidence. …
>
> Where a lawyer is guilty of a conflict of interest in representing a client he will have committed a breach of duty. That duty is usually expressed as a fiduciary obligation arising out of the relationship between solicitor and client. But there is a similar duty owed by a lawyer to the court (as well as an ethical duty). The duty to the court arises from the court's concern that it should have the assistance of independent legal representation for the litigating parties. The

integrity of the adversarial system is dependent on lawyers acting with perfect good faith, untainted by divided loyalties of any kind. This is central to the preservation of public confidence in the administration of justice.

8.53 The article by Ipp J[34] has been referred to in a number of authorities. One example is the case of *Brown v Guss (No 2)* [2015] VSC 57 (8 April 2015), where McMillan J noted that there was an obligation on practitioners to make sure they were not in a position of conflict, either actual or perceived, such that their professional independence could be called into question. The fact that the other side did not seek an order to restrain the practitioner from acting where they could be called as a witness, did not abrogate the responsibility on the part of the practitioner so far as their duty to the court was concerned. He stated, at [153]–[154]:

> [153] … The solicitors for the plaintiff quite properly raised the issue with Joseph Guss, stating that he was a material witness for the defendant, yet he continued to act on his behalf. It is not the responsibility of the lawyers to incur further costs in an application to remove a solicitor when they have already done him the service of bringing a potential conflict to his attention. It is the responsibility of Joseph Guss to ensure that he is not in a position of conflict, either actual or perceived, where his professional independence can be called in to question.
>
> [154] To contend that the plaintiff should have sought to restrain Joseph Guss from acting as the defendant's solicitor, in my view, abrogates not only the responsibility of Joseph Guss, but also his duty to the court.

8.54 In *Barrak Corporation Pty Ltd v The Kara Group of*

Companies Pty Ltd [2014] NSWCA 395 (19 November 2014), in the Court of Appeal in New South Wales, Adamson J (Barrett JA and Sackville AJA agreeing) said at [47]:[35]

> It is necessary to emphasise the risk posed to the administration of justice … by solicitors remaining on the record when they are, or may be, witnesses in proceedings. This risk is heightened when they have a personal interest in the outcome of the litigation beyond recovery of their fees. Courts rely on legal practitioners to discharge their duties to remain objective and professional in the preparation and presentation of proceedings. Such duties are susceptible to compromise where a practitioner is also a witness and even more so when he or she has a financial interest in the outcome: see, for example, the observations made by Brereton J in *Mitchell v Burell.*

OPPOSING A FORMER CLIENT

8.55 Opposing a former client is another area involving a potential conflict of interest.[36] If established, it can result in the granting of an injunction to stop the practitioner from continuing to act against the former client. The jurisprudential basis for the court restraining a solicitor from continuing to act in these circumstances is grounded in the law concerning the continuing protection of client confidences, rather than the existence of a conflict of interest.

8.56 In *Sanna v Wyse and Young International Pty Ltd (No 1)* [2015] NSWSC 580 (18 May 2015), Darke J noted at [14]:

> [14] As pointed out by Brereton J in *Kallinicos v Hunt* [2005] NSWSC 1181; (2005) 64 NSWLR 561 at [32], there has been acceptance in New South Wales of the authority of *Prince Jefri Bolkiah v KPMG* [1998] UKHL 52; [1999] 2 AC 222 for the view that, in a case where the retainer is no longer active, the jurisdiction of the court to intervene at the suit of a former client to restrain a solicitor from acting is founded

solely on obligations of confidence and is not and cannot be connected with some principle of conflict of interest. That view has subsequently been endorsed by the Court of Appeal (see *Cooper v Winter* [2013] NSWCA 261 at [96], and *Maxwell-Smith v S & E Hall Pty Ltd* [2014] NSWCA 146; (2014) 86 NSWLR 481 at [24]). In this respect, there is no reason to take any different approach when the legal practitioner is a barrister. In *Kallinicos* (above), Brereton J stated (at [35]):

> '*Prince Jefri Bolkiah* holds that a former client who seeks to restrain its former solicitor from acting against it must show (1) that the solicitor is in possession of the former client's confidential information, to the disclosure of which the former client has not consented, and (2) that the information is or may be relevant to the new matter, in which the interests of the solicitor's new client may be adverse to those of the former client.'

That is, the practitioner must not act in a way that is contrary to their obligations to their former client, including the obligation to respect the client's confidential information.[37]

8.57 The power of a court to restrain a practitioner from acting or continuing to act against a former client is not only grounded on the principle of protecting the confidences of the former client, but also on the inherent jurisdiction of the court to regulate its officers. In *Wombat Securities Pty Ltd* [2011] NSWSC 194 (18 March 2011), Barrett J at [3] referred to the following statement by Heenan J in *Holborow v Macdonald Rudder* [2002] WASC 265, as to the court's inherent jurisdiction:

> The power of this court to restrain a solicitor from acting in an action

> or other cause because of an alleged conflict of interest is not limited to those instances in which the future action of the solicitor concerned may imperil confidences of the client for whom the solicitor previously acted. It is an ample power to supervise the conduct of legal practitioners, as officers of the Court, to ensure that they do not act in any way contrary to their obligations to their former client. The broader scope of this power has frequently been referred to as ensuring 'that the solicitor's duty of loyalty to the former client is respected, notwithstanding termination of the retainer, and to uphold as a matter of public policy the special relationship of solicitor and client. [references omitted]

8.58 The Rules of Conduct outlined at **8.15**–**8.19** include situations where the practitioner acts against the interests of a former client. In these cases, it is of utmost importance that the practitioner obtains the informed consent of the former client, and that an effective information barrier is established so as to limit information obtained from a former client being used. If there is any doubt concerning the protection of the former client's confidential information, the practitioner should refuse the instructions.

8.59 In *Clark Boyce v Mouat* [1994] 1 AC 428, Lord Jauncey at 435 noted that there was no general rule of law that a solicitor should never act for both parties in a transaction where their interests might conflict.[38] The position was that a solicitor might act, provided they had obtained the informed consent of both to their acting. The court noted at [437] 'that the plaintiff required of Mr Boyce no more than that he should carry out the necessary conveyancing on her behalf and explain to her the legal implications of the transaction', rather than the wisdom of the transaction. Informed consent means consent given in the knowledge that there was a conflict between the parties and that, as a result, the solicitor might be disabled from disclosing

to each party the full knowledge he possessed as to the transaction, or might be disabled from giving advice to one party which conflicted with the interests of the other.

8.60 Until recently, the English position concerning the test for disqualification on the basis of a conflict of interest involving a former client was whether there was 'a reasonable probability of real mischief '.[39] In *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, the House of Lords at 235–9 adopted a stricter 'no reasonable risk of disclosure' test, Lord Millett noting:[40]

> Whether founded on contract or equity, the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it by others otherwise than for his benefit. The former client cannot be protected completely from accidental or inadvertent disclosure. But he is entitled to prevent his former solicitor from exposing him to any avoidable risk; and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant.
>
> …
>
> … I prefer simply to say that the court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial …
>
> … In my view no solicitor should, without the consent of his former client, accept instructions unless, viewed objectively, his doing so will

not increase the risk that information which is confidential to the former client may come into the possession of a party with an adverse interest.

…

I am not satisfied on the evidence that KPMG have discharged the heavy burden of showing that there is no risk that information in their possession which is confidential to Prince Jefri and which they obtained in the course of a former client relationship may unwittingly or inadvertently come to the notice of those working on Project Gemma. It was for this reason that I was in favour of allowing the appeal and granting the injunction in the terms proposed.

Appeal allowed with costs. Injunction granted.

8.61 In *Pradhan v Eastside Day Surgery Pty Ltd* [1999] SASC (FC) 256, the Full Court of the Supreme Court of South Australia held at [50]–[51] that the principles stated by Lord Millett in *Prince Jefri Bolkiah* should be applied, namely:

> [T]he court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial.

8.62 Steytler J in *Newman as trustee for the estates of Littlejohn v Phillips Fox (a firm)* (1999) 21 WAR 309; [1999] WASC 171, adopted a similar view. In *World Medical Manufacturing Corp v Phillips Ormonde and Fitzpatrick Lawyers (a firm)* [2000] VSC 196 (18 May 2000), Gillard J concluded that these same principles should be followed in Victoria. In that case, Gillard J at [121] suggested that, when a court is determining whether a lawyer should be able to act against a former client, the following

questions should be asked:

(i) Is the former supplier of services whether it be a solicitor, accountant or a patent attorney or some other person providing services, in possession of information provided by the former client which is confidential and which the former client has not consented to disclosure?
(ii) Is or may the information be relevant to the new matter in which the interest of the other client is or may be adverse to his own?
(iii) If the answers to the first two issues are yes, then is there a risk which is real and not merely fanciful nor theoretical that there will be disclosure?
(iv) If there is that risk then the evidential burden which is heavy, rests upon the provider of the services to establish that there is no risk of disclosure and this may be established in exceptional cases by the provision of a 'Chinese wall' but this is rarely of sufficient protection.
(v) Should a permanent injunction be granted?

8.63 Following this case, Warren J in *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSC 287 (17 August 2001), also applied the 'no real risk of disclosure' test. The 'no real risk of disclosure' approach reflects a concern that former clients might otherwise be exposed to potential and avoidable risks to which they had not consented, and that former clients could not have sufficient assurance that their confidences would be respected.[41] In *Belan v Casey* [2002] NSWSC 58, Young CJ noted at [17], [21]:

> [17] *Prince Jefri* decided two basic points: (a) the basis of the claim is the fiduciary duty to maintain information as confidential; and (b) that it is sufficient if the plaintiff demonstrates that there is a real and not fanciful risk of disclosure of confidential information, though it is not necessary to show that the risk is substantial.
>
> …
>
> [21] In my view, the overwhelming weight of authority is to the effect

> that where the applicant to restrain a solicitor is a former client, the sole consideration is whether there is a real risk of disclosure of confidential information and one does not delve into matters of conflict of interest or conflict of duty. In other situations this delving may well be material.

8.64 In *PhotoCure ASA v Queen's University at Kingston* [2002] FCA 905 (22 July 2002), Goldberg J, in approving the approach adopted in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222, noted at [49]:

> The duty of the solicitor of a former client is to preserve the confidentiality attendant upon the former relationship. Lord Millett made it clear that a former client of a solicitor will not be granted injunctive relief restraining that solicitor from acting against the former client 'if there is no risk of the disclosure or misuse of confidential information' (at 236).

8.65 The 'no real risk of disclosure' test was recently followed by the Full Court of the Family Court in *Osferatu & Osferatu* [2015] FamCAFC 177 (15 September 2015), where Finn, Ainslie-Wallace, and Aldridge JJ noted at [39], [41]:[42]

> [39] Before leaving this discussion we wish to refer to the statement in *McMillan* that even 'a theoretical risk of the misuse of the confidential information' is sufficient to found relief. The phase 'a theoretical risk' was echoed in *Prince Jeffri* in the passage quoted earlier. For our part, we find the word 'theoretical' unhelpful. There is indeed a continuum of risk from obvious to remote. In *Asia Pacific*, Bergin J described the risk of disclosure or misuse as 'probably real and not fanciful' In *Billington* Coleman J referred to 'any real risk' (at [37]). That phrase was also used by Goldberg J in *PhotoCure* (at [78]). This is a more

meaningful phrase. The consideration should be whether there is a real risk of misuse as opposed to one which is merely fanciful. To the extent that what we have said may be seen to represent a departure from *McMillan* (which we do not necessarily accept), it is to accord with more recent authority and provides a clearer test.

…

[41] It follows from the above discussion that the law requires that an applicant seeking to restrain a solicitor from acting must adduce evidence that establishes the confidential information and the risk of the misuse of that information in the circumstances. The weight and persuasiveness of any evidence adduced depends, of course, on the precision of the evidence called, the nature of the confidential information and the nature of the risk of disclosure.

8.66 The following quotation is from Parker and Samford:[43]

It seems to me that, at least in the circumstances that I have described, it would be preferable to accept the reality of what occurs in day-to-day practice and to seek to set up some rules which will govern how such conflicts will be managed. Rather than simply insisting upon

the application of the conflict of interests rule, I believe that the profession should give consideration to laying down rules which will govern how an informed consent can be obtained from opposing clients who wish to use the same law firm and how Chinese walls can be set up in law firms to minimise the risk of any conflict occurring.

Further, the rule should be clearly laid down that, if, despite all of these efforts, an actual conflict does arise during the course of negotiation of the transaction, the firm is obliged to send both clients away. This possibility must be made known to both clients at the commencement of the transaction.

8.67 Discuss the competing arguments, based on public policy, for a liberal test concerning conflicts of interest and a more stringent test. How would the application of each of these two tests impact on the work of a single firm of solicitors in a small country town?

8.68 What the practitioner needs to consider in order to determine whether they have met their duty of confidentiality when acting against a former client is:

- whether the firm is in possession of information which is confidential to the former client;
- whether that information is, or may be, relevant to the matter in which the firm is proposing to act for another party with an interest adverse to the former client; and
- whether there is any real risk that the information will come into the possession of the other party or of persons in the firm working for the other party.

The burden of establishing the first two propositions is upon the former client, but the burden of establishing the third proposition moves to the firm proposing to act once the first two propositions are satisfied.

8.69 In *Prince Jeffri Bolkiah v KPMG* [1999] 2 AC 222, Lord Millett identified the evidentiary process as follows at [237]:

> [237] Once the former client has established that the defendant firm is in possession of information which was imparted in confidence and that the firm is proposing to act for another party with an interest adverse to his in a matter to which the information is or may be relevant, the evidential burden shifts to the defendant firm to show that even so there is no risk that the information will come into the possession of those now acting for the other party. There is no rule of law that Chinese walls or other arrangements of a similar kind are

> insufficient to eliminate the risk. But the starting point must be that, unless special measures are taken, information moves within a firm. In *MacDonald Estate v Martin* 77 DLR (4th) 249, 269 Sopinka J said that the court should restrain the firm from acting for the second client 'unless satisfied on the basis of clear and convincing evidence that all reasonable measures have been taken to ensure that no disclosure will occur'. With the substitution of the word 'effective' for the words 'all reasonable' I would respectfully adopt that formulation.

8.70 In *Grimwade v Meagher* [1995] VicRp 28; [1995] 1 VR 446, Mandie J observed at 452:

> … The objective test to be applied in the context of this case is whether a fair-minded reasonably informed member of the public would conclude that the proper administration

> of justice required that counsel be so prevented from acting, at all times giving due weight to the public interest that a litigant should not be deprived of his or her choice of counsel without good cause.

8.71 Much will depend upon the adequacy of arrangements put in place to protect the former client's information. The sufficiency of proposed information barriers will be significant in determining whether the practitioner can continue against the former client.

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1. And at [45], referring to the decision of Brereton J in *Kallinicos v Hunt* (2005) 64 NSWLR 561; [2005] NSWSC 1181.
2. See, for example, *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736, referred to in *Bechara v Legal Services Commissioner* [2010] NSWCA 369 (21 December 2010) by McColl JA at [44].
3. See *Re A Firm of Solicitors* [1996] 3 WLR 16; *Alpha Wealth Financial*

Services Pty Ltd v Frankland River Olive Company Ltd [2005] WASC 189 (23 August 2005) per Hasluck J at [27].

4. See *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 per Lord Millett.

5. See also *Watson v Ebsworth & Ebsworth (a firm)* [2010] VSCA 335 (10 December 2010) at [145]–[150]; *Westgate Wool Co Pty Ltd (in liq)* [2006] SASC 372 per Debelle J at [48]. Although in *Pradhan v Eastside Day Surgery Pty Ltd* [1999] SASC 256 (18 June 1999), the SA Full Court at [47] took the view that 'the duty of confidentiality and the need to preserve it [where the lawyer-client relationship has been terminated] will still arise out of the fiduciary nature of the previous relationship'. See also comments by Young CJ in Eq in *Belan v Casey* [2002] NSWSC 58, and the view of Batt JA in *McVeigh v Linen House Pty Ltd* [1999] 3 VR 394 at 399: 'It seems to me to depend rather upon the existence of the retainer that was made in the first place, than upon the existence of confidences disclosed and meriting protection against misuse.'

6. See, for example, *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222; *Belan v Casey* [2002] NSWSC 58; *Photocure ASA v Queen's University at Kingston* (2002) 56 IPR 86; *British American Tobacco Australia Services Ltd v Blanch* [2004] NSWSC 70; *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550. Contra *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501; *McVeigh v Linen House Pty Ltd* [1999] 3 VR 394; *Sent v John Fairfax Publications Pty Ltd* [2002] VSC 429.

7. See also *Grimwade v Meagher* [1995] 1 VR 446; *Newman v Phillips Fox* (1999) 21 WAR 309; [1999] WASC 171; *Mitchell v Pattern Holdings* [2000] NSWSC 1015; *Holborow v Macdonald Rudder* [2002] WASC 265; *Williamson v Nilant* [2002] WASC 225; *Bowen v Stott* [2004] WASC 94; *Law Society of New South Wales v Holt* [2003] NSWSC 629. *Prince Jefri* does not address this jurisdiction at all. However, *Belan v Casey* and *British American Tobacco* should not be read as assuming that *Prince Jefri* excludes it. *Asia Pacific Telecommunications* appears to acknowledge its continued existence.

8. See **8.8**.

9. In relation to the Barristers' Rules of the various jurisdictions, see Bar Association of Queensland, Barristers' Conduct Rules 2011; in respect of

New South Wales, Legal Services Council, Legal Profession Uniform Conduct (Barristers) Rules 2015; in respect of Victoria, Legal Services Council, Legal Profession Uniform Conduct (Barristers) Rules 2015; South Australian Bar Association, Barristers' Conduct Rules 2013; Western Australian Bar Association, Western Australian Barristers' Rules 2013; Northern Territory Bar Association, Barristers' Conduct Rules 2002. The Law Society of Tasmanian, Rules of Practice 1994, define a 'practitioner' as a person practising as a barrister or legal practitioner; Part 8 of the Rules apply solely to those who practise as a barrister.

10. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW).
11. The Law Society of South Australia, Australian Solicitors' Conduct Rules 2015.
12. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Vic).
13. The Law Society of the Australian Capital Territory, Legal Profession (Solicitors) Conduct Rules 2015.
14. See the Legal Profession Uniform Law (NSW) ss 6, 259, 423, Sch 1 s 8 relating to Council membership; Legal Profession Uniform Law Application Act 2014 (Vic) ss 40, 110, Sch 1 s 8 relating to Council membership; Legal Profession Act 2007 (Qld) ss 110, 122, 151, 161, 224, 612, 641; Legal Profession Act 2007 (Tas) ss 111, 122, 151, 161, 226; Legal Practitioners Act 1981 (SA) s 5 and Sch 1. In SA, see also the Office of the Legal Profession Conduct Commissioner; Legal Profession Act 2008 (WA) ss 98, 110, 138, 148, 579; Legal Profession Act 2006 (ACT) ss 82 and 83 (in relation to government lawyers), 99, 112, 141, 151, 559, 584; Legal Profession Act 2006 (NT) ss 118, 129, 158, 168, 692.
15. See *Maguire and Tansey v Makaronis* (1997) 144 ALR 729.
16. See *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154; *Law Society (NSW) v Moulton* [1981] 2 NSWLR 736.
17. Law Society of New South Wales, *Information Barrier Guidelines*, 2015, at p 2. The Guidelines, which were developed by the Law Society of New South Wales and the Victorian Law Institute, have also been adopted by the Queensland Law Society. See also *Zani v Lawfirst Pty Ltd trading as*

Bennett & Co [2014] WASC 75, where the plaintiff 's former solicitor joined Bennett & Co, which was acting for the other party in current litigation; the plaintiff sought an injunction to restrain Bennett & Co from acting for the other party. In *Babcock & Brown DIF III Global v Babcock & Brown International* [2015] VSC 612 (6 November 2015), Riordan J in the Supreme Court of Victoria examined the effectiveness of an information barrier protocol (that was based on the Law Society of New South Wales and the Law Society of Victoria guidelines).

18. See *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307; 115 ALR 112; *Hanna v National Library of Australia* [2004] ACTSC 75 (1 September 2004). See also the articles by L Aitken, 'Chinese Walls, Fiduciary Duties and Intra-Firm Conflicts — a Pan-Australian Conspectus' (2000) 19 *Australian Bar Review* 116; and C Hollander & S Salzedo, *Conflicts of Interest and Chinese Walls*, 3rd ed, Sweet and Maxwell, 2000.

19. See *Morales & Morales* [2015] FamCA 781 (26 August 2015).

20. Per Frederico J *In the Marriage of Thevenaz* [1986] FLC 91-748, and applied in *In the Marriage of Griffis* (1991) FLC 92-233 and *In the Marriage of Kossatz* (1993) FLC 92-386.

21. There have been many cases relating to this area of conflict of interest. Apart from the cases referred to above, see also *Bride v Freehill Hollingdale & Page* [1996] ANZ Conv R 593 [Ext] (solicitors acting for mortgagee and purchasers); *Zaicos v Law Institute of Victoria* (Supreme Court of Victoria, 19 July 1995, unreported) per Nathan J (solicitor acting for vendor and purchaser and sometimes for the lender and borrower in respect of a land scheme); *Clark Boyce v Mouat* [1993] 3 NZLR 641; [1993] 4 All ER 268 (solicitor acting for both parties in a conveyancing transaction); *Re Morton; Ex parte Mitchell Products Pty Ltd* (1996) 21 ACSR 497 (FC) (solicitor acting for administrator of company and shareholders); *Callachor v Black* [2000] NSWCA 347 (solicitor acting for both parties in relation to the sale of a business); *Verson Cleaning International v Ward & Partners* (1996) 189 LSJS 135 (firm of solicitors acting for both insured and insurer after a question of liability to indemnify was raised).

22. This rule does not purport to set out all the situations in which a lawyer

may not act for a party. See *Kingsley v Kendle* [2010] FamCA 598 (16 July 2010); *Epstein & Epstein* [2008] FamCA 907 (29 October 2008).

23. In the appeal case of *Rilak & Tsocas* [2015] FamCAFC 120 (24 June 2015), it was noted that the primary judge had disclosed that his legal associate had secured a contract of employment with a firm of solicitors representing a party. This happened when the trial proceedings were part heard. There was an application that the primary judge disqualify himself on the ground of apprehended bias. The primary judge refused to disqualify himself. The Full Court held that the mother had failed to establish error on the part of the primary judge and dismissed the appeal.

24. See **8.35**.

25. See *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 at 89 (Richardson J), cited in *Maguire and Tansey v Makaronis* (1997) 188 CLR 449 at 466 and 471; (1997) 144 ALR 729; [1997] HCA 23 (Brennan CJ, Gaudron, McHugh, and Gummow JJ). The solicitor-client relationship is a fiduciary relationship such that the solicitor is bound not to abuse the client's trust or allow self-interest to conflict with the duty to the client.

26. See **8.15**–**8.19**.

27. See **8.42**.

28. See *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736.

29. See also *Dual Homes Pty Ltd v Moores Legal Pty Ltd* (2016) 306 FLR 277; [2016] VSC 86 (10 March 2016), where the solicitor acting for the plaintiff was also a principal or employee of each defendant law firm during the relevant period. At [214] Dixon J noted: '… a prudent solicitor in McKellar's circumstances would have recognised a conflict of interest and duty and advised that Dual Homes retain independent lawyers. McKellar recognised, at least to his cross-examiner at trial, that his advice to, and conduct of the affairs of, Dual Homes was infected with an interest in self-preservation. A prudent and independent solicitor would have recognised a duty to provide competent advice about both the circumstances then pertaining, and the consequences for Dual Homes, following McKellar's failings in respect of CSD2, as discussed above.'

30. An example of where the practitioner put his own interests ahead of his clients' arose in *Legal Profession Conduct Commissioner v Brook* [2015] SASCFC 128 (9 September 2015). In that case, the Court ordered that the practitioner's name be removed from the Roll of Practitioners following an arrangement he had made for his clients to indemnify him against any adverse costs order made against him in proceedings concerning the testamentary capacity of a testatrix. He also arranged for his clients to agree to meet any excess payable in respect of his professional indemnity insurance should a successful claim be made against him.
31. See *R v Birks* (1990) 19 NSWLR 677.
32. See *Executive Homes Pty Ltd v First Haven Pty Ltd* [1999] VSC 261 at [10], [11]; *Grey v City of Marion* [2006] SASC 3 (11 January 2006) at [28]–[30]; *Holborow v Macdonald Rudder* [2002] WASC 265 at [29]; *Kallinicos v Hunt* [2005] NSWSC 1181; *Chapman v Rogers* [1984] 1 Qd R 542 at 544; *Clay v Karlson* (1996) 17 WAR 493; *Miles v Hughes* (Western Australian Supreme Court, 11 November 1998, unreported); *Yamaji v Westpac Banking Corp (No 1)* (1993) 42 FCR 431 per Drummond J at 432; *Commissioner for Corporate Affairs v Harvey* [1980] VR 669 at 762.
33. Ipp J, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63.
34. See **8.52**.
35. See *Patounas v The Queen* [2015] VSCA 369 at [23] and *Bailey v Richardson* [2015] VSC 255. See also *Legal Profession Conduct Commissioner v Brook* [2015] SASCFC 128 (9 September 2015), where the practitioner was advised that he would be called as a witness in a dispute concerning the testamentary capacity of the testatrix.
36. See *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118; *Re A Firm of Solicitors* [1992] 1 QB 959; [1992] 1 All ER 353; *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307; *In the Marriage of Kossatz* (1993) FLC 92-386; *Theakstone v McCann* [1996] ANZ Conv R 1; *Grimwade v Meagher, Hegland, Morgan, Lidgett, Reid & Bellheath Pty Ltd* [1995] 1 VR 446; *Newman as trustee for the estates of Littlejohn v Phillips Fox (a firm)* (1999) 21 WAR 309; [1999] WASC 171; *McVeigh v*

Linen House Pty Ltd [1999] 3 VR 394; *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSC 287; [2001] VSCA 248; *British American Tobacco Australia Services Ltd v Blanch* [2004] NSWSC 70; *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2007] NSWSC 350 per Bergin J at [30]–[41]; *Cleveland Investments Global Ltd v Evans* [2010] NSWSC 567 (1 June 2010); *Dalton & Dalton* [2016] FamCA 174; *Re IPM Group Pty Ltd* [2015] NSWSC 240.

37. See *Clark Boyce v Mouat* [1994] 1 AC 428, per Lord Jauncey at 435. Although it appears that this is not the only basis for the obligations. See also *Cleveland Investments Global Ltd v Evans* [2010] NSWSC 567 (1 June 2010) per Ward J at [3]–[5]; and *Watson v Ebsworth and Ebsworth (a firm)* [2010] VSCA 335 (10 December 2010) at [147]–[149].
38. Lord Goff, Lord Lowry, Lord Mustill, and Lord Slynn agreeing.
39. See *Rakusen v Ellis, Munday and Clarke* [1912] 1 Ch 831.
40. Lord Browne-Wilkinson, Lord Hope of Craighead, Lord Clyde, and Lord Hutton agreeing.
41. L Aitken, 'Chinese Walls, Fiduciary Duties and Intra-firm Conflicts — A Pan-Australian Conspectus' (2000) 19 *Australian Bar Review* 121, referring to the decision of Lord Millett in *Prince Jefri Bolkiah*.
42. For other examples where Australian courts have adopted the 'real and sensible possibility of misuse of confidential information test', see *Zalfen v Gates* [2006] WASC 296 (21 December 2006) per Newnes M at [61]–[76]; *Pott v Jones Mitchell* [2004] QSC 48 (19 March 2004) at [15]–[20], where McMurdo J applied a test based on whether there was a real possibility that confidential information undoubtedly disclosed would come into the possession of the other side; *CBA v Kyriackou* [2008] VSC 146; *Pradhan v Eastside Day Surgery Pty Ltd* [1999] SASC 256 per Bleby J at [50]–[51]; *A v Law Society of Tasmania* (2001) 10 Tas R 152 per Underwood J at [47]–[50]; *Styles v O'Brien* [2007] TASSC 13 (21 March 2007) per Holt M; *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2007] NSWSC 350 (18 April 2007) per Bergin J at [31], [41].
43. S Parker & C J G Samford (eds), *Legal Ethics and Legal Practice*, Clarendon Press, NY, 1995, p 63.

9

THE ADVERSARY SYSTEM

INTRODUCTION

9.1 A great deal has been written about the adversary system, much of which relates to the suitability of the adversary system compared with the inquisitorial system as a means of resolving disputes.[1] Since the main focus of the adversary system is the trial, many of the ethical and professional considerations which form part of the adversary system are also referred to in other chapters of this text.[2]

9.2 This chapter considers the role of the judge and the lawyer in the adversary system. It also considers the special role and obligations of the prosecutor in a criminal trial. In broad terms, the adversarial system of conducting proceedings refers to a system in which the parties, not the judge, have the primary responsibility for defining the issues in dispute and for carrying the dispute forward. Both before and at trial, the conduct of the litigation is left, for the most part, to the parties. At trial, the judge generally allows each side to present the evidence and the law in the order and in the manner they wish.

9.3 According to the theory behind the adversary system, rigid adherence by each of the participants to these separate role functions is the most effective way of ensuring that justice is achieved. However, leaving it to the parties to be responsible for the presentation of the evidence has not been without criticism. In this regard, Rogers J[3] noted:

> Not surprisingly, many judges felt uncomfortable with the proposition that, notwithstanding best efforts, from time to time they can provide only a hearing which, even if not to be labelled unfair, is not satisfactory.

The role of the judge is considered further at **9.19**–**9.33**.

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9.4 A particular problem concerning the adversary system relates to situations where one of the parties is not represented by a legal practitioner.[4] In this regard, the Australian Law Reform Commission[5] noted:

> When only one party is unrepresented, a primary difficulty can be maintaining the perception of impartiality. Judges need to ensure that all relevant evidence is heard, relevant questions asked of witnesses, and that the unrepresented party knows and enforces their procedural rights. The represented party may see such judicial intervention as partisan, and judges must ensure they do not apply different rules to unrepresented parties. Where both parties are unrepresented, the parties may be difficult to control, the case disorganised and wrongly construed, there may be party quarrels over irrelevant points, or even harassment or violence.

9.5 The importance of members of the legal profession to the working of the adversary system was outlined in *Giannarelli v*

Wraith (1988) 165 CLR 543, where Mason CJ noted at [17]:

> The advocate is as essential a participant in our system of justice as are the judge, the jury and the witness and his freedom of judgment must be protected. The need for that protection arises from 'the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty', to repeat the words of Fry LJ in *Munster* [*v Lamb* (1883) 11 QBD 588]. [references omitted]

9.6 Prosecutors have a particular role to play in the criminal justice system. Contrary to popular belief, it is not their role to secure a conviction at all costs, but rather to fairly and expeditiously place all the relevant admissible evidence before the court, using considered and non-inflammatory language. In *Libke v R* (2007) 230 CLR 559; 235 ALR 517; [2007] HCA 30 (20 June 2007), Hayne J noted at [71]:[6]

> A criminal trial in Australia is an accusatorial and adversarial process. In that process, prosecuting counsel has a role that is bounded by long-established duties and responsibilities. Those duties and responsibilities are summarised when it is said that '[t]he duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice'. In the Supreme Court of Canada, Rand J described the role of the prosecutor as being:
>
> > '[N]ot to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed *with an ingrained sense of the dignity,*

the seriousness and the justness of judicial proceedings' (emphasis added).

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A central, even the central, element in that role is 'ensuring that the Crown case is presented *with fairness to the accused*'.

9.7 This chapter also considers the ethical issues that arise when an accused, in a criminal matter, makes a confession of guilt to their lawyer.[7]

9.8 It should be noted that there is an increasing trend to substitute the adversarial system with a system of conciliation, mediation, and reconciliation. This is most evident in the area of family law. Sections 13C and 60I of the Family Law Act 1975 (Cth) are examples of the mandating of an alternative dispute resolution process:

13C(1) A court exercising jurisdiction in proceedings under this Act may, at any stage in the proceedings, make one or more of the following orders:

(a) that one or more of the parties to the proceedings attend family counselling;
(b) that the parties to the proceedings attend family dispute resolution;
(c) that one or more of the parties to the proceedings participate in an appropriate course, program or other service.

60I(1) The object of this section is to ensure that all persons who have a dispute about matters that may be dealt with by an order under this Part (a Part VII order) make a genuine effort to resolve that dispute by family dispute resolution before the Part VII order is applied for.

(2) The dispute resolution provisions of the Family Law Rules 2004

impose the requirements for dispute resolution that must be complied with before an application is made to the Family Court of Australia for a parenting order.

9.9 The various State and Territory Civil Procedure Acts or Rules also make provision for the alternative dispute resolution of civil disputes.[8] In relation to proceedings in the Federal Court, see the Federal Court of Australia Act 1976 (Cth).[9]

9.10 It is also generally the case that, if a matter is before an administrative tribunal, rather than a court, the adherence to the adversarial system is not so pronounced.[10] In *Repatriation Commission v Campbell* (1984) 1 FCR 249, Fitzgerald J held that it was an error for the Repatriation Review Tribunal to proceed on the basis that the proceedings were adversarial, and that the onus was on the Repatriation Commission to disprove, beyond a reasonable doubt,

the presence of a relationship between a war service injury and the death of an ex-serviceman. His Honour expressed the view that an inquisitorial approach in terms of exploring what, if anything, caused or contributed to the disease, was necessary.[11] The Act that establishes the relevant administrative tribunal will generally include a reference to the powers of the tribunal regarding the hearing of evidence and other procedural matters. Such legislation can include a restriction on the right to legal representation.[12]

9.11 The Australian Law Reform Commission's Report No 89, titled *Managing Justice: A Review of the Federal Civil Justice System*,[13] noted:

> 1.121 There are many texts which recite and analyse the 'adversarial' benefits of judicial impartiality, independence, consistency, flexibility and the democratic character of adversarial processes, or perceived disadvantages including tactical maneuvering, partisan and unreliable witnesses, the obscured focus of many adversarial hearings, and the unfairness that can result in such hearings when parties are unrepresented or there is inequality of legal representation.
>
> …
>
> 1.125 Several submissions from individual litigants, corporations and consumer groups expressed the view that the adversarial system was unsuitable for many types of disputes, particularly family law disputes, because the system was concerned with 'winning at all costs', exacerbated conflict, victimised the poor and less powerful and left children out of the process.

9.12 This begs the question whether the adversary system is about a search for the 'truth' or the dispensing of justice based on the evidence as it is presented to the court by each of the parties. In some cases, truth and justice might coincide. However, this is more likely to happen by coincidence rather than design. As Sir Owen Dixon remarked,[14] 'the object of the parties is always victory, not abstract truth'. Each side is seeking to do its best for the client. In the development of legal argument, the aim is to present the court with the strongest possible case, without consideration of any interest others may have in the way the case is conducted or its outcome. In *Whitehorn v R* (1983) 152 CLR 657, Dawson J observed at 682:

> A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. When a party's case is deficient, the ordinary consequence

is that it does not succeed. If a prosecution does succeed at trial when it ought not to and there is a miscarriage of justice as a result, that is a matter to be corrected on appeal. It is no part of the function of the trial judge to prevent it by donning the mantle of prosecution or defence counsel.

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9.13 David Ipp[15] noted:

It is generally accepted that the adversarial system contains the following elements:

1 adjudication by a neutral tribunal, acting with considerable degree of passivity;
2 the preparation and presentation of the case by parties; and
3 a structured procedural system governing the proceedings.

…

[Referring to the decision of Viscount Simon in *Hickman v Peacey* [1945] AC 304 at 318:]

> 'A court of law, whether it takes the form of a judge sitting alone, or sitting with the help of a jury, is not engaged in ascertaining ultimate verities: it is engaged in determining what is the proper result to be arrived at, having regard to the evidence before it.'

Perhaps the frankest exposition of this approach was that given by Viscount Kilmuir who was of the view that the common law was not so much interested in the ascertainment of truth but in ensuring fair play, even at the expense of truth. In his introduction to a series of talks he gave on 'the migration of common law' he said:

> 'Now the first and most striking feature of the common law

> is that it puts justice before truth. The issue in a criminal prosecution is not, basically "guilty or not guilty" but "can the prosecution prove its case according to the rules?" These rules are designed to ensure "fair play" at the expense of truth. … The attitude of the common law to a civil action is essentially the same: the question is "has the plaintiff established his claim by lawful evidence?" Not "has he really got a good claim?" Again, justice comes before truth. So, you see, there is more than meets the eye in the old story of the Irish prisoner who when asked whether he pleaded "guilty" or "not guilty" replied "and how should I be knowing whether I am guilty until I have heard the evidence". '

Nevertheless, over the last 20 years there has been a gradual, but clearly discernible trend towards accepting that the ultimate purpose of our adversarial system is to resolve disputes by pursuing the truth; this goal to be limited only by consideration of fairness and resources. A striking manifestation of this change is the attitude expressed by Sir Anthony Mason, who drew attention to 'the rediscovery of the fundamental truth — or truism — that the courts are concerned with the administration of justice'. His Honour observed:

> 'There was a time when it was thought that the courts administered the law as distinct from justice. This is not the position today. And judicial concern with the ideal of justice is at bottom one of the reasons why the courts have refined some of the principles of substantive as well as procedural law. The notion that the judge merely administered laws, that is, rigid and specific rules, was a comforting one but it did not always achieve justice. The emphasis on achieving justice, because it calls incidentally for refinement of principle, demands more of the judge.'

In recent times, in Australia, there have been judicial expressions consistent with this attribute. For example, in *Bassett v Host*; in the context of a trial where there had been a failure to lead adequate evidence, Hope JA said:

> 'A trial is not a game; it is an attempt, on behalf of the community, to resolve in accordance with the law the questions at issue between the parties. A system which requires the courts to resolve those issues in the circumstances in which the issues in his case have had to be resolved is surely deficient, for instead of assisting the finding of the truth, the system has prevented the court from having before it the only witness who could have spoken directly as to what the truth was. In some other parts of the world where the adversary system prevails, this patent defect has been remedied. … The present case highlights the need for some such remedial measures in this State.'

Similar views have been expressed by leading commentators.

In England, the trend is less explicit but a guide can be obtained from *Ashmore v Corporation of Lloyds* where Lord Templeman rejected the proposition that litigants had a 'legitimate expectation that the trial would proceed to a conclusion upon the evidence to be adduced'. His Lordship said:

> '[T]he control of the proceedings rests with the judge and not with the plaintiff. An expectation that the trial would proceed to a conclusion upon the evidence to be adduced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice.'

RULES OF PROFESSIONAL PRACTICE

9.14 Extracts from the various jurisdictions' Solicitors' Rules of Professional Conduct concerning advocacy and a client's admission

of guilt are reproduced below.[16]

9.15 The following is an extract from the Northern Territory Rules of Professional Conduct and Practice 2005:

> **14. Admission of Guilt**
>
> 14.1 If a practitioner's client, who is the accused or defendant in criminal proceedings, admits to the practitioner before the commencement of, or during, the proceedings, that the client is guilty of the offence charged, the practitioner must not, whether acting as instructing practitioner or advocate—
>
> 14.1.1 put a defence case which is inconsistent with the client's confession;
>
> 14.1.2 falsely claim or suggest that another person committed the offence; or

> 14.1.1 continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence.
>
> 14.2 A practitioner may continue to act for a client who elects to plead 'not guilty' after admitting guilt to the practitioner, and in that event, the practitioner must ensure that the prosecution is put to proof of its case, and the practitioner may argue that the evidence is insufficient to justify a conviction or that the prosecution has otherwise failed to establish the commission of the offence by the client.
>
> …
>
> **17. ADVOCACY RULES**
>
> *Rules 17.1 to 17.58 apply to legal practitioners other than legal practitioners practising solely as barristers when they are acting*

as advocates.

Duty to client

17.1 A practitioner must seek to advance and protect the client's interests to the best of the practitioner's skill and diligence, uninfluenced by the practitioner's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the practitioner or any other person, and always in accordance with the law including these Rules.

17.2 A practitioner must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, if the practitioner is instructed to give advice on any such matter, sufficiently to permit the client to give proper instructions, particularly in connection with any compromise of the case.

Independence — Avoidance of personal bias

17.3 A practitioner must not act as the mere mouthpiece of the client or of the instructing practitioner and must exercise the forensic judgments called for during the case independently, after appropriate consideration of the client's and the instructing practitioner's desires where practicable.

17.4 A practitioner will not have breached the practitioner's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing practitioner's desires, simply by choosing, contrary to those desires, to exercise the forensic judgments called for during the case so as to:

(a) confine any hearing to those issues which the practitioner believes to be the real issues;
(b) present the client's case as quickly and simply as may be consistent with its robust advancement; or
(c) inform the court of any persuasive authority against the

client's case.

17.5 A practitioner must not make submissions or express views to a court on any material evidence or material issue in the case in terms which convey or appear to convey the practitioner's personal opinion on the merits of that evidence or issue.

Frankness in court

17.6 A practitioner must not knowingly make a misleading statement to a court on any matter.

17.7 A practitioner must take all necessary steps to correct any misleading statement made by the practitioner to a court as soon as possible after the practitioner becomes aware that the statement was misleading.

17.8 A practitioner will not have made a misleading statement to a court simply by failing to correct an error on any matter stated to the court by the opponent or any other person.

17.9 A practitioner seeking any interlocutory relief in an ex parte application must disclose to the court all matters which:

(a) are within the practitioner's knowledge;
(b) are not protected by legal professional privilege; and
(c) the practitioner has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.

17.10 A practitioner who has knowledge of matters which are within Rule 17.9(c):

(a) must seek instructions for the waiver of legal professional privilege if the matters are protected by that privilege, so as to permit the practitioner to disclose those matters under Rule 17.9; and

(b) if the client does not waive the privilege as sought by the practitioner:
    (i) must inform the client of the client's responsibility to authorise such disclosure and the possible consequences of not doing so; and
    (ii) must inform the court that the practitioner cannot assure the court that all matters which should be disclosed have been disclosed to the court.

17.11 A practitioner must, at the appropriate time in the hearing of the case and if the court has not yet been informed of that matter, inform the court of:

(a) any binding authority;
(b) any authority decided by the Full Court of the Federal Court of Australia, a Court of Appeal of a Supreme Court or a Full Court of a Supreme Court;
(c) any authority on the same or materially similar legislation as that in question in the case, including any authority decided at first instance in the Federal Court or a Supreme Court, which has not been disapproved; or
(d) any applicable legislation;

which the practitioner has reasonable grounds to believe to be directly in point, against the client's case.

17.12 A practitioner need not inform the court of matters within Rule 17.11 at a time when the opponent tells the court that the opponent's whole case will be withdrawn or the opponent will consent to final judgment in favour of the client, unless the appropriate time for the practitioner to have informed the court of such matters in the ordinary course has already arrived or passed.

17.13 A practitioner who becomes aware of a matter within Rule 17.11 after judgment or decision has been reserved and while it remains pending, whether the authority or legislation came into existence before or after argument, must inform the court of that matter by:

(a) a letter to the court, copied to the opponent, and limited to the relevant reference unless the opponent has consented beforehand to further material in the letter; or
(b) requesting the court to relist the case for further argument on a convenient date, after first notifying the opponent of the intended request and consulting the opponent as to the convenient date for further argument.

17.14 A practitioner need not inform the court of any matter otherwise within Rule 17.11 which would have rendered admissible any evidence tendered by the prosecution which the court has ruled inadmissible without calling on the defence.

17.15 A practitioner will not have made a misleading statement to a court simply by failing to disclose facts known to the practitioner concerning the client's character or past, when the practitioner makes other statements concerning those matters to the court, and those statements are not themselves misleading.

17.16 A practitioner who knows or suspects that the prosecution is unaware of the client's previous conviction must not ask a prosecution witness whether there are previous convictions, in the hope of a negative answer.

17.17 A practitioner must inform the court in civil proceedings of any misapprehension by the court as to the effect of an order which the court is making, as soon as the practitioner becomes aware of the misapprehension.

Delinquent or guilty clients

17.18 A practitioner whose client informs the practitioner, during a hearing or after judgment or decision is reserved and while it

remains pending, that the client has lied in a material particular to the court or has procured another person to lie to the court or has falsified or procured another person to falsify in any way a document which has been tendered:

(a) must refuse to take any further part in the case unless the client authorises the practitioner to inform the court of the lie or falsification;
(b) must promptly inform the court of the lie or falsification upon the client authorising the practitioner to do so; but
(c) must not otherwise inform the court of the lie or falsification.

17.19 A practitioner retained to appear in criminal proceedings whose client confesses guilt to the practitioner but maintains a plea of not guilty:

(a) may cease to act, if there is enough time for another practitioner to take over the case properly before the hearing, and the client does not insist on the practitioner continuing to appear for the client;
(b) in cases where the practitioner continues to act for the client:
    (i) must not falsely suggest that some other person committed the offence charged;
    (ii) must not set up an affirmative case inconsistent with the confession; but
    (iii) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;
    (iv) may argue that for some reason of law the client is not guilty of the offence charged; or
    (v) may argue that for any other reason not prohibited by (i) and (ii) the client should not be convicted of the offence charged.

17.20 A practitioner whose client informs the practitioner that the client intends to disobey a court's order must:

(a) advise the client against that course and warn the client of

its dangers;

(b) not advise the client how to carry out or conceal that course; but

(c) not inform the court or the opponent of the client's intention unless:
   (i) the client has authorised the practitioner to do so beforehand; or
   (ii) the practitioner believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.

Responsible use of privilege

17.21 A practitioner must, when exercising the forensic judgments called for throughout a case, take care to ensure that decisions by the practitioner or on the practitioner's advice to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person:

(a) are reasonably justified by the material then available to the practitioner;
(b) are appropriate for the robust advancement of the client's case on its merits;
(c) are not made principally in order to harass or embarrass the person; and
(d) are not made principally in order to gain some collateral advantage for the client or the practitioner or the instructing practitioner out of court.

17.22 A practitioner must not open as a fact any allegation which the practitioner does not then believe on reasonable grounds will be capable of support by the evidence which will be available to support the client's case.

17.23 A practitioner must not cross-examine so as to suggest criminality, fraud or other serious misconduct on the part of any person unless:

(a) the practitioner believes on reasonable grounds that the material already available to the practitioner provides a proper basis for the suggestion;

(b) in cross-examination going to credit alone, the practitioner believes on reasonable grounds that affirmative answers to the suggestion would diminish the witness's credibility.

17.24 A practitioner may regard the opinion of the instructing practitioner that material which appears to support a suggestion within Rule 17.23 is itself credible as a reasonable ground for holding the belief required by Rule 17.23(a).

17.25 A practitioner must make reasonable enquiries to the extent which is practicable before the practitioner can have reasonable grounds for holding the belief required by Rule 17.23(a), unless the practitioner has received and accepted an opinion from the instructing practitioner within Rule 17.24.

17.26 A practitioner must not suggest criminality, fraud or other serious misconduct against any person in the course of the practitioner's address on the evidence unless the practitioner believes on reasonable grounds that the evidence in the case provides a proper basis for the suggestion.

17.27 A practitioner who has instructions which justify submissions for the client in mitigation of the client's criminality and which involve allegations of serious misconduct against any other person not able to answer the allegations in the case must seek to avoid disclosing the other person's identity directly or indirectly unless the practitioner believes on reasonable grounds that such disclosure is necessary for the robust defence of the client.

Integrity of evidence

17.28 A practitioner must not suggest or condone another person suggesting in any way to any prospective witness (including a party or the client) the content of any particular evidence which the witness should give at any stage in the proceedings.

17.29 A practitioner will not have breached Rule 17.28 by expressing a general admonition to tell the truth, or by questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not coach or encourage the witness to give evidence different from the evidence which the witness believes to be true.

17.30 A practitioner must not confer with, or condone another practitioner conferring with, more than one lay witness (including a party or client) at the same time, about any issue:

(a) as to which there are reasonable grounds for the practitioner to believe it may be contentious at a hearing; or

(b) which could be affected by, or may affect, evidence to be given by any of those witnesses.

17.31 A practitioner will not have breached Rule 17.30 by conferring with, or condoning another practitioner conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.

17.32 A practitioner must not confer with any witness (including a party or client) called by the practitioner on any matter related to the proceedings while that witness remains under cross-examination, unless:

(a) the cross-examiner has consented beforehand to the practitioner doing so; or

(b) the practitioner:
    (i) believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require such a conference;
    (ii) has, if possible, informed the cross-examiner beforehand of the practitioner's intention to do so; and
    (iii) otherwise does inform the cross-examiner as soon as possible of the practitioner having done so.

17.33 A practitioner must not take any step to prevent or discourage prospective witnesses or witnesses from conferring with the opponent or being interviewed by or on behalf of any other person involved in the proceedings.

17.34 A practitioner will not have breached Rule 17.33 simply by telling a prospective witness or a witness that the witness need not agree to confer or to be interviewed.

Duty to opponent

17.35 A practitioner must not knowingly make a false statement to the opponent in relation to the case (including its compromise).

17.36 A practitioner must take all necessary steps to correct any false statement unknowingly made by the practitioner to the opponent as soon as possible after the practitioner becomes aware that the statement was false.

17.37 A practitioner does not make a false statement to the opponent simply by failing to correct an error on any matter stated to the practitioner by the opponent.

17.38 A practitioner must not deal directly with the opponent's client unless:

(a) the opponent has previously consented;
(b) the practitioner believes on reasonable grounds that:
    (i) the circumstances are so urgent as to require the practitioner to do so; and
    (ii) the dealing would not be unfair to the opponent's client; or
(c) the substance of the dealing is solely to enquire whether the person is represented and, if so, by whom.

17.39 Subject to Rule 17.38 a practitioner must not confer with or deal directly with the party opposed to the client unless:

(a) the party, not being indemnified by an insurance company which is actively engaged in contesting the proceedings, is unrepresented and has signified willingness to that course; or
(b) the party, being indemnified by an insurance company which is actively engaged in contesting the proceedings, is otherwise unrepresented and the practitioner:
    (i) has no reasonable grounds to believe that any statements made by the party to the practitioner may harm the party's interests under the insurance policy; or
    (ii) has reasonable grounds for the belief referred to in (i) but has clearly informed the party beforehand of that possibility; or
(c) the party, being indemnified by an insurance company which is actively engaged in contesting the proceedings, is personally represented but not in the case and the practitioner:
    (i) has notified the party's representative of the practitioner's intention to do so; and
    (ii) has allowed enough time for the party to be advised by the party's representative.

17.40 A practitioner must not, outside an ex parte application or a hearing of which the opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:

(a) the court has first communicated with the practitioner in such a way as to require the practitioner to respond to the court; or

(b) the opponent has consented beforehand to the practitioner dealing with the court in a specific manner notified to the opponent by the practitioner.

17.41 A practitioner must promptly tell the opponent what passes between the practitioner and a court in a communication referred to in Rule 17.40.

17.42 A practitioner must not raise any matter with a court in connection with current proceedings on any occasion to which the opponent has consented under Rule 17.40(b), other than the matters specifically notified by the practitioner to the opponent when seeking the opponent's consent.

Integrity of hearings

17.43 A practitioner must not publish, or take steps towards the publication of, any material concerning current proceedings in which the practitioner is appearing or has appeared, unless:

(a) the practitioner is merely supplying, with the consent of the instructing practitioner or the client, as the case may be:

(i) copies of pleadings or court processes in their current form, which have been filed, and which have been served in accordance with the court's

requirements;

(ii) copies of affidavits or witness statements, which have been read, tendered or verified in open court, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection;

(iii) copies of the transcript of evidence given in open court, if permitted by copyright and clearly marked so as to show any corrections agreed by the other parties or directed by the court;

(iv) copies of exhibits admitted in open court and without restriction on access; or

(v) copies of written submissions, which have been given to the court, and which have been served on all other parties; or

(b) the practitioner, with the consent of the instructing practitioner or the client, as the case may be, is answering unsolicited questions from journalists concerning proceedings in which there is no possibility of a jury ever hearing the case or any retrial and:

(i) the answers are limited to information as to the identity of the parties or of any witness already called, the nature of the issues in the case and the nature of the orders made or judgment given including any reasons given by the court;

(ii) the answers are accurate and uncoloured by comment or unnecessary description; and

(iii) the answers do not appear to express the practitioner's own opinions on any matters relevant to the case.

17.44 A practitioner will not have breached Rule 17.43 simply by advising the client about whom there has been published a report relating to the case, and who has sought the practitioner's advice in relation to that report, that the client may take appropriate steps to present the client's own position

for publication.

17.45 A practitioner must not in the presence of any of the parties or practitioners deal with a court, or deal with any practitioner appearing before the practitioner when the practitioner is a referee, arbitrator or mediator, on terms of informal personal familiarity which may reasonably give the appearance that the practitioner has special favour with the court or towards the practitioner.

…

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9.16 The following extracts are from rr 3, 4, 17-28 of the Queensland Australian Solicitors Conduct Rules 2012, which are mirrored for New South Wales,[17] South Australia,[18] Victoria,[19] and the Australian Capital Territory:[20]

Fundamental Duties of Solicitors

3. Paramount Duty to the Court and the Administration of Justice

3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

4. Other fundamental ethical duties

4.1 A solicitor must also:

4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;

4.1.2 be honest and courteous in all dealings in the course of legal practice;

4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;

4.1.4 avoid any compromise to their integrity and professional independence; and

4.1.5 comply with these Rules and the law.

17. Independence — Avoidance of Personal Bias

17.1 A solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client or of the instructing solicitor (if any) and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's instructions where applicable.

17.2 A solicitor will not have breached the solicitor's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's instructions, simply by choosing, contrary to those instructions, to exercise the forensic judgments called for during the case so as to:

17.2.1 confine any hearing to those issues which the solicitor believes to be the real issues;

17.2.2 present the client's case as quickly and simply as may be consistent with its robust advancement; or

17.2.3 inform the court of any persuasive authority against the client's case.

17.3 A solicitor must not make submissions or express views to a court on any material evidence or issue in the case in terms which convey or appear to convey the solicitor's personal opinion on the merits of that evidence or issue.

18. Formality before the Court

18.1 A solicitor must not, in the presence of any of the parties or solicitors, deal with a court on terms of informal personal familiarity which may reasonably give the appearance that the solicitor has special favour with the court.

19. Frankness in Court

19.1 A solicitor must not deceive or knowingly or recklessly mislead the court.

19.2 A solicitor must take all necessary steps to correct any misleading statement made by the solicitor to a court as soon as possible after the solicitor becomes aware that the statement was misleading.

19.3 A solicitor will not have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by the opponent or any other person.

19.4 A solicitor seeking any interlocutory relief in an ex parte application must disclose to the court all factual or legal matters which:

19.4.1 are within the solicitor's knowledge;
19.4.2 are not protected by legal professional privilege; and
19.4.3 the solicitor has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.

19.5 A solicitor who has knowledge of matters which are within Rule 19.4:

19.5.1 must seek instructions for the waiver of legal professional privilege, if the matters are protected by that privilege, so as to permit the solicitor to disclose those matters under Rule 19.4; and
19.5.2 if the client does not waive the privilege as sought by the solicitor:
(i) must inform the client of the client's responsibility to authorise such disclosure and the possible consequences of not doing so; and
(ii) must inform the court that the solicitor cannot assure the court that all matters which should be

disclosed have been disclosed to the court.

19.6 A solicitor must, at the appropriate time in the hearing of the case if the court has not yet been informed of that matter, inform the court of:

19.6.1 any binding authority;

19.6.2 where there is no binding authority, any authority decided by an Australian appellate court; and

19.6.3 any applicable legislation,

known to the solicitor and which the solicitor has reasonable grounds to believe to be directly in point, against the client's case.

19.7 A solicitor need not inform the court of matters within Rule 19.6 at a time when the opponent tells the court that the opponent's whole case will be withdrawn or the opponent will consent to final judgment in favour of the client, unless the appropriate time for the solicitor to have informed the court of such matters in the ordinary course has already arrived or passed.

19.8 A solicitor who becomes aware of matters within Rule 19.6 after judgment or decision has been reserved and while it remains pending, whether the authority or legislation came into existence before or after argument, must inform the court of that matter by:

19.8.1 a letter to the court, copied to the opponent, and limited to the relevant reference unless the opponent has consented beforehand to further material in the letter; or

19.8.2 requesting the court to relist the case for further argument on a convenient date, after first notifying the

opponent of the intended request and consulting the opponent as to the convenient date for further argument.

19.9 A solicitor need not inform the court of any matter otherwise within Rule 19.8 which would have rendered admissible any evidence tendered by the prosecution which the court has ruled inadmissible without calling on the defence.

19.10 A solicitor who knows or suspects that the prosecution is unaware of the client's previous conviction must not ask a prosecution witness whether there are previous convictions, in the hope of a negative answer.

19.11 A solicitor must inform the court of any misapprehension by the court as to the effect of an order which the court is making, as soon as the solicitor becomes aware of the misapprehension.

19.12 A solicitor must alert the opponent and if necessary inform the court if any express concession made in the course of a trial in civil proceedings by the opponent about evidence, case-law or legislation is to the knowledge of the solicitor contrary to the true position and is believed by the solicitor to have been made by mistake.

…

20. Delinquent or guilty clients

20.1 A solicitor who, as a result of information provided by the client or a witness called on behalf of the client, learns during a hearing or after judgment or the decision is reserved and while it remains pending, that the client or a witness called on behalf of the client:

20.1.1 has lied in a material particular to the court or has procured another person to lie to the court;

20.1.2 has falsified or procured another person to falsify in any way a document which has been tendered; or

20.1.3 has suppressed or procured another person to suppress material evidence upon a topic where there was a

positive duty to make disclosure to the court;

must —

20.1.4 advise the client that the court should be informed of the lie, falsification or suppression and request authority so to inform the court; and

20.1.5 refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie, falsification or suppression and must promptly inform the court of the lie, falsification or suppression upon the client authorising the solicitor to do so but otherwise may not inform the court of the lie, falsification or suppression.

20.2 A solicitor whose client in criminal proceedings confesses guilt to the solicitor but maintains a plea of not guilty:

20.2.1 may cease to act, if there is enough time for another solicitor to take over the case properly before the hearing, and the client does not insist on the solicitor continuing to appear for the client;

20.2.2 in cases where the solicitor continues to act for the client:

(i) must not falsely suggest that some other person committed the offence charged;

(ii) must not set up an affirmative case inconsistent with the confession;

(iii) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;

(iv) may argue that for some reason of law the client is not guilty of the offence charged; and

(v) may argue that for any other reason not

prohibited by (i) and (ii) the client should not be convicted of the offence charged;

20.2.3 must not continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence.

20.3 A solicitor whose client informs the solicitor that the client intends to disobey a court's order must:

20.3.1 advise the client against that course and warn the client of its dangers;

20.3.2 not advise the client how to carry out or conceal that course; and

20.3.3 not inform the court or the opponent of the client's intention unless:

(i) the client has authorised the solicitor to do so beforehand; or

(ii) the solicitor believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.

21. Responsible use of court process and privilege

21.1 A solicitor must take care to ensure that the solicitor's advice to invoke the coercive powers of a court:

21.1.1 is reasonably justified by the material then available to the solicitor;

21.1.2 is appropriate for the robust advancement of the client's case on its merits;

21.1.3 is not made principally in order to harass or embarrass a person; and

21.1.4 is not made principally in order to gain some collateral advantage for the client or the solicitor or the instructing solicitor out of court.

21.2 A solicitor must take care to ensure that decisions by the solicitor to make allegations or suggestions under privilege against any person:

21.2.1 are reasonably justified by the material then available to the solicitor;

21.2.2 are appropriate for the robust advancement of the client's case on its merits; and

21.2.3 are not made principally in order to harass or embarrass a person.

21.3 A solicitor must not allege any matter of fact in:

21.3.1 any court document settled by the solicitor;

21.3.2 any submission during any hearing;

21.3.3 the course of an opening address; or

21.3.4 the course of a closing address or submission on the evidence,

unless the solicitor believes on reasonable grounds that the factual material already available provides a proper basis to do so.

21.4 A solicitor must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the solicitor believes on reasonable grounds that:

21.4.1 available material by which the allegation could be supported provides a proper basis for it; and

21.4.2 the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.

21.5 A solicitor must not make a suggestion in cross-examination on credit unless the solicitor believes on reasonable grounds that acceptance of the suggestion would diminish the credibility of the evidence of the witness.

21.6 A solicitor may regard the opinion of an instructing solicitor

that material which is available to the instructing solicitor is credible, being material which appears to the solicitor from its nature to support an allegation to which Rules 21.1, 21.2, 21.3 and 21.4 apply, as a reasonable ground for holding the belief required by those Rules (except in the case of a closing address or submission on the evidence).

21.7 A solicitor who has instructions which justify submissions for the client in mitigation of the client's criminality which involve allegations of serious misconduct against any other person not able to answer the allegations in the case must seek to avoid disclosing the other person's identity directly or indirectly unless the solicitor believes on reasonable grounds that such disclosure is necessary for the proper conduct of the client's case.

21.8 Without limiting the generality of Rule 21.2, in proceedings in which an allegation of sexual assault, indecent assault or the commission of an act of indecency is made and in which the alleged victim gives evidence:

21.8.1 a solicitor must not ask that witness a question or pursue a line of questioning of that witness which is intended:

(i) to mislead or confuse the witness; or

(ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; and

21.8.2 a solicitor must take into account any particular vulnerability of the witness in the manner and tone of the questions that the solicitor asks.

22. Communication with opponents

22.1 A solicitor must not knowingly make a false statement to an opponent in relation to the case (including its compromise).

22.2 A solicitor must take all necessary steps to correct any false statement made by the solicitor to an opponent as soon as possible after the solicitor becomes aware that the statement

was false.

22.3 A solicitor will not have made a false statement to the opponent simply by failing to correct an error on any matter stated to the solicitor by the opponent.

22.4 A solicitor must not confer or deal with any party represented by or to the knowledge of the solicitor indemnified by an insurer, unless the party and the insurer have signified willingness to that course.

22.5 A solicitor must not, outside an ex parte application or a hearing of which an opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:

22.5.1 the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court; or

22.5.2 the opponent has consented beforehand to the solicitor communicating with the court in a specific manner notified to the opponent by the solicitor.

22.6 A solicitor must promptly tell the opponent what passes between the solicitor and a court in a communication referred to in Rule 22.5.

22.7 A solicitor must not raise any matter with a court in connection with current proceedings on any occasion to which an opponent has consented under Rule 22.5.2 other than the matters specifically notified by the solicitor to the opponent when seeking the opponent's consent.

22.8 A solicitor must take steps to inform the opponent as soon as possible after the solicitor has reasonable grounds to believe

that there will be an application on behalf of the client to adjourn any hearing, of that fact and the grounds of the application, and must try, with the opponent's consent, to inform the court of that application promptly.

23. Opposition access to witnesses

23.1 A solicitor must not take any step to prevent or discourage a prospective witness or a witness from conferring with an opponent or being interviewed by or on behalf of any other person involved in the proceedings.

23.2 A solicitor will not have breached Rule 23.1 simply by telling a prospective witness or a witness that the witness need not agree to confer or to be interviewed or by advising about relevant obligations of confidentiality.

24. Integrity of evidence — influencing evidence

24.1 A solicitor must not:

24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or

24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.

24.2 A solicitor will not have breached Rules 24.1 by:

24.2.1 expressing a general admonition to tell the truth;

24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness; or

24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but the solicitor must not encourage the witness to give evidence different from the evidence which the witness believes to be true.

25. Integrity of evidence — two witnesses together

25.1 A solicitor must not confer with, or condone another solicitor conferring with, more than one lay witness (including a party or client) at the same time:

25.1.1 about any issue which there are reasonable grounds for the solicitor to believe may be contentious at a hearing; and

25.1.2 where such conferral could affect evidence to be given by any of those witnesses, unless the solicitor believes on reasonable grounds that special circumstances require such a conference.

25.2 A solicitor will not have breached Rule 25.1 by conferring with, or condoning another solicitor conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.

26. Communication with witnesses under cross-examination

26.1 A solicitor must not confer with any witness (including a party or client) called by the solicitor on any matter related to the proceedings while that witness remains under cross-examination, unless:

26.1.1 the cross-examiner has consented beforehand to the solicitor doing so; or

26.1.2 the solicitor:

(i) believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require such a conference;

(ii) has, if possible, informed the cross-examiner beforehand of the solicitor's intention to do so; and

(iii) otherwise does inform the cross-examiner as soon as possible of the solicitor having done so.

27. Solicitor as material witness in client's case

27.1 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court, the solicitor may not appear as advocate for the client in the hearing.

27.2 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court the solicitor, an associate of the solicitor or a law practice of which the solicitor is a member may act or continue to act for the client unless doing so would prejudice the administration of justice.

28. Public comment during current proceedings

28.1 A solicitor must not publish or take steps towards the publication of any material concerning current proceedings which may prejudice a fair trial or the administration of justice.

…

9.17 In Tasmania, the law concerning advocacy, frankness in court, delinquent or guilty clients, independence, prosecutor's duties, among others, is found in the common law.

[page 399]

9.18 The following extract is from Pt 6 — Advocacy and litigation of the Law Society of Western Australia's Legal Profession Conduct Rules 2010:

32. Independence

(1) A practitioner engaged to represent a client in a matter that is before a court must exercise the judgment called

for during the hearing of the matter independently, after giving appropriate consideration to the wishes of the client and any instructing practitioner.

(2) A practitioner must—

(a) confine the hearing of a matter to issues which the practitioner believes to be the real issues; and

(b) present the client's case as quickly and simply as is consistent with its robust advancement; and

(c) if the practitioner is aware of any persuasive authority that the practitioner reasonably believes might be against the client's case, inform the court of that authority.

(3) During the hearing of a matter, a practitioner must not make submissions or express views to a court on any material evidence or material issue relevant to the matter in terms which convey, or appear to convey, the practitioner's personal opinion on the merits of that evidence or issue, unless required to do so by law or by a court.

33. Formality before court

(1) A practitioner must not act towards a court or another practitioner in a manner that may reasonably give the appearance to another person that the practitioner has special favour with a court.

(2) A practitioner must not act as counsel for a client in a matter if it would be difficult for the practitioner to maintain professional independence because of a connection with the client.

(3) A practitioner must not act as counsel for a client in a matter if the impartial administration of justice might be prejudiced or appear to be prejudiced because of the practitioner's connection with the court or a member of the court.

(4) Without limiting the generality of this rule, Schedule 1 provides examples of circumstance where a practitioner should not act as counsel for a client because of connections that may affect professional independence or impartial administration of justice.

34. Frankness in court

(1) A practitioner must not knowingly or recklessly mislead a court.

(2) A practitioner must correct a misleading statement made to a court by the practitioner as soon as possible after the practitioner becomes aware that the statement was misleading.

(3) A practitioner who does not correct an error in a statement made to a court by another person has not by that omission made a misleading statement.

(4) A practitioner seeking any interlocutory relief in an ex parte application must disclose to the court all factual and legal matters—

(a) that are within the practitioner's knowledge; and

(b) that are not protected by legal professional privilege; and

(c) that the practitioner has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the practitioner's client.

(5) A practitioner who has knowledge of matters that the practitioner believes are protected by legal professional privilege but that otherwise the practitioner would be required to disclose under subrule (4) must—

(a) seek instructions for the waiver of legal professional privilege so as to permit the practitioner to disclose those matters to the court; and

(b) if the client does not waive the privilege—

(i) inform the client of the client's responsibility to authorise such disclosure and the possible consequences of not doing so; and

(ii) inform the court that the practitioner cannot assure the court that all matters which should be disclosed by the practitioner's client have been disclosed to the court.

(6) A practitioner must, at the appropriate time in the hearing of a matter and if the court has not yet been so informed, inform the court of—

(a) any binding authority; or

(b) where there is no binding authority, any other authority decided by an Australian appellate court; or

(c) any authority on the same or materially similar legislation as that in question in the case, including any authority decided at first instance in the Federal Court or a Supreme Court, which has not been disapproved; or

(d) any applicable legislation,

of which the practitioner is aware and that the practitioner reasonably believes may be relevant to a matter before the court and adverse to the case of the practitioner's client.

(7) A practitioner need not inform the court of things referred to in subrule (6) if the opponent tells the court that—

(a) the opponent's whole case will be withdrawn; or

(b) the opponent will consent to final judgment in favour of the practitioner's client,

unless the appropriate time for the practitioner to have informed the court of those matters has already arrived or passed.

(8) A practitioner must inform the court of things referred to in subrule (6) that the practitioner becomes aware of after judgment or decision has been reserved and while the case remains pending, whether the authority or legislation came into existence before or after the judgment or decision was reserved.

(9) For the purposes of subrule (8) a practitioner may inform the court by—

(a) sending a letter to the court, copied to the opponent, that is limited to the relevant reference unless the opponent has consented beforehand to any further material in the letter; or

(b) requesting the court to relist the case for further argument on a convenient date, after first notifying the opponent of the intended request and consulting the opponent as to the convenient date for further argument.

(10) A practitioner is not required to inform the court of things referred to in subrule (6) that would have rendered admissible evidence tendered by the prosecution that the court ruled to be inadmissible without calling on the defence.

(11) A practitioner who does not disclose a fact known to the practitioner about a client's character or past has not by that omission made a misleading statement.

(12) A practitioner who knows or suspects that the prosecution is unaware of a client's previous conviction

must not ask a prosecution witness whether the client has previous convictions.

(13) A practitioner who knows or suspects that a court may be unaware of an effect of an order which the court is making must, as soon as the practitioner becomes aware that the court may be unaware of the effect of the order, inform the court.

35. Delinquent or guilty clients

(1) If a client informs a practitioner, before judgment or decision in a matter that the client has lied in a material particular to the court or has procured another person to lie to the court or has falsified or procured another person to falsify in any way a document which has been tendered, the practitioner must—

(a) advise the client that the court should be informed of the lie or falsification and request authority from the client so to inform the court; and

(b) if the client authorises the practitioner to inform the court, promptly inform the court of the lie or falsification; and

(c) if the client does not authorise the practitioner to inform the court, refuse to take any further part in the matter and not inform the court of the lie or falsification.

(2) If a client in criminal proceedings confesses guilt to a practitioner but maintains a plea of not guilty, the practitioner may cease to act for the client unless—

(a) there is insufficient time for another practitioner to be engaged by the client and for that practitioner to master the case; and

(b) the client, having been informed of the consequences, insists on the practitioner continuing to act.

(3) If, in circumstances referred to in subrule (2), a

practitioner continues to act for a client the practitioner —

(a) must not falsely suggest that another person committed the offence to which the proceedings relate; or

(b) must not lead evidence that is inconsistent with the client's confession; or

(c) may, as relevant to the circumstances, argue that—

(i) the evidence as a whole does not prove that the client is guilty of the offence charged; or

(ii) for some reason of law the client is not guilty of the offence charged;
or

(iii) for any other reason not prohibited by paragraph (a) or (b) the client should not be convicted of the offence charged.

(4) If a client informs a practitioner that the client intends to disobey a court's order the practitioner—

(a) must advise the client against that course and warn the client of its dangers; and

(b) must not advise the client how to carry out or conceal that course; and

(c) must not inform the court or the opponent of the client's intention unless—

(i) the client has authorised the practitioner to do so beforehand; or

(ii) the practitioner believes on reasonable grounds that the client's intended conduct constitutes a threat to any person's safety.

36. Responsible use of court process and privilege

(1) A practitioner must take all reasonable and practicable steps to ensure that work the practitioner does in relation to a case is done so as to—

(a) confine the case to identified issues which are genuinely in dispute; and

(b) have the case ready to be heard as soon as practicable; and

(c) present the identified issues in dispute clearly and succinctly; and

(d) limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case; and

(e) occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case.

(2) A practitioner must ensure that action by or on behalf of the practitioner to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person—

(a) is reasonably justified by the material then available to the practitioner; and

(b) is appropriate for the advancement of the client's case on its merits; and

(c) is not made principally in order to harass or embarrass the person; and

(d) is not made principally in order to gain some collateral advantage for the client or the practitioner or the instructing practitioner (if any) out of court.

(3) A practitioner must not draw or settle any court document that alleges criminality, fraud or other serious misconduct by a person unless the practitioner believes on reasonable grounds that—

(a) factual material already available to the practitioner provides a proper basis for the allegation; and

(b) the evidence by which the allegation is made will be admissible; and

(c) the practitioner's client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the client's case if it is not made out.

(4) A practitioner must not open as a fact any allegation which the practitioner does not then believe on reasonable grounds will be capable of support by available evidence.

(5) A practitioner must not cross-examine so as to suggest criminality, fraud or other serious misconduct on the part of any person unless—

(a) the practitioner believes on reasonable grounds that the material already available to the practitioner provides a proper basis for the suggestion; and

(b) in cross-examination going to credit alone, the practitioner believes on reasonable grounds that affirmative answers to the suggestion would diminish the witness's credibility.

(6) A practitioner must make all reasonably practicable enquiries before the practitioner can have reasonable grounds for holding a belief required by subrule (2), (3), (4) or (5).

(7) For the purpose of subrule (6), a practitioner may rely on the opinion of an instructing practitioner to establish reasonable grounds for holding a belief, except in the case of a closing address or submission on the evidence.

(8) A practitioner must not suggest criminality, fraud or

other serious misconduct against any person in the course of the practitioner's address on the evidence unless the practitioner believes on reasonable grounds that the evidence in the case provides a proper basis for the suggestion.

(9) A practitioner who has instructions which justify submissions for the client in mitigation of the client's criminality and which involve allegations of serious misconduct against any other person not able to answer the allegations in the case must seek to avoid disclosing the other person's identity directly or indirectly unless the practitioner believes on reasonable grounds that such disclosure is necessary for the defence of the client.

(10) In proceedings in which an allegation of sexual assault, indecent assault or the commission of an act of indecency is made and in which the alleged victim gives evidence—

(a) a practitioner must not ask that witness a question or pursue a line of questioning which tends—

(i) to mislead or confuse the witness; or

(ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive;

and

(b) a practitioner must take into account any particular vulnerability of the witness in the matter and tone of the questions that the practitioner asks.

37. Communication with opponents

(1) A practitioner must not knowingly make a false or misleading statement to an opponent in relation to a matter (including its compromise).

(2) A practitioner must take all necessary steps to correct any false or misleading statement unknowingly made by the practitioner to an opponent as soon as practicable after the practitioner becomes aware that the statement was false or misleading.

(3) A practitioner who does not correct an error in a statement made to the practitioner by an opponent has not by that omission made a misleading statement, unless by the practitioner's silence the opponent might reasonably infer that the practitioner is affirming the statement.

(4) A practitioner must not confer or deal directly with an opponent who is represented by another practitioner unless—

(a) the other practitioner has previously consented to the dealing; or

(b) the practitioner believes on reasonable grounds that —

(i) the circumstances are so urgent as to require the practitioner to do so; and

(ii) the dealing would not be unfair to the other practitioner's client;

or

(c) the substance of the dealing is solely to enquire whether the opponent is represented and, if so, by whom; or

(d) notice has been given to the other practitioner of the practitioner's intention to communicate with the opponent and the other practitioner has failed to respond to the notice within a reasonable time and there is a reasonable basis for proceeding with the communication.

(5) A practitioner must not confer or deal directly about a matter with an opponent who is not represented by a practitioner but is being indemnified by an insurance

company that is actively engaged in contesting the matter unless—

(a) if the practitioner believes on reasonable grounds that any statements made by the opponent to the practitioner may harm the opponent's interests under the insurance policy, the practitioner has clearly informed the opponent beforehand of that belief; or

(b) the practitioner—

(i) is aware that the opponent is represented by a practitioner in another matter; and

(ii) has notified the representative in the other matter of the practitioner's intention to confer or deal directly with the opponent; and

(iii) has allowed enough time for the opponent to be advised by the representative in the other matter.

(6) A practitioner must not communicate with a court in an opponent's absence concerning a matter of substance in connection with current proceedings unless—

(a) the communication is made in connection with—

(i) an ex parte application; or

(ii) a hearing of which the opponent has had proper notice;

or

(b) the communication is in response to a court requirement; or

(c) the opponent has consented to the specific communication.

(7) A practitioner must promptly tell the opponent what

passes between the practitioner and a court in a communication referred to in subrule (6).

38. Opposition access to witnesses

(1) A practitioner must not take any step to prevent or discourage a witness or a prospective witness in proceedings from—

(a) conferring with an opponent in the proceedings; or

(b) being interviewed by or on behalf of any person involved in the proceedings.

(2) A practitioner who advises a witness or prospective witness—

(a) that the witness need not agree to confer or to be interviewed; or

(b) about relevant obligations of confidentiality, has not, by providing that advice, breached subrule (1).

39. Integrity of evidence — influencing evidence

(1) A practitioner must not suggest to or advise a witness that the witness should give false evidence.

(2) A practitioner must not make a suggestion to, or condone a suggestion being made to, a prospective witness about the content of evidence which the witness should give at any stage in the proceedings.

(3) A practitioner who—

(a) advises a prospective witness to tell the truth; or

(b) questions and tests in conference the version of evidence to be given by a prospective witness; or

(c) draws the witness's attention to inconsistencies or other difficulties with the witness's evidence,

has not, by that action, breached subrule (1) or (2).

40. Integrity of evidence — 2 witnesses together

(1) A practitioner must not confer with, or condone another practitioner conferring with, 2 or more lay witnesses at

the same time about an issue if—

(a) there are reasonable grounds for the practitioner to believe that the issue may be contentious at a hearing; and

(b) one of the witnesses may be affected by, or may affect, evidence to be given by another of the witnesses,

unless the practitioner believes on reasonable grounds that special circumstances require such a conference.

(2) Subrule (1) does not apply in respect of an issue about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.

41. Communication with witness under cross-examination

A practitioner must not confer with a witness, including a party or client, called by the practitioner on any matter related to proceedings while that witness remains under cross-examination, unless—

(a) the cross-examiner has consented beforehand to the practitioner conferring with the witness; or

(b) the practitioner—

(i) believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require the practitioner to confer with the witness; and

(ii) informs the cross-examiner—

(I) if possible, before the practitioner confers with the witness; or

(II) otherwise, as soon as practicable after the practitioner has conferred with the witness.

42. Practitioner as material witness in client's case

(1) A practitioner must not act for a client in the hearing of a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence centrally material to the determination of contested issues before the court.

(2) In the circumstances provided for in subrule (1) an associate of the practitioner's law practice may act for the client if—

(a) in the practitioner's reasonable opinion there are exceptional circumstances that justify the associate acting; and

(b) the client, having been given an opportunity to obtain independent legal advice concerning the issue, consents to the associate acting.

43. Public comment

(1) Except as otherwise provided in this rule, a practitioner may—

(a) participate in any lecture, talk or public appearance; or

(b) participate in any radio, television or other transmission; or

(c) contribute to any written or printed publication.

(2) A practitioner must not publish or take steps towards the publication of any material concerning current proceedings that may prejudice a fair trial or otherwise subvert or undermine the administration of justice.

(3) A practitioner must not participate in or contribute to a forum of a type referred to in subrule (1) if the forum is, in whole or in part, about a matter in which the practitioner is or has been professionally engaged unless —

(a) participation is not contrary to the interests of the client; and

(b) the practitioner gives a fair and objective account of the matter in a manner consistent with the maintenance of the good reputation and standing of the legal profession; and
(c) if the forum is of a type referred to in subrule (1)(b), the client has given informed consent.

…

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THE ROLE OF THE JUDGE

9.19 It has been suggested for some years that there is a need for judges to be more active, not only in respect of the management of cases,[21] but also in terms of the conduct of the litigation itself — for example, by the judge intervening as to the calling of evidence and the questioning of witnesses.[22] The basis for this suggestion is that, at the end of the day, the judge must be satisfied that a just decision, as opposed to a decision based on the evidence presented by counsel, prevails.[23]

9.20 Save in exceptional circumstances, a trial judge should not call a person to give evidence.[24] In *R v Apostilides* (1984) 154 CLR 563, the High Court noted at 576:

> The circumstances which would justify [a judge calling a witness] would be rare. It is clear to us that more would be required to establish 'most exceptional circumstances' than the refusal of the prosecutor, for reasons which the judge thinks insufficient, to call a witness.

9.21 In *Huang v University of New South Wales (No 3)* [2006] FCA 626, Rares J noted at [22]–[27]:

[22] The circumstances in which a judge may call a witness of his or her own motion, absent a statutory power, have been the subject of considerable judicial discussion (see JD Heydon, *Cross on Evidence* (7th Australian ed) at [17080]–[17100]). In *Shaw v The Queen* (1952) 85 CLR 365 at 379, Dixon, McTiernan, Webb and Kitto JJ said that in *Titheradge v The King* [1917] HCA 76; (1917) 24 CLR 107 the High Court had denied that a presiding judge in a criminal trial had power to call a witness if he (or she) thought that the imperative demands of justice so required. Dawson J affirmed that view in *Whitehorn v The Queen* [1983] HCA 42; (1983) 152 CLR 657 at 684 where he said that *Shaw v The Queen* (1952) 85 CLR 365 had held that *Titheradge v The Queen* [1917] HCA 76; (1917) 24 CLR 107 was authority for the proposition that no distinction was to be drawn in Australia between criminal trials and civil actions with regard to the power of a judge to call a witness. However, Gibbs CJ and Brennan J, reserved their positions on this issue (152 CLR at 660). Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ returned to the issue in *R v Apostilides* [1984] HCA 38; (1984) 154 CLR 563 at 575 saying of the conduct of criminal trials:

> 'Save in the most exceptional circumstances, the trial judge should not himself call a person to give evidence.'

That position appears to have been reaffirmed by Gleeson CJ, Gummow, Kirby and Hayne JJ in *R v Soma* [2003] HCA 13; (2003) 212 CLR 299 at 309 [29].

[23] In *Titheradge v The King* (1917) 24 CLR 107 at 116, Barton J said that where the right of a judge to call a witness exists — and *R v Apostilides* (1984) 154 CLR 563 at 575 [5] accepts that it does in the conduct of a criminal trial — it must be exercised with extreme caution. He continued (24 CLR at 116):

> 'In a civil case there must either be the consent of the parties or an acquiescence on their part from which the strong inference is consent.'
>
> …
>
> Our system of justice involves, fundamentally, an adversarial process in which the court acts as an independent umpire, applying the law to its view of the facts elicited in evidence chosen and adduced by the parties, not the court. Of course, there may be exceptions in civil proceedings, such as the jurisdiction of courts involving the welfare of a child, where the ascertainment of the child's best interests may not be able to be left solely to adversarial contest, because in that situation each party's interests are potentially different to, or distinct from, that of the child the subject of the parties' forensic battle.
>
> [27] So, it is vital to guard against an absolute prohibition of a judge's power of calling witnesses because some circumstances in which courts exercise jurisdiction are not wholly adversarial. But the power, according to the authorities to which I have referred, exists to prevent, not occasion, a miscarriage of justice which the judge perceives would otherwise occur. Before forming such a view, over the opposition of the parties and, where appropriate, their legal representatives, a trial judge would obviously need to consider whether the conscious choice of the parties not to call the witness properly can be overborne by the court while preserving the appearance and actuality of judicial impartiality. For a judge to use his or her power to override the choice of the parties as to what evidence they will adduce in order that the judge may decide their dispute is a drastic step which must only be available even in civil proceedings '… in the most exceptional circumstances' (*R v Apostilides* (1984) 154 CLR at 575 [5]). The exercise of such a power removes the court from its usual and necessary position outside, and places it within, the forensic arena (cp: *Yuill v Yuill* [1945] P 15 at 20).

9.22 In *Galea v Galea* (1990) 19 NSWLR 263, in assessing a complaint of excessive judicial questioning of a witness, Kirby A-CJ

(with whom Meagher JA agreed) set out the following guidelines at 281:

1. The test to be applied is whether the excessive judicial questioning or pejorative comments have created a real danger that the trial was unfair. If so, the judgment must be set aside: see *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146 (NZCA).
2. A distinction is drawn between the limits of questioning or comments by a judge when sitting with a jury and when sitting alone in a civil trial. Although there is no relevant distinction, in principle, between the judicial obligation to ensure a fair trial whatever the constitution of the court, greater latitude in questioning and comment will be accepted where a judge is sitting alone. This is because it is conventionally inferred that a trained judicial officer, who has to find the facts himself or herself, will be more readily able to correct and allow for preliminary opinions formed before

the final decision is reached: see *R v Matthews* (1983) 78 Cr App R 23; *E H Cochrane Ltd v Ministry of Transport*.

3. Where a complaint is made of excessive questioning or inappropriate comment, the appellate court must consider whether such interventions indicate that a fair trial has been denied to a litigant because the judge has closed his or her mind to further persuasion, moved into counsel's shoes and 'into the perils of self-persuasion': see Sir Robert Megarry, 'Temptations of the Bench' (1978) 16 *Alta L Rev* 406 at 409; see also U Gautier, 'Judicial Discretion to Intervene in the Course of the Trial' (1980) 23 *Crim LQ* 88 at 95–96 and cases there cited.
4. The decision on whether the point of unfairness has been

reached must be made in the context of the whole trial and in the light of the number, length, terms and circumstances of the interventions. It is important to draw a distinction between intervention which suggests that an opinion has been finally reached which could not be altered by further evidence or argument and one which is provisional, put forward to test the evidence and to invite further persuasion: see *In the Marriage of Lonard* (1976) 26 FLR 1 at 10–11; 11 ALR 618 at 626 (FFC); see discussion [1976] ACLD DT 630; cf *Ex parte Prentice; Re Hornby* (1969) 90 WN (Pt 1) (NSW) 427; [1970] 1 NSWR 654.

5. It is also relevant to consider the point at which the judicial interventions complained of occur. A vigorous interruption early in the trial or in the examination of a witness may be less readily excused than one at a later stage where it is designed for the legitimate object referred to in *Jones*, namely of permitting the judge to better comprehend the issues and to weigh the evidence of the witness concerned. By the same token, the judge does not know what is in counsel's brief and the strength of cross-examination may be destroyed if a judge, in a desire to get to what seems crucial, at any stage prematurely intervenes by putting questions: see *Yuill* (at 185) and Gautier (at 117).

6. The general rules for conduct of a trial and the general expression of the respective functions of judge and advocate do not change. But there is no unchanging formulation of them. Thus, even since *Jones* and *Tousek*, at least in Australia, in this jurisdiction and in civil trials, it has become more common for judges to take an active part in the conduct of cases than was hitherto conventional. In part, this change is a response to the growth of litigation and the greater pressure of court lists. In part, it reflects an increase in specialisation of the judiciary and in the legal profession. In part, it arises from a growing appreciation that a silent judge may sometimes occasion an injustice by failing to reveal opinions which the party affected then has no opportunity to correct or modify. In part, it is simply a reflection of the heightened willingness of judges to take greater control of

> proceedings for the avoidance of injustices that can sometimes occur from undue delay or unnecessary prolongation of trials deriving in part from new and different arrangements for legal aid. The conduct of criminal trials, particularly with a jury, remains subject to different and more stringent requirements: see *Whitehorn v The Queen* [1983] HCA 42; (1983) 152 CLR 657 discussed in *R v R* (1989) 18 NSWLR 74 at 84F per Gleeson CJ.

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9.23 In *R v L, GA* [2015] SASCFC 166 (18 November 2015), Sulan, Peek, and Lovell JJ, in a joint judgment, noted in relation to numerous interventions by the judge at [115]–[117]:

> [115] The Judge's interventions were numerous and were such that the Judge had dropped the mantle of a Judge and assumed the role of an advocate. The questioning by the Judge went beyond clearing up ambiguities or assisting the jury to better understand the evidence. On occasions, the Judge's questions suggested incredulity on his part. On other occasions, he took over the role of the prosecutor, both in examination-in-chief of the prosecution witnesses and in cross-examination of the appellant. On other occasions, his questioning interfered with the examination by the appellant's counsel of the appellant, and interfered unduly when counsel was cross-examining the prosecution's witnesses.
>
> [116] This is an unfortunate case where, no matter how strong one might consider the Crown case to have been, the entering by the Judge into the arena of counsel was so numerous and so extensive that it cannot be said that the trial was a fair trial.
>
> [117] We would allow the appeal, set aside the convictions and order a retrial.

9.24 *R v Capaldo* [2015] SASCFC 56 (28 April 2015) is a further

example of the need to maintain the strict demarcation of roles as between judge and prosecutor. In that case, Gray, Sulan, and Kelly JJ noted at [35]:

> Our review of the transcript reveals many instances of lengthy periods of cross-examination [by the judge] of the defendant. The questioning was incisive and represented a direct attack on the credibility of the defendant. We consider that the submission that the Judge had entered into the arena and taken on the role of the prosecutor was fully justified. We consider that, through this process, the Judge demonstrated pre-judgment which then became manifest in the sentencing remarks. In our view, an appearance of bias arose. In these circumstances, we conclude that the discretion as to whether to suspend the sentence has miscarried. In our view, this Court should allow the appeal and determine for itself whether the sentence of imprisonment should be wholly suspended.

9.25 In *Denney v Lusted* [2015] TASSC 10 (23 March 2015), Pearce J noted at [15] in relation to criminal trials:

> In *R v Esposito* (1998) 45 NSWLR 442; 105 A Crim R 27 at 56 it was said that the task of destroying the credit of a defence witness should always be left by the judge to the prosecutor. The care that is required of a judge conducting a criminal trial involving a jury is explained by Wood CJ at CL in *Esposito* at 56–7:
>
> > 'The line that a trial judge walks when asking questions of a witness is a narrow one. There is nothing wrong with questions designed to clear up answers that may be equivocal or uncertain, or, within reason, to identify matters that may be of concern to himself. However, once the judge resorts to extensive questioning, particularly of the kind that amounts to cross-examination in a criminal trial before a jury, then he is treading on thin ice. The thinness of that ice will depend upon the identity of the witness being examined (here the person on trial), and on whether the questions

> appear to be directed towards elucidating an area of evidence that has been

> overlooked or left in an uncertain or equivocal state, or directed towards establishing a point that is favourable or adverse to the interests of one or other of the parties.'

9.26 In *R v Baltensperger* [2006] SASC 246 (18 August 2006), Bleby J noted at [60]–[62]:

> The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes behind this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.

9.27 In *Lockwood & Lockwood v Police* [2010] SASC 120 (29 April 2010), Vanstone J outlined the role of a judge or magistrate in terms of the questioning of witnesses as follows at [15]–[16]:

> [15] The overriding obligation on a judge or magistrate hearing a trial is to ensure that it is a fair one. Under our adversary system the primary task of eliciting evidence is that of counsel. In an ideal world there would be no need for the judge or magistrate to intervene in that process at all, because all relevant topics would be covered with optimum efficiency, any lack of clarity in a witness's answers would be elucidated and cross-examination would comprehensively demonstrate any inherent contradictions, weaknesses and deficiencies

in the witness's story. However, there are many reasons why that does not always, perhaps not even usually, occur. There are many reasons why it will sometimes be necessary for a judge or magistrate to question a witness. Often, it will be necessary to remove ambiguity. Sometimes it will be necessary to assist a witness — perhaps a young witness or one suffering from a disability — to express his or her evidence (for example, *R v Arthur* (1991) 163 LSJS 18 (CCA)). At other times it may be apparent that counsel had overlooked the interaction of evidence given by one witness with that of another, such as to leave uncertainty. Sometimes it will be to invite the witness's attention to a difficulty or improbability perceived in their story, so that the witness has opportunity to understand and defuse the issue. The circumstances in which judicial intervention might be called for, or appropriate, cannot be circumscribed.

[16] However, there are dangers inherent in participating in the questioning of witnesses. First, there are matters of perception. The judicial officer might, by such questioning, identify himself or herself with one party or the other. That might lead to a defendant or a party apprehending a discrimination or even bias against his case. Then there is the fact of it. The eyes of the judicial officer might become 'clouded with the dust of conflict': as Lord Greene MR put it in *Yuill v Yuill* [1945] P 15 at 20; [1945] 1 All ER 183. Denning LJ observed in *Jones v National Coal Board* [1957] 2 QB 55 at 64: '… an over-speaking judge is no well-tuned cymbal'. Then, the intervention may make it impossible for defence counsel to properly present the defence, or it might impede a witness in giving his account in such a way as to do himself justice. Therefore, it is as well for judicial officers to strive to ensure that by the tone and language of their interventions they maintain neutrality and that such interventions are no more than are necessary to achieve legitimate purposes.

9.28 In *Ellis v R* [2015] NSWCCA 262 (25 September 2015), Bathurst CJ, R A Hulme J, and Garling J adopted the view of Kirby A-CJ in the case of *Galea v Galea* (1990) 19 NSWLR 263, namely:

> The test to be applied is whether the excessive judicial questioning or pejorative comments have created a real danger that the trial was unfair. If so, the judgment must be set aside.

9.29 The court also referred to the comments made by Barwick CJ in *Ratten v R* (1974) 131 CLR 510 (25 September 1974) at 517:

> It is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law. Upon the evidence and under the judge's directions, the jury is to decide whether the accused is guilty or not.

9.30 A barrister is reported to have once said to a judge: 'My Lord, my job is to talk and yours is to listen. Let us each get on with our respective work.' Discuss this in light of the differences between the adversary system and the inquisitorial system.

9.31 A further issue that arises in relation to the role of the judge is the extent to which it is proper for a judge, in a criminal matter, to be guided by the views of the prosecution when it comes to sentencing. The matter was discussed in *Browning v R* [2015] NSWCCA 147 (17 June 2015), where Garling J noted at [144]–[147] (Gleeson JA and Johnson J agreeing):

> [144] In *Barbaro v The Queen*; *Zirilli v The Queen* (2014) 88 ALJR 372, the High Court held that the Victorian practice of counsel for the prosecution providing a submission about the bounds of the available

range of sentences in any particular matter, was wrong in principle. The practice referred to, involved counsel for the prosecution specifying in numerical terms, a range for a head sentence, and in some cases, a range for a non-parole period also in numerical terms.

[145] In the judgment of the majority (French CJ, Hayne, Kiefel and Bell JJ), the dangers in such a practice were identified. At [33], their Honours said:

> 'The statement by the prosecution of the bounds of an available range of sentences may lead to erroneous views about its importance in the process of sentencing with consequential blurring of what should be a sharp distinction between the role of the judge and the role of the prosecution in that process. If a judge sentences within the range which has been suggested by the prosecution, the statement of that range may well be seen as suggesting that the sentencing judge has been swayed by the prosecution's view of what punishment should be imposed. By contrast, if the sentencing judge fixes a sentence outside the suggested range, an appeal against sentences seems well-nigh inevitable.'

[146] However, the judgment of the High Court in *Barbaro* is not authority for the proposition that the obligation of a prosecutor to render assistance to the Court has been

entirely removed. The contrary is the case. In *CMB v Attorney General for New South Wales* [2015] HCA 9; (2015) 89 ALJR 407, French CJ and Gaegeler J, said at [38]:

> 'The Crown (by whomever it is represented) has a duty to assist a sentencing court to avoid appealable error. That

> duty would be hollow were it not to remain rare that an "appellate court" would intervene on an appeal against sentence to correct an alleged error by increasing the sentence if the Crown had not done what was reasonably required to assist the sentencing Judge to avoid error': *R v Tait* (1979) 24 ALR 473 at 477.

[147] The plurality (Kiefel, Bell and Keane JJ) were of a like view. At [64], their Honours said:

> 'The determination of the appropriate sentence is one that rests solely with the Court. The public interest in the sentencing of offenders, does not permit the parties to bind the Court by their agreement. Nonetheless, the prosecutor is under a duty to assist the Court to avoid appealable error. Where the sentencing Judge indicates the form of proposed sentencing order and the prosecutor considers that such a penalty would be manifestly inadequate, the prosecutor discharges his or her duty to the Court by so submitting. The failure to do so is a material consideration in the exercise by the Court of Criminal Appeal of the residual discretion. The weight of that consideration will depend upon all of the circumstances. A prosecution concession that a noncustodial sentence is an available disposition is a powerful consideration weighing against intervening to impose a sentence of imprisonment on appeal.' (footnotes omitted)

9.32 The emphasis must always be on the fact that it is for the court to determine the appropriate sentence. The role of the prosecution and the role of the judge in the sentencing process is not the same. The proffering by the prosecution of a range of possible sentences, in the absence of providing the court with the relevant facts and sentencing principles, exposes any sentence imposed to possible appeal.[25]

9.33 In *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 (9 December 2015), Keane J noted at [96]–[98]:

> [96] In *Barbaro*, the plurality made the point that an opinion proffered by the prosecutor, an officer of the executive government, as to the proper sentence, is an unwarranted intrusion upon the performance of an exclusively judicial task. Their Honours said: 'It is neither the role nor the duty of the prosecution to proffer some statement of the specific result which counsel then appearing for the prosecution … considers should be reached or a statement of the bounds within which that result should fall.'
>
> [97] Their Honours also said of the assumption that the prosecution's proffering of a statement of the bounds of the available range of sentences will assist a sentencing judge to come to a just sentence: 'That assumption depends upon the prosecution determining the supposed range dispassionately. It depends upon the prosecution acting not only fairly

> (as it must) but in the role which Buchanan JA rightly described [in *R v MacNeil-Brown* (2008) 20 VR 677] as that of "a surrogate judge". That is not the role of the prosecution.'
>
> [98] The plurality emphasised the importance of the strict separation of the functions of the executive and judicial organs of government in relation to the integrity of the sentencing process because:
>
> > '[T]he prosecution forms a view which (properly) reflects the interests that the prosecution is bound to advance. But that view is not, and cannot be, dispassionate.'

UNREPRESENTED PARTIES

9.34 In relation to civil matters,[26] the Report of the Australian Law Reform Commission No 89, titled *Managing Justice: A Review of the Federal Civil Justice System*,[27] noted the difficulties faced by a court when one or both parties were unrepresented:

> [5.148] The Commission's survey of unrepresented litigants in the Family Court and AAT revealed the variety of unrepresented litigants, their differing understandings of the process and reasons for lack of representation. Many of those who were unrepresented wanted or needed some advice and assistance, as the following selection of typical comments indicate:
>
> > 'Before me and my wife separate we have many difficulty and we try to work out and find out what was the wrong. Unfortunately, did not work that way. Finally we separate of course. I did not have any idea about all the law system … then she moved … [A few times] she came to me and ask for sign of few paper. I did so. Few weeks later I received some paper from Family Court. I didn't understand all that and I didn't know what is going on? … I don't know what to do how to do? So hopefully you will understand that in this case I didn't have any lawyer or solicitor or didn't go to Court. …'
> >
> > 'People don't realise they will get virtually no assistance from the Court with solving their problem. Information sessions cannot solve this: people need advice that is addressed to their specific situation.'
> >
> > 'I found it very difficult in even finding out which forms to obtain, which direction to follow and what was expected from me. This was from counter staff or duty solicitor. When conducting my own case, the judge was not the slight [sic] bit interested in my situation.'

> 'Very hard for a person with no legal background to help themselves, feels like us against them.'
>
> 'I did my own representation I had no choice. The DSS had a lawyer. I felt intimidated by the DSS lawyer.'
>
> 'I was ill-prepared as I did not understand what was required. Some representation or assistance on case preparation would have helped.'

[5.149] Other unrepresented litigants felt adequately assisted by the court or tribunal, were confident and satisfied with the case outcome they secured for themselves, and/or felt that a better outcome had been achieved without lawyer assistance.

> 'I was given all help required and was made to feel confident on presenting my own case. This was my first experience at anything of this type. I was not confident until I became involved with dealing with the AAT staff and received their help, advice and informative material. … Even a video of a typical AAT hearing was made available to me.'
>
> 'I was assisted in every way with positive advice, co-operation, vital facts regarding my case and this made me aware of the situation at hand. Through the AAT assistance I was able to confidently appear at two hearings for the first time.' …

[5.152] … When only one party is unrepresented, a primary difficulty can be maintaining the perception of impartiality. Judges need to ensure that all relevant evidence is heard, relevant questions asked of witnesses, and that the unrepresented party knows and enforces their procedural rights. The represented party may see such judicial intervention as partisan, and judges must ensure they do not apply different rules to unrepresented parties. Where both parties are

unrepresented, the parties may be difficult to control, the case disorganised and wrongly construed, there may be party quarrels over irrelevant points, or even harassment or violence.

9.35 In *Batey-Elton v Elton* (2010) 43 Fam LR 62, May, Boland, and Strickland JJ considered the difficulties faced by an unrepresented litigant in a family law matter, the assistance available to unrepresented parties, and the role of lay advocates, stating at [72]–[86]:

> [72] [The difficulties faced by an unrepresented litigant] include matters such as unexpected language difficulties and emergencies. An example of the latter was the absence of legal aid in a criminal appeal (*Schagen* (at 411–412)). Also, in that case, the appellant was deaf and virtually incomprehensible to the court reporters. The court permitted two law students to address the court: see also *Re G J Mannix* (at 314, 316, 317); *Scotts Head* (at 4); *Abse* (at 549); *Galladin* (at 147–8); and *Stergiou* (at 247).
>
> …
>
> [81] There are indications in some of the cases that Local Courts, given their jurisdiction and large numbers of unrepresented litigants, may be more likely to grant leave to unqualified persons. This is, one assumes, in straightforward uncomplicated matters where the party is under some disability in presenting his/her own case. This may also be the case with some specialist jurisdictions and tribunals.

> [82] The authorities however suggest that higher courts should be very chary at giving leave. See *Re G J Mannix* (at 314); *Hubbard* (at 343), *Bay Marine* (at 111); *Scotts Head* (at 3–4); and *D v S* (see *Paragon* (at 2369)).
>
> [83] What runs through all of the authorities as the guiding principle

in the exercise of the discretion is the public interest in the attainment of the ends of justice. The public has an interest in the effective, efficient and expeditious disposal of litigation in the courts. As a general rule this can best be achieved by parties employing qualified lawyers.

[84] The reason for this was explained by Gleeson CJ in a speech given to the Supreme Court of Japan in January 2000 (Current Issues for the Australian Judiciary). The Chief Justice said that: 'The adversary system assumes, in the interests of both justice and efficiency, that cases will be presented to courts by skilled professionals. To the extent to which that assumption breaks down, so does the system'.

[85] Representation by legal practitioners will not always be possible because of the high cost of legal services and restrictions on legal aid. There is therefore room for the discretion to be exercised in an appropriate case, as indeed the authorities make plain and in circumstances where the achievement of justice cannot be otherwise secured.

[86] Nonetheless, the foundation for the general principle and limited room for the discretion to be exercised is, as Mahoney AP said in *Scotts Head*, the proper administration of justice and the protection of the parties. It is not a rule devised to protect a lawyer's privilege or monopoly. Access to justice is a difficult issue in an ever more complex society with constraints on public resources. It will therefore be understandable and appropriate that judges will from time to time be prepared to grant leave to an unqualified person. Advocacy before courts is however a difficult skill to acquire without formal qualifications, training and practice.

9.36 In *Dietrich v R* (1992) 177 CLR 292; 109 ALR 385, the High Court considered the situation where an accused in a serious criminal matter was not represented by counsel. The case identified the approach which should be adopted by a trial judge faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence, who, through no fault on their part,

is unable to obtain legal representation. In these circumstances, which involved an indictable matter, the judge should have considered adjourning the matter so that additional attempts could be made to obtain legal representation. The exchange between the accused and the judge highlights the competing interests in this matter. Mason CJ and McHugh J noted at [9]–[41]:

> [9] The primary argument of the applicant relies in part on the explications of the right to a fair trial in the instruments to which we have referred. The argument is that, at least in any indictable matter to be tried before a judge with or without a jury that may result in imprisonment upon conviction, the interests of justice require that an indigent accused who wishes to have legal representation be provided with such representation at public expense. The central proposition in this submission is that the absence of representation for an accused who cannot afford to engage counsel necessarily means that the trial is unfair and that any conviction should be quashed. In the course of argument, counsel for the applicant proposed a less absolute form of this proposition. He submitted that, as an incident of a

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> court's duty to ensure that an accused receives a fair trial, a trial judge has a discretion to stay or adjourn the trial of an unrepresented accused and that, in the absence of exceptional circumstances, this discretion should be exercised in favour of the accused. This contention was proposed in the context of an alternative submission that the trial judge erred in refusing the applicant's application for an adjournment of his trial for the purpose of trying to secure representation.
>
> …
>
> [30] [It] should be accepted that Australian law does not recognize

that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial. Such a finding is, however, inextricably linked to the facts of the case and the background of the accused.

[31] A trial judge faced with an application for an adjournment or a stay by an unrepresented accused is therefore not bound to accede to the application in order that representation can be secured; a fortiori, the judge is not required to appoint counsel. The decision whether to grant an adjournment or a stay is to be made in the exercise of the trial judge's discretion, by asking whether the trial is likely to be unfair if the accused is forced on unrepresented. For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only. In all other cases of serious crimes, the remedy of an adjournment should be granted in order that representation can be obtained. While, in some jurisdictions, judges once had the power to direct the appointment of counsel for indigent accused (eg, Poor Persons Legal Assistance Act 1925 (SA), s 3), this power has been largely overtaken by the development of comprehensive legal aid schemes in all States and, as such, trial judges now cannot be asked to appoint counsel in order that a trial can proceed (apart, of course, from the related procedure under the Judiciary Act, s 69(3)). However, even in those cases where the accused has been refused legal assistance and has unsuccessfully exercised his or her rights to review of that refusal, it is possible, perhaps probable, that the decision of a Legal Aid Commission would be reconsidered if a trial judge ordered that the trial be adjourned or stayed pending representation being found for the accused. In the absence of more extensive factual, statistical and economic material than was furnished by the parties, it is difficult for this Court to assess the full practical implications which will flow from the procedure of adjourning a criminal trial, on such occasions as may be necessary, to

enable an unrepresented indigent person accused of a serious offence to be represented by counsel at public expense.

…

Did the applicant's trial miscarry?

[33] The alternative argument of the applicant was that the trial judge erred in the exercise of his discretion in refusing an application by the applicant for an adjournment. This argument was not developed fully in submissions, principally because the applicant's case

was founded upon the existence of the alleged absolute right. However, it is clear that the issue is before the Court in the alternative form.

[34] In approaching this argument, the question before this Court is not merely whether or not an adjournment should have been granted but whether the applicant's conviction should be set aside 'on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice', provided that the conviction will stand if 'no substantial miscarriage of justice has actually occurred' (Crimes Act, s 568(1); *McInnis* [*v R*] (1979) 143 CLR, per Mason J at pp 581–582). …

[35] The Crown case against the applicant was as follows. On the night of 17 December 1986, the applicant arrived at Melbourne Airport from Bangkok and imported into Australia a quantity of heroin which was packaged in condoms concealed in his body. Members of the Australian Federal Police followed the applicant from the airport to his flat in Hotham Street, East St Kilda. The next morning, the applicant drove from his flat and was arrested some distance away by police. The police returned the accused to his flat and, pursuant to a lawful warrant, conducted a search. Under a rug in

the study they found a quantity of heroin in a plastic bag, which became the subject of count four on the indictment, and in a kitchen bin they found a condom containing 3.7 grams of heroin, which became the subject of count one. The applicant was then charged and transferred to an isolation ward in the hospital at Her Majesty's Prison, Pentridge. He remained in that ward until the following morning when condoms containing 66.4 grams of heroin, which the applicant had allegedly passed during the night, were discovered in the ward. This heroin also became the subject of count one.

[36] The Crown relied on evidence of Australian Federal Police officers involved in the surveillance, arrest and search procedures, as well as evidence of prison officers, hospital staff and police officers present while the applicant was in hospital. The applicant denied the importation and alleged that the heroin discovered in his flat and in the hospital ward was placed there by police officers or other unnamed persons.

[37] As stated earlier, the applicant was unrepresented at all stages of his lengthy trial. It is difficult to gain an accurate impression of the course of the trial from the mere 150 pages, culled from a transcript exceeding 3,000 pages, that have been placed before this Court, but certain important features emerge. The applicant did not wish to go to trial unrepresented. Failing appointment of counsel by the trial judge, who had no power to make such an appointment, the applicant sought leave to be assisted by what is called a 'McKenzie friend' after the procedure confirmed in *McKenzie v McKenzie* ((1971) P 33). That application was refused. There was also a serious question prior to trial as to the applicant's fitness to plead. On several occasions, the applicant appeared to be emotionally and psychologically overwhelmed, whether genuinely or not, by the prospect of proceeding to trial unrepresented. A clinical psychologist called by the applicant testified that the applicant was an excitable, volatile person who would have great difficulty withstanding the rigours of a trial, although it appears that the opinion of a psychiatrist, who did not give evidence, was that the applicant was fit to plead. From the material before this Court, it appears that the undue length of the trial may well

have been occasioned by the applicant's irregular outbursts of volatile behaviour.

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[38] In this context, and before the trial proper commenced, the applicant made an informal application for an adjournment. As the following exchange shows, this was peremptorily refused:

> *His Honour*: I want you to understand this Mr Dietrich — if you will listen to me — that I have no power to give you legal representation.
>
> *Accused*: You have the power to adjourn the matter, sir.
>
> *His Honour*: I don't propose to adjourn the matter. The matter is an alleged offence, which occurred the year before last, and it is desirable that the matter proceed to trial.
>
> *Accused*: Desire by whose side?
>
> *His Honour*: Desirable to the community.
>
> *Accused*: The community has got no interest in it. If the community is aware that they're putting people in front of court without representation, the community would be aghast.
>
> *His Honour*: Yes. Well I don't propose to engage in this type of matter; this debate can get us nowhere.

On numerous occasions, the trial judge reiterated his lack of power to appoint counsel to represent the applicant, but on no other occasion did he appear to give any consideration to exercising his discretion to adjourn the matter on the ground that there was a real likelihood that the applicant would not receive a fair trial. In fact, the trial judge did not seem to be aware of the discretionary power he enjoyed; rather

than just failing to take into account some material consideration or giving undue weight to one or another factor, his Honour virtually overlooked the possibility of adjourning the matter on the basis suggested. The trial judge erred in this respect.

[39] In our view, the trial judge's failure to adjourn the trial resulted in an unfair trial and deprived the applicant of a real chance of acquittal. Central to this conclusion is the not guilty verdict returned by the jury on count four. The evidence against the applicant appears strong on all counts but, in circumstances where the jury found him not guilty on one count, how can this Court conclude that, even with the benefit of counsel, the applicant did not have any prospect of acquittal on count one, of which he was then deprived by being forced to trial unrepresented (cf *McInnis* (1979) 143 CLR, per Mason J at p 583)? It is impossible to know the basis on which the jury found for the applicant on count four; the possibility exists that the jury found credible the alternative explanation of events given by the applicant which involved allegations of impropriety by the police. Judging by the question asked of the trial judge by the jury foreman during deliberations, the jury may also have doubted whether the first count could be made out against the applicant in relation to the heroin found in the hospital ward. If such doubts were present in the jury's mind, how can it be said that competent counsel appearing on behalf of the applicant may not have found further weaknesses in the prosecution case? On the material before this Court, it appears that the applicant's defence was so disorganized and haphazard as to lack cogency. In these circumstances, the conclusion that the applicant may have lost a real chance of acquittal is compelling.

[40] In view of the differences in the reasoning of the members of the Court constituting the majority in the present case, it is desirable that, at the risk of some repetition, we identify what the majority considers

> to be the approach which should be adopted by a trial judge who is faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault on his or her part, is unable to obtain legal representation. In that situation, in the absence of exceptional circumstances, the trial in such a case should be adjourned, postponed or stayed until legal representation is available. If, in those circumstances, an application that the trial be delayed is refused and, by reason of the lack of representation of the accused, the resulting trial is not a fair one, any conviction of the accused must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial.
>
> [41] In the result, we would grant special leave to appeal, allow the appeal, set aside the conviction and order a new trial.

Deane, Toohey, and Gaudron JJ also allowed the appeal.

9.37 It is clear from the authorities that the role of the judge where a party is unrepresented (be it a criminal or civil matter) is a delicate question of balance. Whatever the circumstances, the judge must ensure that the proceedings are conducted fairly, with each party being able to present their submissions and evidence to the extent that such evidence complies with the various rules of evidence and procedure.

9.38 In respect of criminal matters, where the liberty of the subject is at stake, the issue of an unrepresented accused is particularly acute. As Gray J noted in *Friedrichs v Police* [2007] SASC 6 (19 January 2007) at [23]–[25]:

> [23] The duty of the trial judge is not to advise the unrepresented defendant how to conduct the defence case but to ensure that the defendant is fully aware of the legal position in relation to the procedural and substantive aspects of the case, thereby putting the defendant in a position in which he or she can make effective choices. This necessity arises from the judge's duty to ensure that the trial is

fair.

…

[25] Similarly, in *Moore-McQuillan* [*v Police*] (1998) 196 LSJS 488, Bleby J observed:

> '[A] Magistrate, despite busy lists and the need for expedition, must ensure that a self-represented litigant [that is a litigant who is unrepresented] is not denied a fair hearing through ignorance of the basic procedures of the court and of the rules with which he must comply in presenting his case. It is not for a magistrate to advise a litigant on the law or his rights. However, he or she must ensure that a self-represented litigant at least understands that there are rules under which parties must proceed, and ensure that he or she is not deprived of a fair hearing by virtue of a failure to bring to that party's attention some of the more obvious rules which are second nature to legal practitioners and those who regularly appear in the courts. The court does have an obligation to protect a litigant in person from any apparent procedural disadvantages that such a party may suffer simply through ignorance of particular procedural rules.'

9.39 The position where a party is unrepresented (or self-represented) in a civil matter, was summarised by Derham AsJ in *Owerhall v Bolton & Swan Pty Ltd* [2016] VSC 91 (11 March 2016) as follows at [8]:

> [8] The plaintiff is a self-represented litigant. A judge has a duty in relation to represented and unrepresented litigants alike to ensure that the hearing or trial is conducted fairly and in accordance with law. It

> is a frequent consequence of self-representation that the Court must assume the burden of endeavoring to ascertain the rights of parties which are obfuscated by their own advocacy. What a judge must do to assist a litigant in person depends on the litigant, the nature of the case, and the litigant's intelligence and understanding of the case. The judge cannot be the advocate of the self-represented litigant, for the role of the judge is fundamentally different to that of an advocate. The judge must maintain the reality and appearance of judicial neutrality at all times and to all parties. The assistance must be proportionate in the circumstances — it must ensure a fair trial and not afford an advantage to the self-represented litigant.[28] [footnotes omitted]

9.40 Although the focus of the case-law is on unrepresented litigants, the requirements for a fair trial apply whether a litigant is represented or unrepresented. The overall duty of the judge is to ensure that the trial or hearing is fair, and the judge must maintain the reality and appearance of judicial neutrality at all times and to all parties. In *Guissine v Silver Top Taxi Service Pty Ltd* [2016] VSC 225 (13 May 2016), Derham AsJ noted at [17] that '[a] judge has a duty in relation to represented and unrepresented litigants alike to ensure that the hearing or trial is conducted fairly and in accordance with law'.

9.41 What are the policy implications of having litigants appearing in person? Comment in relation to the quality of decision making, costs, delays, and court efficiency. Do or should courts expect 'far less' from litigants appearing in person? What special responsibilities should the judge and the representatives of opposing parties have to assist a litigant in person? To what extent (if at all) should non-lawyers (including law students) be permitted to represent clients (*pro bono*) in civil and criminal proceedings? How should we deal with the fact that the funds available for legal aid are insufficient to deal with all litigious matters? Should Australian law recognise a Constitutional right to counsel at public

expense in the case of a person charged with a serious criminal offence? Should legal aid be available equally for civil as well as criminal matters? To what extent do you think a party is disadvantaged by not having legal representation, and to what extent should the judge assist such a person?

9.42 *Dietrich v R* (1992) 177 CLR 292; 109 ALR 385 is an example of how the adversarial system can break down where there is an imbalance of expertise or the lack of representation during a criminal trial. Discuss some of the consequences where there is such an imbalance of

expertise — for example where one party is represented by a first-year solicitor and the other party by senior counsel? Is this a problem we need to address?

THE ROLE OF THE ADVOCATE

9.43 The fearless approach of counsel when representing the interests of their client was described by Lord Brougham[29] (when acting as counsel for Queen Caroline) as follows:

> An advocate in the discharge of his duty knows but one person in all the world and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

9.44 However, this duty to the client is subject to the advocate's overriding duty (be they a solicitor or a barrister) to the court, and requires fairness, honesty, and candour.[30] Mason CJ[31] (as he then was) noted:

> An important element in the relationship between the court and the barrister is the special duty which the barrister owes to the court over and above the duty which the barrister owes to the client. The performance of the duty contributes to the efficient disposition of litigation. In the performance of that duty the independence of the barrister, allied to his familiarity with the judicial process, gives him a particular advantage. In balancing his duty to the court and that owed to the client, the barrister is free from the allegiances and interest and the closer and continuing association which the solicitor has with the client.

9.45 The role of counsel in the administration of justice under the adversarial system was a matter for consideration by the Australian High Court in *Giannarelli v Wraith* (1988) 165 CLR 543 (13 October 1988). In that case, the appellants were convicted of perjury under s 314 of the Crimes Act 1958 (Vic) as a result of evidence they gave to a Commonwealth and Victorian Royal Commission. Their convictions were quashed on appeal to the High Court on the ground that s 6DD of the Royal Commissions Act 1902 (Cth)[32] rendered the evidence given by

the applicants inadmissible on the perjury charges. The appellants then instituted proceedings against their barristers and their instructing solicitor for damages, alleging negligence in failing to advise them that s 6DD would render their evidence to the Royal

Commission inadmissible, and their barristers' alleged failure to object to the tender of that evidence. Before the High Court decided this case, it was unclear whether the immunity of barristers from an action in negligence had been removed by Statute.[33]

9.46 The views of Mason CJ and Brennan J are set out below. Mason CJ, Wilson, Brennan, and Dawson JJ formed the majority dismissing the appeal, with Deane, Toohey, and Gaudron JJ dissenting.[34] The case makes it clear that the duty of counsel to the court is to be placed above the duty of counsel to the client.[35]

9.47 Mason CJ stated at 556–8:

> The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case. And, if he notes an irregularity in the conduct of a criminal trial, he must take the point so that it can be remedied, instead of keeping the point up his sleeve and using it as a ground for appeal.
>
> It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent

judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case. In such an adversarial system the mode of presentation of each party's case rests with counsel. The judge is in no position to rule in advance on what witnesses will be called, what evidence should be led, what questions should be asked in cross-examination. Decisions on matters such as these, which necessarily influence the course of a trial and its duration, are made by counsel, not by the judge. This is why our system of justice as administered by the courts has proceeded on the footing that, in general, the litigant will be represented by a lawyer who, not being a mere agent for the litigant, exercises an independent judgment in the interests of the court. …

… The advocate is as essential a participant in our system of justice as are the judge, the jury and the witness and his freedom of judgment must be protected. The need for that protection arises from 'the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty', to repeat the words of Fry LJ in *Munster* [*v Lamb* (1883) 11 QBD 588].

9.48 Brennan J stated at 578–9:

The purpose of court proceedings is to do justice according to law. That is the foundation of a civilized society. According to our mode of administering justice, parties with inconsistent interests are cast in the role of adversaries and the court or judge is appointed to be an impartial arbiter between them. Counsel (whether barrister or solicitor) may appear to represent the adversaries, but counsel's duty is to assist the court in the doing of justice according to law. A client — and perhaps the public — may sometimes think that the primary duty of counsel in adversary proceedings is to secure judgment in

> favour of the client. Not so. … By a paradox which is obvious to any who have experience in our courts, the client is best served by a counsel who is manifestly independent. In representing a client, counsel is expected not only to exercise due skill and diligence but also to do to the best of counsel's ability whatever may legitimately be done in the client's interests, for that is the way in which counsel assists in doing justice according to law: cf *Tombling v Universal Bulb Co Ltd* [(1951) 2 TLR 289]. The privileges of counsel are accorded to that end; they are not accorded to protect counsel. If a duty owed to the client were seen to be separate from the primary duty of assisting to do justice according to law, the two duties might not be wholly compatible. No duty to a client which stands apart from the primary duty can be allowed to impair performance of the primary duty. Counsel who take part in proceedings in court (as well as witnesses and judges) must be able to perform their primary duty free from the chilling threat of civil suit by the parties to the litigation. …

9.49 Further, while the advocate must present the best possible case for their client, they are not mere vessels to mouth the words the client wishes said. There is a duty on practitioners to exercise an independent discretion as to the arguments and the evidence that is brought before the court, taking into account, among other things, the duties not to abuse the judicial process

and not to mislead the court. In *Donnelly v Australia and New Zealand Banking Group Ltd* [2016] NSWSC 263 (15 March 2016), Pembroke J noted at [16]:

> [16] A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently. And as the Hon Gerard

> Brennan AC KBE observed in 'Ethics and the Advocate' Bar Association of Queensland, Continuing Legal Education Lectures, No 9/92 — 3 May 1992, counsel 'is not an amanuensis or spokesperson for a client'.

9.50 Counsel acting for an accused in a criminal trial, especially where there is a co-accused, must also take care that their opening address does not exceed the boundaries of fairness, such that it causes prejudice to the co-accused — for example, by addressing the jury on evidence that may or may not ultimately be put to the court.[36]

9.51 The duty not to abuse the judicial process can extend to cases where the lawyer proceeds with litigation which is doomed to failure and continued for an ulterior purpose, as opposed to the pursuit of a case that is merely hopeless.[37]

9.52 The various Rules of Professional Conduct outlined at **9.15–9.18** give effect to the principles discussed above in terms of the role of the advocate to the administration of justice.[38]

THE ROLE OF THE PROSECUTOR

9.53 Counsel for the prosecution should not strive for a conviction at all costs.[39] Thus, where counsel for the Crown uses intemperate language (for example, in a closing address), there is a real possibility of a miscarriage of justice.[40] In *Whittaker v Tasmania* [2006] TASSC 26 (12 April 2006), Evans J noted at [38]:

> It is no part of the duty of a prosecutor to address a jury in language which is intemperate, inflammatory, or over-zealous in nature. In opening for the Crown it is highly undesirable to use unnecessarily emotive language which on any view can only excite sympathy for the victim or prejudice against the accused in the minds of the jury. In

DDR [1998] 3 VR 580; (1997) 99 A Crim R 327, Tadgell JA observed that it was 'no part of the duty of counsel for the Crown to excite passion'. In *M* [1991] 2 Qd R 69 a conviction was quashed on the ground that the prosecutor in his address to the jury had so far exceeded the bounds of proper comment and submission that the effect could not be, and was not, repaired by the judge's summing up. This conduct on the part of the prosecutor constituted a serious irregularity in the trial. See also *McCullough* (1982) 6 A Crim R 274; *Bazley* (1986) 21 A Crim R 19 at 31; *Pernich* (1991) 55 A Crim R 464; and *DDR*.

9.54 In *R v Pelly* [2015] SASCFC 25, Gray J noted the role of the prosecutor in a criminal trial at [68]–[70] as follows:

> [68] The role of the prosecutor was discussed in *Alister*, where Murphy J observed:
>
> > *'Duty of the Prosecutor*
> >
> > 'In the eyes of the jury the prosecutor is the State and takes on much of its authority and prestige. "The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says. The same power and force allow him, with a minimum of words, to impress on the jury that the government's vast investigatory network, apart from the orderly machinery of the trial, knows that the accused is guilty or has non-judicially reached conclusions on relevant facts which tend to show he [or she] is guilty": *Hall v United States*. Respect for the office of prosecutor reflects confidence in the system of justice and induces the jury to regard the prosecutor as unprejudiced and impartial. Therefore, the prosecutor must refrain from

> doing anything which might improperly influence the jury and deny the defendant a fair trial. "It is not the duty of prosecuting counsel to secure a conviction … [his] duty … is to present to the tribunal a precisely formulated case for the Crown against the accused and to call evidence in support of it … the prosecutor is fundamentally a minister of justice. …': Christmas Humphreys, 'The Duties and Responsibilities of Prosecuting Council' [1955] *Crim LR*, pp 739, 740, 741. [Footnote omitted]'

…

[70] *Libke* concerned a particularly hostile cross-examination by the prosecutor. The High Court considered the role of defence counsel and the trial judge in addressing inappropriate conduct by the prosecutor. Kirby and Callinan JJ said:

> 'The role of prosecuting counsel is not to be passive. He or she may be robust, and be expected and required to conduct the prosecution conscientiously and firmly. Because a criminal trial is an adversarial proceeding, there is at least the same expectation of defence counsel. The obligation of counsel extends to the making of timely objections to impermissible or unacceptable questions and conduct. But it is also the duty of the trial judge to make appropriate interventions if questions of those kinds, capable of jeopardising a fair trial, are asked. The duty of the trial judge is the highest duty of all. It is a transcendent duty to ensure a fair trial. …' [endnotes omitted]

9.55 The primary function of the prosecutor is to aid in the attainment of justice, not to secure a conviction. In *R v McCullough* (1982) 6 A Crim R 274, the court noted at 285:

> Counsel for the Crown is obliged to put the Crown case to the jury and, when appropriate, he is entitled to firmly and vigorously urge the Crown view about a particular issue and to test and, if necessary, to

attack that advanced on behalf of the accused. But he must always do so temperately and with restraint, bearing constantly in mind that his primary function is to aid in the attainment of justice, not the securing of convictions. See also *R v Callaghan* [1994] 2 Qd R 300; *McCullough v R* [1982] Tas R 43; (1982) 6 A Crim R 274; *R v Pernich* (1991) 55 A Crim R 464; *Livermore v R* [2006] NSWCCA 334 at [24]–[30].

9.56 In *Tahche v Abboud* [2002] VSC 42 (1 March 2002), Smith J noted at [94]–[95]:

> [94] … As was stated by Newton and Norris JJ, in *R v Lucas* [1973] VR 693 at 705:
>
> > 'It is very well established that prosecuting counsel are ministers of justice, who ought not to struggle for a conviction nor be betrayed by feelings of professional rivalry, and it is their duty to assist the court in the attainment of the purpose of criminal prosecutions, namely, to make certain that justice is done as between the subject and the State. Consistently with these principles, it is the duty of prosecuting counsel not to try and shut out any evidence which the jury could reasonably regard as credible and could be of importance to the accused case. We may add that these obligations which attach to prosecuting counsel apply, in our opinion, to officers in the service of the Crown whose function it is to prepare the Crown case in criminal prosecutions.'
>
> The Full Court of Western Australia in *Love v Robbins* [(1990) 2 WAR 510 at 524] stated:
>
> > 'In my view, however, a Crown Prosecutor is an officer of

> the Court and, as such, "a minister of justice". In that capacity he has a role in a criminal trial which is not accurately described as merely "one of the contending adversaries". '
>
> The Court then referred to the above passage from *Lucas* and stated that it was consistent with what Deane J had said in *Whitehorn* [(1983) 152 CLR 657 at 663], namely:
>
> > 'Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and the standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one.'
>
> [95] There can be no argument in my view that counsel briefed to prosecute, and a solicitor from the staff of the DPP instructing such counsel, hold positions in which they are performing a very significant public service for the whole community.

9.57 It is ultimately the duty of the prosecution to determine whether to prosecute a case or not.[41] This is reflected in the various Prosecution Policies in each jurisdiction.[42]

9.58 One area that arises in the context of the duty of prosecutors is in respect of the provision of relevant material to the defence. While the prosecution owes no personal duty of fairness to an accused,[43] the prosecutor does owe a duty to the court that defence counsel does not share — that is, the duty to bring to the attention of the other side, and the court, material which is cogent and relevant to the prosecution of the accused.[44] In *Clarkson v DPP* [1990] VR 745, referred to in *Smith, M and Madden v R* [2003]

TASSC 91 (24 September 2003) at [24], the Victorian Full Court allowed an appeal, and held that the failure of the prosecution to

provide relevant material to the appellant at his trial constituted a denial of natural justice, and so rendered his trial a nullity.

9.59 A secondary and equally significant function of the prosecutor concerns the decision of the prosecutor whether or not to call certain witnesses or present certain evidence. In this, the prosecutor has a discretion.[45] Whether prosecuting counsel is obliged to call a particular witness depends upon the broad rule that it is for counsel to decide — there is no duty to call a witness whose evidence is not essential to the unfolding of the narrative upon which the prosecution case is based.[46] However, care needs to be taken, for although the decision not to call a witness is not reviewable,[47] it can nevertheless give rise to a miscarriage of justice and grounds for appeal.[48]

9.60 In general, the prosecutor should call as witnesses all persons who are eyewitnesses to any events which go to prove the elements of the crime charged, and any witnesses who are considered by the prosecutor to be material, in the sense that their evidence is cogent, relevant, and reliable. This is so irrespective of whether their evidence strengthens or weakens the Crown's case.[49] In *Whitehorn v R* (1983) 152 CLR 657, the prosecutor failed to call a child complainant and the High Court held that the failure to offer any satisfactory explanation for not having done so amounted to a denial to the appellant of a fair trial. In *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, Fullagar

J noted at 294:

> [T]here could be no possible question that Sergeant Phillis was not merely a material witness but a witness of vital importance. So far it appears the only possible object of not calling him was to place the appellant under the tactical disadvantage which resulted from his inability to cross-examine him. Such tactics are permissible in civil cases, but in criminal cases, in view of what is at stake, they may sometimes accord ill with the traditional notion of the functions of a prosecutor for the Crown.

9.61 The matter was discussed by the High Court in *Dyers v R* (2002) 210 CLR 285; 192 ALR 181; [2002] HCA 45 (9 October 2002), where Callinan J (forming part of the majority allowing the appeal) noted at [118], [119], [135]:

> [118] There is no universal current practice with respect to the nomination of witnesses on an indictment. The reference to it in the joint judgment should be taken to be a reference to reasonably available material witnesses. The obligation of the prosecution is to call all material witnesses. Whilst counsel and judges should be vigilant to ensure that trials are not needlessly prolonged, 'material' in this field of discourse should not be given any narrow meaning. A witness will not cease to be a material witness merely because he or she is a

> witness to a relevant circumstantial matter or event. The persons whom it was implied by the trial judge that the appellant should have called were material witnesses, because evidence from them could have borne upon the movements and activities of the complainant and the appellant at about the time of the alleged commission of the offence. A broad practical view of materiality should be taken. All the

available admissible evidence which could reasonably influence a jury on the question of the guilt or otherwise of an accused is capable of answering the description 'material'.

[119] The fact that the prosecution here saw fit to comment on the absence of the possible witnesses forecloses any argument by the respondent that they were not material witnesses or were not available, and provides a clear indication that if it was for anyone to call them, it was, as indicated by *Apostilides* [*R v Apostilides* [1984] HCA 38; (1984) 154 CLR 563], for the prosecution to do so. *Apostilides* does not hold that such a failure necessarily causes a trial to miscarry. Indeed the appellant in this case did not argue that it did on that account. But *Apostilides* has a relevant and important bearing on the case because it serves to throw into relief that whilst the onus lies upon the Crown to prove guilt, it is not entitled to do so at any, and all costs; that the prosecutor is a minister of justice bound to call all material witnesses: and that there is no obligation of any kind upon the accused to prove, or bring forward anything.

…

[135] I would allow the appeal, quash the verdict and order that there be a new trial.

9.62 On the other hand, McHugh J in *Dyers v R* (2002) 210 CLR 285; 192 ALR 181; [2002] HCA 45 (30 October 2008), dismissed the appeal, noting at [35]–[36]:

[35] The Crown had no duty to call Ms Tinkler as a witness. She could give no evidence that supported the Crown case. Nor was she a witness to the events that constituted the *actus reus* of any charge. Her evidence became relevant only when the appellant asserted that he was with her at the relevant time. If the appellant was telling the truth and Ms Tinkler had been called as a witness, her evidence would have tended to prove that there was no offence. But that does not mean that the prosecution must call every witness who may support an affirmative case that the prosecution thinks the accused might run. The cards are not yet stacked so heavily against the prosecution that it

has a duty to call every witness that might support any affirmative case the accused might put forward. Ms Tinkler was a member of the sect that the appellant appears to have dominated. It is natural to suppose — as the Crown prosecutor, defence counsel and the trial judge evidently believed — that the jury might reasonably think that the appellant should have called her to support his alibi.

[36] Contrary to the majority view in this case, it does not undermine the requirement of proof beyond reasonable doubt to hold that the jury might think that the appellant could be expected to call Ms Tinkler. Nor would that holding undermine the adversarial system of criminal justice, the presumption of innocence or the privilege against self-incrimination. …

9.63 It can sometimes be a difficult question of balance when determining whether evidence, which the prosecution suspects is unreliable, should be called. In *R v Rich (Ruling No 9)* [2008] VSC 453, the court referred to the earlier case of *Shaw v R* (1991) 57 A Crim R 425, where the Victorian Court of Criminal Appeal upheld an application for leave to appeal on, among other

grounds, a complaint that an eye-witness to the stabbing of the deceased was not called by the Crown and stated at [42].

[42] … The particular witness was said by the prosecutor in that case to be unreliable. She had made a statement and had been called at the committal but her name was not on the presentment. The trial judge expressed the view to the prosecutor that he thought the witness was a 'crucial' witness. The matter was raised again at the end of the Crown case and the prosecutor again indicated he would not call the witness. In the judgment of the Court of Criminal Appeal, both Young CJ and Murphy J referred to the following passage from the judgment of the

High Court in *Apostolides* [1984] HCA 38; (1984) 154 CLR 563 at 576:

> 'A decision whether or not to call a person whose name appears on the indictment and from whom the defence wish to lead evidence must be made with due sensitivity to the dictates of fairness towards an accused person. A refusal to call the witness will be justified only by reference to the overriding interests of justice. Such occasions are likely to be rare. The unreliability of the evidence will only suffice where there are identifiable circumstances which clearly establish it; it will not be enough that the prosecutor merely has a suspicion about the unreliability of the evidence. In most cases where a prosecutor does not wish to lead evidence from a person on the indictment but the defence wishes that person to be called, it will be sufficient for the prosecutor simply to call the person so that he may be cross-examined by the defence and then, if necessary, be re-examined.'

9.64 The fact that a potential witness has made inconsistent statements will not, without other considerations, be a reason for not calling the witness. Such considerations may include knowledge by the prosecution that the evidence which the witness will give is plainly untruthful or unreliable. However, even in these circumstances, the prosecution should communicate this fact to the other side.[50] In *Coulson v R* [2010] VSCA 146 (22 June 2010), Neave and Harper JJA noted at [58]–[60]:

> [58] It is trite law that those who appear as advocates in litigation before courts or tribunals have a dual responsibility. They have a duty to their client or clients. They also have another, and higher, duty: to the court or tribunal before which they appear. For those who act for the Crown in criminal proceedings, that higher duty embraces a duty to act with the fairness which is essential if they are to put, as they must, the interests of justice, rather than the conviction of the accused, above all else.

[59] It is important for the proper administration of justice that this consideration inform every decision about those to be called to give evidence for the Crown. As was said by Deane J in *Whitehorn v The Queen*:

> 'Under the adversarial system which operates in a criminal trial in this country, it is for the Crown and not the judge to determine what witnesses are called by the Crown. That is not to say that the Crown is entitled to adopt the approach that it will call only those witnesses whose evidence will assist in obtaining a conviction. Prosecuting counsel in a criminal trial represents the State. The accused, the court and

> the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one. The consequence of a failure to observe the standards of fairness to be expected of the Crown may be insignificant in the context of an overall trial. Where that is so, departure from those standards, however regrettable, will not warrant the interference of an appellate court with a conviction. On occasion however, the consequences of such a failure may so affect or permeate a trial as to warrant the conclusion that the accused has actually been denied his fundamental right to a fair trial. As a general proposition, that will, of itself, mean that there has been a serious miscarriage of justice with the consequence that any conviction of the accused should be quashed and, where

appropriate, a new trial ordered. If there be exceptions to that general proposition, they do not presently occur to me.

'The observance of traditional considerations of fairness requires that prosecuting counsel refrain from deciding whether to call a material witness by reference to tactical considerations. Whether or not their names appear on the back of the indictment or information, all witnesses whose testimony is necessary for the presentation of the whole picture, to the extent that it can be presented by admissible and available evidence, should be called by the Crown unless valid reason exists for refraining from calling a particular witness or witnesses, such as that the interests of justice would be prejudiced rather than served by the calling of an unduly large number of witnesses to establish a particular point. All available witnesses whose names appear on the back of the indictment or information or who were called by the Crown to give evidence on any committal proceedings which preceded the trial should be called to give evidence, or, where the circumstances justify the Crown in refraining from leading evidence from such a witness, either be sworn by the Crown to enable cross-examination by the accused or, at the least, be made available to be called by the accused. Among the considerations which may justify the Crown in refraining from leading evidence from a particular witness is that the evidence which he or she would give is plainly untruthful or unreliable. If the Crown proposes to refrain from calling as a witness a person whose name appears on the back of the indictment or information or who it would otherwise be expected to call as a matter of course, it should communicate that fact to the accused or his lawyer a reasonable time before the commencement of the trial. If the accused seeks to be told why the Crown is refraining from calling such a witness, fairness to the accused would ordinarily require that the Crown communicate the reason or reasons.'

> [60] In the same case, Dawson J stated that all available witnesses should be called whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based. His Honour excluded from this proposition witnesses whose evidence the prosecutor judges to be unreliable, untrustworthy or otherwise incapable of belief. His Honour also agreed with Deane J in excepting from the general rule witnesses whose evidence would be unnecessarily repetitious.

9.65 This especially applies to committal proceedings, where there is an important function apart from establishing a *prima facie* case against the accused, namely, the accused being able

to know the evidence against them. The prosecution cannot, in the exercise of its discretion, call only the minimum evidence required to make out a *prima facie* case or avoid calling a witness for tactical reasons.[51] However, it seems that there is no unfairness if the Crown relies on evidence at trial that was not available at the committal, so long as the accused is not taken by surprise. In *Re Van Beelen* (1974) 9 SASR 163, Walters, Wells, and Jacobs JJ noted:

> 1. Where the Crown calls a witness who did not give evidence at the committal proceedings, the accused should be given reasonable notice of the Crown's intention to call that witness and should be furnished with a proof of the witness's proposed evidence: *R v Greenslade*; *R v Devenish*.
> 2. Where the Crown does not propose to call a witness who gave evidence on the committal proceedings, it should, unless there are strong and satisfactory reasons to the contrary, have the witness available in court so that the counsel may have the opportunity of calling him, as his own witness, if he so wishes: *R*

v Woodhead; *R v Cassidy*.

3. Where the Crown has in its possession the statement of a person who can give material evidence, but decides not to call him, it must make him available as a witness for the defence, but need not supply the defence with a copy of the statement taken: *R v Bryant and Dixon*.
4. Where the Crown has in its possession a statement of a credible witness who can speak of material facts 'which tend to show the prisoner to be innocent', it must either call that witness or make his statement available to the defence: *Dallison v Caffery* per Lord Denning MR at p 69.

9.66 In *R v Apostilides* (1984) 154 CLR 563,[52] Gibbs CJ, Mason, Murphy, Wilson, and Dawson JJ gave consideration to the situation where the prosecution failed to call two witnesses regarding an alleged rape. The prosecutor did, however, make available to the defence copies of the statements made by the two witnesses. The defence decided to call the two witnesses, which gave the prosecution the forensic advantage of being able to cross-examine them. An appeal against conviction to the Full Court of the Supreme Court was allowed and a new trial was ordered. The Crown applied for special leave to appeal to the High Court, which was refused. In its decision, the Court at 575 set out the following propositions regarding the conduct of a criminal trial in Australia:[53]

1. The Crown prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.

2. The trial judge may but is not obliged to question the prosecutor in order to discover the reasons which lead the prosecutor to decline to call a particular person. He is not called upon to

adjudicate the sufficiency of those reasons.

3. Whilst at the close of the Crown case the trial judge may properly invite the prosecutor to reconsider such a decision and to have regard to the implications as then appear to the judge at that stage of the proceedings, he cannot direct the prosecutor to call a particular witness.
4. When charging the jury, the trial judge may make such comment as he then thinks to be appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial. No doubt that comment, if any, will be affected by such information as to the prosecutor's reasons for his decision as the prosecutor thinks it proper to divulge.
5. Save in the most exceptional circumstances, the trial judge should not himself call a person to give evidence.
6. A decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.

9.67 Discuss the differences in the role and the ethical obligations of the prosecutor and defence counsel in a criminal matter. Compare the views of Callinan J and McHugh J in *Dyers v R* (2002) 210 CLR 285; 192 ALR 181; [2002] HCA 45 (9 October 2002).[54] With which view do you agree and why?

9.68 The Conduct Rules concerning the role of the prosecutor in a criminal trial are outlined below.

9.69 The following extract is from the Northern Territory Rules of Professional Conduct and Practice 2005:

…

Prosecutor's duties

17.46 A prosecutor must fairly assist the court to arrive at the truth,

must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

17.47 A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.

17.48 A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

17.49 A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.

17.50 A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such

material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused, unless:

(a) such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person; and

(b) the prosecutor believes on reasonable grounds that such a threat could not be avoided by confining such disclosure, or full disclosure, to the opponent being a legal practitioner, on appropriate conditions which may include an undertaking by the opponent not to disclose certain material to the opponent's client or any other person.

17.51 A prosecutor who has decided not to disclose material to the

opponent under Rule

17.50 must consider whether:

(a) the defence of the accused could suffer by reason of such nondisclosure;
(b) the charge against the accused to which such material is relevant should be withdrawn; and
(c) the accused should be faced only with a lesser charge to which such material would not be so relevant.

17.52 A prosecutor must call as part of the prosecution's case all witnesses:

(a) whose testimony is admissible and necessary for the presentation of the whole picture;
(b) whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;
(c) whose testimony or statements were used in the course of any committal proceedings; and
(d) from whom statements have been obtained in the preparation or conduct of the prosecution's case;

unless:

(e) the opponent consents to the prosecutor not calling a particular witness;
(f) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused; or
(g) the prosecutor believes on reasonable grounds that the administration of justice in the case would be harmed by calling a particular witness or particular witnesses to establish a particular point already adequately established by another witness or other witnesses;

provided that:

(h) the prosecutor is not obliged to call evidence from a particular witness, who would otherwise fall within (a)-

(d), if the prosecutor believes on reasonable grounds that the testimony of that witness is plainly unreliable by reason of the witness being in the camp of the accused;

(i) the prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within (f), (g) and (h), together with the grounds on which the prosecutor has reached that decision; and

17.53 A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully or improperly obtained must promptly:

(a) inform the opponent if the prosecutor intends to use the material;

(b) make available to the opponent a copy of the material if it is in documentary form; and

(c) inform the opponent of the grounds for believing that such material was unlawfully or improperly obtained.

17.54 A prosecutor must not confer with or interview any of the accused except in the presence of the accused's representative.

17.55 A prosecutor must not inform the court or the opponent that the prosecution has evidence supporting an aspect of its case unless the prosecutor believes on reasonable grounds that such evidence will be available from material already available to the prosecutor.

17.56 A prosecutor who has informed the court of matters within Rule 17.55, and who has later learnt that such evidence will not be available, must 25 immediately inform the opponent of that fact and must inform the court of it when next the case is before the court.

17.57 A prosecutor must not seek to persuade the court to impose a vindictive sentence or a sentence of a particular magnitude, but:

(a) must correct any error made by the opponent in address on sentence;
(b) must inform the court of any relevant authority or legislation bearing on the appropriate sentence;
(c) must assist the court to avoid appealable error on the issue of sentence;
(d) may submit that a custodial or non-custodial sentence is appropriate; and
(e) may inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant appellate authority.

17.58 A practitioner who appears as counsel assisting an inquisitorial body such as the Australian Crime Commission, the Australian Securities and Investments Commission, a Royal Commission or other statutory tribunal or body having investigative powers must act in accordance with Rules 17.46, 17.48 and 17.49 as if the body were the court referred to in those Rules and any person whose conduct is in question before the body were the accused referred to in Rule 17.48.

…

9.70 The following extract is from the Queensland Australian Solicitors Conduct Rules 2012, which is mirrored for New South Wales,[55] South Australia,[56] Victoria,[57] and the Australian Capital Territory:[58]

29. Prosecutor's duties

29.1 A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the

law properly to be applied to the facts.

29.2 A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.

29.3 A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

29.4 A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.

29.5 A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused other than material subject to statutory immunity, unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person.

29.6 A prosecutor who has decided not to disclose material to the opponent under Rule 29.5 must consider whether:

29.6.1 the charge against the accused to which such material is relevant should be withdrawn; or

29.6.2 the accused should be faced only with a lesser charge to which such material would not be so relevant.

29.7 A prosecutor must call as part of the prosecution's case all witnesses:

29.7.1 whose testimony is admissible and necessary for the

presentation of all of the relevant circumstances;

29.7.2 whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;

UNLESS:

(i) the opponent consents to the prosecutor not calling a particular witness;

(ii) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused;

(iii) the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point already adequately established by another witness or other witnesses; or

(iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable,

provided that the prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within (ii), (iii) or (iv) together with the grounds on which the prosecutor has reached that decision.

29.8 A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully or improperly obtained must promptly:

29.8.1 inform the opponent if the prosecutor intends to use the material; and

29.8.2 make available to the opponent a copy of the material if it is in documentary form.

29.9 A prosecutor must not confer with or interview any accused except in the presence of the accused's legal representative.

29.10 A prosecutor must not inform the court or an opponent that the prosecution has evidence supporting an aspect of its case unless the prosecutor believes on reasonable grounds that such evidence will be available from material already available to the prosecutor.

29.11 A prosecutor who has informed the court of matters within Rule 29.10, and who has later learnt that such evidence will not be available, must immediately inform the opponent of that fact and must inform the court of it when next the case is before the court.

29.12 A prosecutor:

29.12.1 must correct any error made by the opponent in address on sentence;

29.12.2 must inform the court of any relevant authority or legislation bearing on the appropriate sentence;

29.12.3 must assist the court to avoid appealable error on the issue of sentence; and

29.12.4 may submit that a custodial or non-custodial sentence is appropriate.

29.13 A solicitor who appears as counsel assisting an inquisitorial body such as the Criminal Justice Commission, the Australian Crime Commission, the Australian Securities and Investments Commission, the ACCC, a Royal Commission or other statutory tribunal or body having investigative powers must act in accordance with Rules 29.1, 29.3 and

29.4 as if the body is a court referred to in those Rules and any person whose conduct is in question before the body is an accused referred to in Rule 29.

…

9.71 In Tasmania, the duties of the Prosecutor and their responsibilities to the Court are found in the common law.

9.72 The following extract is r 44 of the Law Society of Western

Australia's Legal Profession Conduct Rules 2010:

44. Prosecutor's duties

(1) In this rule—

prosecutor means a practitioner who appears for a complainant, the Commonwealth or the State in criminal proceedings.

(2) A prosecutor must—

(a) seek to have the whole of the relevant evidence placed before the court in an impartial and intelligible manner; and

(b) assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

(3) A prosecutor must as soon as practicable after becoming aware of any information or material which might arguably affect or assist either the defence case or the prosecution case make the information or material available to the defence.

(4) A prosecutor must not press the prosecution's case for a conviction beyond a full, firm and impartial presentation of that case.

(5) A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

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(6) A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds—

(a) is capable of contributing to a finding of guilt; and

(b) carries weight.

(7) A prosecutor who has reasonable grounds to believe that

material available to the prosecution may have been unlawfully or improperly obtained must promptly—

(a) inform the defence if the prosecutor intends to use the material; and

(b) make available to the defence a copy of the material if it is in documentary form; and

(c) inform the defence of the grounds for believing that the material was unlawfully or improperly obtained.

(8) A prosecutor must not confer with or interview an accused person except in the presence of the accused person's legal representative.

(9) A prosecutor must not inform a court or an opponent that the prosecution has evidence supporting an aspect of its case unless the prosecutor believes on reasonable grounds that such evidence will be available from material already available to the prosecutor.

(10) A prosecutor who informs a court of evidence supporting an aspect of the prosecution's case and who later learns that the evidence will not be available, must—

(a) promptly inform the defence; and

(b) inform the court when next the case is before the court.

(11) A prosecutor must—

(a) correct any error made by the defence; and

(b) assist the court to avoid appealable error.

(12) If an accused person is unrepresented, a prosecutor must inform the court of any mitigating circumstances of which the prosecutor is aware.

CONFESSIONS OF GUILT

9.73 The guilt of the accused is something to be proven by the prosecution or the Crown. It is dangerous (for either the

prosecution or defence counsel) to accept a confession of guilt when all the facts have not been properly identified and tested. In the case of defence counsel, it is professional misconduct to lead evidence that is inconsistent with a confession of guilt (as opposed to situations where the practitioner merely holds a personal view that the client is not telling the truth). An example would be leading alibi evidence following a confession of guilt.

9.74 In *New South Wales Bar Association v Punch* [2008] NSWADT 78, the applicant claimed that the respondent (a barrister) was guilty of professional misconduct, on the ground that in proceedings in the District Court between 19 and 23 June 1995, the respondent adduced evidence from five witnesses, knowing that evidence to be untrue. On 18 November 1994, an armed robbery was committed at 1 Carol Crescent, Roselands, New South Wales; on 14 December 1994, Tony Haddad informed the respondent that he had been present during

the commission of the armed robbery; on 19 June 1995, Tony Haddad, represented by the respondent, entered a plea of not guilty to the charges of armed robbery arising from the incident on 18 November 1994; on 21 June 1995, the respondent adduced evidence, knowing it to be untrue, from Tony Haddad to the effect that Haddad was not present at 1 Carol Crescent, Roselands, on 18 November 1994 and had never been to that address; on 21 June 1995, the respondent adduced evidence, knowing it to be untrue, from Tony Haddad to the effect that, at the time the armed robbery was being committed at 1 Carol Crescent, Roselands, Haddad was in bed at his home at 26 Defoe Street, Punchbowl. In finding the

respondent guilty of professional misconduct, the Tribunal noted at [23]–[24]:

> [23] It would not, however, have been enough to prove professional misconduct if the evidence merely showed that the respondent believed that Haddad was at the premises during the armed robbery. Barristers will sometimes find themselves in situations where the evidence strongly indicates that the client is not telling the truth. The fact that the barrister's personal belief is that the client is not telling the truth as to the facts of the case, does not mean that the barrister is prohibited from conducting the case in accordance with the client's instructions. That was not what the evidence revealed in these proceedings.
>
> [24] But if:
>
> (a) a barrister believed that a client was present at certain premises and there committed a serious crime;
> (b) the barrister held that belief because the client told the barrister the client was present and committed the crime; and
> (c) the making of the admission by the client took place in circumstances which the barrister realised strongly supported the conclusion that the client was telling the barrister what in fact actually happened, then if the barrister later led evidence from the client that the client was not present, the barrister would be actively misleading the Court as to the facts — which is something a barrister must not do (see *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 220 — Lord Diplock). That would be professional misconduct.

9.75 Although a defence lawyer in a criminal matter must not lead evidence inconsistent with a confession of guilt, they must also not disclose to the court the fact that a confession has been made by an accused. In these circumstances, the practitioner may cease to act if there is sufficient time for another practitioner to take carriage of the matter and the client does not insist on the

practitioner acting for them. In cases where the practitioner continues to act for the client, while the practitioner must not lead evidence inconsistent with the confession, they may argue that the evidence as a whole does not prove that the client is guilty of the offence charged or that there is some other reason why the client is not guilty. If the client insists on giving evidence denying guilt, or insists that the practitioner makes a statement asserting the client's innocence, then the practitioner must cease to act for the client in the matter.

9.76 The prohibition on the disclosure of any confession of guilt by the client applies even after the jury has determined that the accused is guilty of the offence charged. Advising the court that 'the verdict is in accord with an earlier confession made by the accused', compromises the rights of the accused so far as an appeal is concerned.

9.77 In *Tuckiar v R* (1934) 52 CLR 335, a police constable named McColl was killed by the spear of a native. The following facts are summarised from the decision of Gavan Duffy CJ, Dixon, Evatt, and McTiernan JJ at 341–3: The prisoner (Tuckiar) was brought to Darwin and charged with his murder. Tuckiar understood no English and was defended by counsel instructed by the Protector of Aborigines. During the hearing, the Judge suggested that defence council take Paddy, the interpreter, and discuss the evidence with Tuckiar. The Court adjourned for half an hour to enable this to be done. On the Court resuming, defence counsel said that he had a specially important matter which he desired to discuss with the Judge. He was in a predicament, the worst predicament that he had

encountered in all his legal career. The jury retired, and the Judge, the Protector of Aborigines, and counsel for the defence went into the Judge's Chambers. Upon return, the prosecutor obtained leave to recall a witness as to the good character of the deceased constable, McColl. This evidence was inadmissible, but no objection was taken to it. The witness said that the deceased was a very decent man, that he had never heard anything against his moral character, that he had been closely associated with him upon a patrol, where there were half-caste girls and many native women, and there was nothing in his conduct which could be censured in the least degree. No evidence was called for the defence.

9.78 Before the Crown case was quite complete, the jury, who had heard much discussion of the Crown's failure to bring witnesses to Darwin, asked: 'If we are satisfied that there is not enough evidence, what is our position?' The Judge reported that he understood them to mean, what was their position if they were satisfied that the Crown had not brought before the Court all the evidence it might have brought. He replied: 'You must think very carefully about that aspect of the matter and not allow yourselves to be swayed by the fact that you think the Crown has not done its duty. If you bring in a verdict of not guilty, it means that this man is freed and cannot be tried again, no matter what evidence may be discovered in the future, and that may mean a grave miscarriage of justice. Another aspect of the matter that troubles me is that evidence has been given about a man who is dead, and if the jury brings in a verdict of not guilty it may be said that they believe that evidence, and it would be a serious slander on that man. It was the obvious duty of the Crown to bring all the evidence procurable and to have all these matters cleared up entirely, but you must not allow the fact that the Crown has failed in its duty to influence you to bring a verdict of not guilty if there really is evidence of guilt before

you on which you can rely. You should go and think about the matter quietly and carefully weigh all the evidence that has been given before you.'

9.79 Upon the jury's finding a verdict of guilty, the prisoner's counsel told the court that Tuckiar had made a confession to him concerning the killing. After hearing some evidence upon the subject of punishment, the learned Judge pronounced sentence of death. In the High Court, Gavan Duffy CJ, Dixon, Evatt, and McTiernan JJ noted at 346–7:

> Whether he be in fact guilty or not, a prisoner is, in point of law, entitled to acquittal from any charge which the evidence fails to establish that he committed, and it is not incumbent on his counsel by abandoning his defence to deprive him of the benefit of such rational arguments as fairly arise on the proofs submitted. The subsequent action of the prisoner's counsel in openly disclosing the privileged communication of his client and acknowledging the correctness of the more serious testimony against him is wholly indefensible. It was his

> paramount duty to respect the privilege attaching to the communication made to him as counsel, a duty the obligation of which was by no means weakened by the character of his client, or the moment at which he chose to make the disclosure. No doubt he was actuated by a desire to remove any imputation on Constable McColl. But he was not entitled to divulge what he had learnt from the prisoner as his counsel. Our system of administering justice necessarily imposes upon those who practice advocacy duties which have no analogies, and the system cannot dispense with their strict observance.
>
> In the present case, what occurred is productive of much difficulty.

We have reached the conclusion, as we have already stated, that the verdict found against the prisoner must be set aside. Ordinarily the question would next arise whether a new trial should be had. But upon this question we are confronted with the following statements made by the learned trial Judge in his report—

> 'After the verdict, counsel — for reasons that may have been good — made a public statement [concerning the confession] which has been published in the local press and otherwise broadcasted throughout the whole area from which jurymen are drawn. If a new trial were granted … it would be practically impossible for [the jury] to put out of their minds the fact of this confession by the accused to his own counsel, which would certainly be known to most, if not all, of them. … Counsel for the defence … after verdict made, entirely of his own motion, a public statement which would make a new trial almost certainly a futility.'

In face of this opinion, the correctness of which we cannot doubt, we think the prisoner cannot justly be subjected to another trial at Darwin, and no other venue is practicable.

The High Court stayed the indictment permanently.

9.80 Reference to the guilt of the accused was also referred to in *Long v R* [2002] QSC 54 (18 February 2002), where Dutney J noted at [15]:

> [15] The power to stay an indictment permanently is not doubted. Among other references it was recognised by the High Court in *Glennon v R* (1992) 173 CLR 592 and the Court of Appeal in Queensland in *R v Lewis* [1992] 1 QD R 613. Despite this counsel have been able to find only one Australian authority in which the power has been exercised in favour of the applicant. In *Tuckiar v R* (1934) 52 CLR 335 the power was exercised in favour of what was described as a completely uncivilised aboriginal native charged with the murder of a police constable in the Northern Territory. The appellant was

> convicted. After the conviction his counsel announced in open court that his client had admitted that evidence of a confession given by him of the murder was correct. … The statement by counsel in open court was of such damning prejudice to the fairness of any retrial that a verdict of acquittal was substituted.

9.81 Finally, in relation to the adversary system, the situation can arise where the accused in a criminal trial wishes to enter a plea of 'guilty', even though they are in fact not guilty. This might arise for a variety of reasons, including to protect the actual perpetuator of the crime.[59]

9.82 *Meissner v R* (1995) 184 CLR 132 concerned a charge against the appellant of attempting to pervert the course of justice by improperly endeavoring to influence another person to plead guilty to a charge of making a false statutory declaration. In the joint judgment of Brennan, Toohey, and McHugh JJ, their Honours said at 141:

> A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty. … A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence. [footnote omitted]

9.83 Dawson J said at 157:

> It is true that a person may plead guilty upon grounds which extend

> beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred.

9.84 These passages from *Meissner* were referred to by the Court of Appeal of Queensland in *R v Allison* [2003] QCA 125. In that case, Allison, on appeal, complained that his counsel at trial had not explained to him the benefit of a plea of guilty to a charge of assault, a course which he claimed he might have taken, even though he maintained his innocence. Jerrard JA, with whom McMurdo P and Mackenzie J agreed, stated at [23]:

> The judgments in the High Court in *Meissner v R* [(1995) 184 CLR 132 at 141 and 157] require this court to accept that a plea of guilty entered in open court by a person of full age and apparently of sound mind and understanding, and made in the exercise of the free choice in the interest of that person, causes no miscarriage of justice if a court acts on that plea, although the person entering it is not in reality guilty of the offence.

9.85 What is the purpose of a criminal trial? Is it to find the truth, in which case what counsel did in disclosing the confession was consistent with that purpose, or is it merely to decide the matter on the evidence that is made available by the parties, which may not be complete? Should a practitioner agree to a client's request to enter a plea of guilty when this is done for an ulterior purpose, for example to save another person who has a number of demerit points from losing their licence? Does this bring the law into disrepute, in that an innocent person is convicted of a crime

they did not commit?

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1. See, for example, F Nagorcka, M Stanton & M Wilson, 'Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice' (2005) 29 *Melb Univ LR* 448.
2. See **Chapters 4**, **5**, **6**, **7**, **8**, and **10**.
3. Rogers J, 'Judges in Search of Justice' (1987) *University of New South Wales Law Journal* 93 at 95.
4. There has been considerable judicial comment in relation to this issue, which is further discussed in this chapter. See, for example, **9.34**–**9.40**.
5. The Australian Law Reform Commission, *Report No 89 — Managing Justice: A Review of the Federal Civil Justice System*, 17 February 2000, at [5.152].
6. The role of prosecutors is further considered at **9.53**–**9.72**.
7. See **9.73**–**9.80**.
8. These are not the only legislative provisions concerning alternative dispute resolution. There are a variety of other specific statutory provisions that provide for the mediation of commercial, building, and other disputes. For example, see the Civil Procedure Act 2005 (NSW) Pt 4 — Mediation; Supreme Court (General Civil Procedure) Rules 2015 (Vic) r 50.07; Civil Proceedings Act 2011 (Qld) Pt 6; Alternative Dispute Resolution Act 2001 (Tas); Supreme Court Civil Rules 2006 (SA) Ch 10; Supreme Court Act 1935 (WA) Pt VI; Rules of the Supreme Court 1971 (WA) O 4A; Supreme Court Rules (NT) r 48.01–48.14; Court Procedure Rules 2006 (ACT) Pt 2.11 Div 2.11.7.
9. Sections 53A–54.
10. See *Masters v McCubbery* [1996] 1 VR 635; *Southern Cross Homes v Nicholls* (1993) 173 LSJS 80; *McDonald v Director-General of Social Security* (1984) 1 FCR 354; *New Theme Pty Ltd v Victorian Casino and Gaming Authority* [2002] VSCA 80 (3 June 2002) per Eames JA at [50]; *Ejueyitisi v Minister for Immigration* [2006] FCA 328 (4 April 2006).
11. See also *Repatriation Commission v Compton* (1984) 1 FCR 249.
12. See, for example, Civil and Administrative Tribunal Act 2013 (NSW) s

45.

13. Australian Law Reform Commission, *Report No 89 — Managing Justice: A Review of the Federal Civil Justice System*, January 2000.
14. O Dixon, *Jesting Pilate*, Law Book Co, Sydney, 1965, p 16.
15. D Ipp, 'Reforms to the Adversarial Process in Civil Litigation Part 1' 69 *Australian Law Journal* 712–16.
16. In relation to the Barristers' Rules of the various jurisdictions, see Bar Association of Queensland, Barristers' Conduct Rules 2011; in respect of New South Wales, the Legal Services Council, Legal Profession Uniform Conduct (Barristers) Rules 2015; in respect of Victoria, Legal Services Council, Legal Profession Uniform Conduct (Barristers) Rules 2015; South Australian Bar Association, Barristers' Conduct Rules 2013; Western Australian Bar Association, Western Australian Barristers' Rules 2012; Northern Territory Bar Association, Barristers' Conduct Rules 2002. The Law Society of Tasmanian, Rules of Practice 1994, define a 'practitioner' as a person practising as a barrister or legal practitioner; Pt 8 applies solely to those who practise as a barrister.
17. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW).
18. The Law Society of South Australia, Australian Solicitors' Conduct Rules 2015.
19. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Vic).
20. The Law Society of the Australian Capital Territory, Legal Profession (Solicitors) Conduct Rules 2015.
21. In relation to the role of the judge in terms of minimising delays so far as trials are concerned, see Black CJ (as his Honour then was), 'The Role of the Judge in Attacking Endemic Delays: Some Lessons from Fast Track' (2009) 19 *Journal of Judicial Administration* 88 at 92–3. In relation to the weight and reliability a judge should give to the evidence, see *IMM v R* [2016] HCA 14 (14 April 2016). See also Heydon J, 'Is the Weight of Evidence Material to Its Admissibility?' (2014) 26 *Current Issues in Criminal Justice* 219 at 234.
22. For a discussion of these issues, see D A Ipp, 'Judicial Intervention in the Trial Process' (1995) 69 *Australian Law Journal* 365.

23. See R Eggleston, 'What is Wrong With the Adversary System' (1975) 49 *Australian Law Journal* 428.
24. See *R v Griffis* (1996) 67 SASR 170.
25. See the decision of Foster J in *Comcare v Commonwealth of Australia* [2015] FCA 810 (7 August 2015) at [95].
26. In each State and Territory, legal aid commissions deliver a wide range of legal assistance services in criminal, family, and civil law matters. Some legal assistance is available free-of-charge to everyone, including through free brochures, information sessions, or telephonic legal advice. To be eligible for a grant of legal assistance for legal representation, the applicant must satisfy the means and merits tests, and meet the relevant legal aid commission's guidelines. For further details, refer to http://www.australia.gov.au/content/legal-aid.
27. The Australian Law Reform Commission, *Report No 89 — Managing Justice: A Review of the Federal Civil Justice System*, 17 February 1974, at [5.152].
28. See also *Rajski v Scitec Corporation Pty Ltd* (NSW CA, 16 June 1986, Butterworths unreported judgments); *Morton v Vouris* [1996] FCA 828; (1996) 21 ACSR 497 at 513–14, per Sackville J; *In the Marriage of Johnson* (1997) 139 FLR 384 (Fam Ct/FC) at 406 (and cases cited there); *Weber v Deakin University* [2015] VSC 703 (11 December 2015); *Webb v Secretary to the Department of Justice* [2015] VSC 616 (12 November 2015); *Garrett v Legal Services Commissioner* [2015] VSC 465; *Zhong v Melbourne Health* [2015] VSCA 165 (25 June 2015); *Haque v Jabella Group Pty Ltd* [2016] FCCA 147 (4 February 2016).
29. Per Lord Brougham in defence of Queen Caroline before the House of Lords, in H Broughan, *Life and Times of Henry Lord Brougham*, W Blackwood, Edinburgh, 1871, p 406.
30. See Chapter 13.
31. Mason CJ, 'The Independence of the Bench, The Independence of the Bar, The Bar's Role in the Judicial System' (March 1993) 10(1) *Australian Bar Review* 1 at 5.
32. Section 6DD: *Statements made by witness not admissible in evidence against the witness*
    (1) The following are not admissible in evidence against a natural

person in any civil or criminal proceedings in any court of the Commonwealth, of a State or of a Territory:

(a) a statement or disclosure made by the person in the course of giving evidence before a Commission;

(b) the production of a document or other thing by the person pursuant to a summons, requirement or notice under section 2 or subsection 6AA(3).

(2) Subsection (1) does not apply to the admissibility of evidence in proceedings for an offence against this Act.

33. The relevant statutory provision was s 10(2) of the (then) Legal Profession Practice Act 1958 (Vic).

34. Deane, Toohey, and Gaudron JJ took the view that the intention of the parliament under the relevant statutory provision was to abolish immunity for all Victorian lawyers. The majority took the view that the immunity had not been removed.

35. In *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87, Bell J said he was still bound by the immunity doctrine, and in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, the doctrine was upheld. In *Humphrey & Humphrey* [2015] FCCA 2961 (6 November 2015), Neville J applied the principles set out in *Giannarelli v Wraith* (1988) 165 CLR 543 (13 October 1988). For further discussion, see Y Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia*, 6th ed, LexisNexis, Chatswood, NSW, pp 315–22. See also *O'Neill v Hayley (No 1)* [2015] FCCA 2197 (24 July 2015) per Circuit Court Judge Harman; *Kamano & Kamano* [2015] FamCAFC 111 (12 June 2015), where Strickland, Murphy, and Kent JJ noted at [25]: 'The justification for reserving the practice of law to qualified lawyers is that lawyers, as officers of the Court, owe their paramount duty to the administration of justice. That principle is reflected in many published rules of professional conduct including the New South Wales Barristers Rules; the Queensland Barristers' Rules; and the Barristers' Conduct Rules of the Australian Bar Association. That paramount duty is beyond doubt.' See also a speech delivered by Warren J to the Judicial Conference of Australia Colloquium, Melbourne on 9 October 2009, titled 'The Duty Owed To The Court — Sometimes Forgotten'.

36. See *R v Rogerson; R v McNamara (No 8)* [2015] NSWSC 1036 at [2], [3] and [11].
37. See, for example, the discussion in *Lemoto v Able Technical Pty Ltd* [2005] NSWCA 153.
38. In Tasmania, the law concerning advocacy, frankness in court, delinquent or guilty clients, independence, amongst others, is found in the common law.
39. See *R v Bathgate* (1946) 46 SR (NSW) 281; 63 WN (NSW) 173.
40. See *Hugo v R* [2000] WASCA 199 (4 August 2000) per Sheller AJ; *R v Freer and Weekes* [2004] QCA 97 (6 April 2004) per Jerrard J at [93]–[99].
41. See *Mensinga v Commissioner Australian Federal Police* [2001] ACTSC 46 at [7] and [8].
42. See **9.69**–**9.72**.
43. See *Love v Robbins* (1990) 2 WAR 510; *Grimwade v Victoria* (1997) Aust Torts R 81-422.
44. See *R v Glover* (1987) 46 SASR 310; *Richardson v R* (1974) 131 CLR 116.
45. See *R v Grant-Taylor; Ex parte Johnson* [1980] Qd R 387.
46. See *R v Lucas* [1973] VR 693 at 697; *Re Van Beelen* (1974) 9 SASR 163; *R v Grant-Taylor; Ex parte Johnson* [1980] Qd R 387.
47. See *R v Harry; Ex parte Eastway* (1985) 39 SASR 203; *R v Hall* [1986] 1 Qd R 462; *R v Andrews* [1987] 1 Qd R 21.
48. See *Hugo v R* [2000] WASCA 199 (4 August 2000) per Scheller JA at [151]–[153]; *DPP v Jensen* [2007] VSC 77 (23 February 2007).
49. See *R v Basha* (1989) 39 A Crim R 337; *R v Sloan* (1988) 32 A Crim R 366; *R v Lucas* [1973] VR 693; *R v Shaw* (1991) 57 A Crim R 425; *R v Wilson* [1998] 2 Qd R 599; *R v Kneebone* (1999) 47 NSWLR 450.
50. See *Shaw v R* (1991) 57 A Crim R 425; *Whitehorn v R* (1983) 152 CLR 657; *Richardson v R* (1974) 3 ALR 115; *Re Van Beelen* (1974) 9 SASR 163; *R v Silva* [2010] QCA 79 (9 April 2010).
51. See *R v Basha* (1989) 39 A Crim R 337.
52. Referred to in the case of *Dyers v R* (2002) 210 CLR 285; 192 ALR 181; [2002] HCA 45. See **9.61**.
53. The principles set out by the High Court have subsequently been followed in a number of cases, including *Hugo v R* [2000] WASCA 199

(4 August 2000) at [151]; *Dyers v R* (2002) 210 CLR 285; 192 ALR 181; [2002] HCA 45; *R v Rich (Ruling No 9)* [2008] VSC 453 (30 October 2008); *Mahmood v State of Western Australia* [2008] HCA 1 (30 January 2008); *Svajcer v R* [2010] VSCA 116 per Redlich JA at [28] and [32]; *R v Bolte* [2010] SASC 112 (27 April 2010) per Gray J at [23] and Layton J at [132]; *R v Chimirri* [2010] VSCA 57 (22 March 2010); *Walsh v The State of Western Australia* [2011] WASCA 119 per McLure P at [69]; *Tema v The State of Western Australia* [2011] WASCA 41 (14 March 2011) per Blaxell J at [50].

54. See **9.61**.

55. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW).

56. The Law Society of South Australia, Australian Solicitors' Conduct Rules 2015 (Vic).

57. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

58. The Law Society of the Australian Capital Territory, Legal Profession (Solicitors) Conduct Rules 2015.

59. See P Hidden, 'Some Ethical Problems for the Criminal Advocate' (2003) 27 *Criminal Law Journal* 191, in relation to the client who maintains their innocence, but wishes to plead guilty. See also a paper delivered by Peter Hidden at the Public Defenders' Conference in 2012, entitled 'Common Ethical Problems for the Criminal Advocate', at http://www.austlii.edu.au/au/journals/NSWJSchol/2003/3.pdf.

10

DUTIES OF DILIGENCE, INTEGRITY AND CANDOUR

INTRODUCTION

10.1 This chapter brings together a number of ethical and legal issues. These include the duty of diligence, the avoidance of unreasonable delay, the interference with witnesses and others, the duty of candour and frankness, and the giving of undertakings.

10.2 A failure to act fairly, honestly, and candidly can, in certain circumstances, result in disciplinary proceedings. For example, in *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, the appellant was removed from the roll of practitioners in part because of a savage and unfounded attack he had made on the character of a solicitor. The court referred to practice at the bar in terms of it being 'governed by rules which are reflective of common decency and common fairness'.[1]

THE AVOIDANCE OF UNREASONABLE DELAY

10.3 Unreasonable delay can constitute professional

misconduct. In *Re Nelson* (1991) 106 ACTR 1, Higgins and Foster JJ noted at 20:

> Gross neglect and delay, particularly if there is a pattern of gross neglect and delay, can constitute professional misconduct: see *Re Moseley* (1925) 42 WN (NSW) 44. Such neglect and delay brings the profession into serious disrepute. A solicitor has a clear duty to avoid situations where overwork or other sources of stress prevent the proper processing of matters undertaken for clients.

10.4 Unreasonable delay might arise not just due to the carelessness or negligence of the practitioner, but also as a result of a calculated decision and part of the litigation strategy — for example, to 'buy some time' or 'build-up costs' in order to pressure the other side to accept a settlement. In *White Industries (Qld) Pty Ltd v Flower and Hart* (1998) 156 ALR 169, Goldberg J found that the filing of proceedings by the firm Flower and Hart was not to vindicate any right, but to stall or delay the collection of money due under the contract. As part of his conclusion on the matter, his Honour noted at 252:

> The time has passed when obstructionist and delaying tactics on the part of parties to proceedings in the Court can be countenanced by the Court. It is perfectly proper for a party and its legal advisers to fight a case and to put an opposing party to the proof of its case, although I question whether it is appropriate to put an opposing party to the proof of an issue, which is not disputed, which will not be a critical issue at trial and which will have the effect of running up costs unnecessarily. Nevertheless it is not proper, in my view, to adopt a positive or assertive obstructionist or delaying strategy which is not in the interests of justice and inhibits the Court from achieving an

> expeditious and timely resolution of a dispute. Court resources are finite and so are the resources of most litigants and the Court should not countenance a deliberate strategy of obstruction and delay. If a party instructs its legal advisers to adopt such a strategy the legal adviser should inform the party that it is not proper for it to do so and if the party insists, then the legal adviser should withdraw from acting for that party. It is most regrettable that a legal adviser should make a conscious decision not to have the senior counsel representing a party appear on a directions hearing (such as occurred on 10 November 1987) for fear that the judge will be better informed. It is also most regrettable that a legal adviser should make a conscious decision to adopt a particular approach or procedure because it will have the effect of 'side tracking' the opposition, and achieving delay in the resolution of the proceeding (letter 14 October 1987).
>
> In these circumstances I consider that I should exercise the jurisdiction to order Flower & Hart to pay White's costs of the proceeding on the basis sought. I also consider that it follows from my findings, and it is implicit in them, that those costs should be paid on an indemnity basis.[2]

10.5 A single instance of delay would not ordinarily justify suspension or striking off.[3] Likewise, mere inactivity by a defendant where no procedural step is called for would not generally be regarded as a relevant inducement to a plaintiff to incur further costs, and would therefore not generally give rise to disciplinary proceedings. However, conduct which is designed to induce a party to incur extra expense in the belief that an action would proceed to trial notwithstanding any delay, is a circumstance which can preclude that party from obtaining relief.[4]

10.6 The reason delay can amount to misconduct or an adverse order as to costs[5] is that unreasonable delay leads to unnecessary expense for the other side, which is not only unfair and

against the public interest, but brings the law into disrepute. Supreme Courts have a statutory power which can be applied where costs are incurred improperly or in breach of the Rules, for example as a result of undue delay.[6]

10.7 Apart from an adverse order as to costs, unreasonable delay is a factor taken into account in an application to dismiss an action for want of prosecution,[7] or in cases involving an abuse of process.[8] In *Tyler v Custom Credit Corp Ltd* [2000] QCA 178 (19 May 2000), Atkinson J noted at [2]–[3]:

> [2] When the Court is considering whether or not to dismiss an action for want of prosecution or whether to give leave to proceed under Uniform Civil Procedure Rules ('UCPR') r 389, there are a number of factors that the Court will take into account in determining whether the interests of justice require a case to be dismissed. These include:
>
> (1) how long ago the events alleged in the statement of claim occurred and what delay there was before the litigation was commenced;
> (2) how long ago the litigation was commenced or causes of action were added;
> (3) what prospects the plaintiff has of success in the action;
> (4) whether or not there has been disobedience of Court orders or directions;
> (5) whether or not the litigation has been characterised by periods of delay;
> (6) whether the delay is attributable to the plaintiff, the defendant or both the plaintiff and the defendant;
> (7) whether or not the impecuniosity of the plaintiff has been responsible for the pace of the litigation and whether the defendant is responsible for the plaintiff's impecuniosity;
> (8) whether the litigation between the parties would be concluded by

the striking out of the plaintiff's claim;

(9) how far the litigation has progressed;

(10) whether or not the delay has been caused by the plaintiff's lawyers being dilatory. Such dilatoriness will not necessarily be sheeted home to the client but it may be. Delay for which an applicant for leave to proceed is responsible is regarded as more difficult to explain than delay by his or her legal advisers;

(11) whether there is a satisfactory explanation for the delay; and

(12) whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial.

[3] The court's discretion is, however, not fettered by rigid rules but should take into account all of the relevant circumstances of the particular case including the consideration that ordinary members of the community are entitled to get on with their lives and plan their affairs without having the continuing threat of litigation and its consequences hanging over them.

Unnecessary delay in proceedings has a tendency to bring the legal system into disrepute and to decrease the chance of there being a fair and just result. [references omitted]

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10.8 In a criminal matter, where the delay would be prejudicial to an accused being given a fair trial, a court can stay proceedings. In *R v Upton* [2005] ACTSC 52, Connolly J noted at [11]–[16]:

[11] There is ample authority for the proposition that at common law the right to a fair trial can be vitiated due to undue delay, and that delay can be a factor that can lead to a stay of proceedings. In *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23, Mason CJ at 26, endorsed—

'the proposition that, at least in cases of undue delay, the

> courts possess power to stay criminal proceedings in order to prevent "injustice" to the accused. Indeed, that view seems to have been accepted as long ago as 1844 in *R v Robbins* (1844) 1 Cox CC 114 … '.

[12] It seems appropriate to regard *Jago* as authority for the proposition that delay can affect the right to a fair trial, not that delay of itself must lead to an unfair trial. Gaudron J at 78 noted that—

> 'there is no power to grant a stay of proceedings on the indictment in vindication merely of a claimed 'right to a speedy trial'.

[13] Her Honour stressed that, while delay was a factor, actual prejudice to a fair trial was necessary in order to enliven the discretion to stay proceedings.

[14] Toohey J adopted a similar view, and agreed that in that case no prejudice had been shown. His Honour noted (at 72) that—

> 'There is more than one interest involved in the trial of the appellant. The Crown has an interest in bringing him to trial; he, of course, has an interest in obtaining a fair trial; running in parallel is the public interest that charges of serious offences be disposed of but that they be disposed of at a hearing which is fair and not oppressive to the person charged.'

[15] In this Court, Higgins J, as he then was, ordered a permanent stay of criminal proceedings in *Emanuele v Dau* (1995) 78 A Crim R 242, a case where a person was arrested in November 1985, and a committal commenced in April 1988. The matter then proceeded over a number of years as a committal, until in October 1991 the Magistrate decided to proceed as a summary trial. The proceedings concluded in June 1992, and a decision convicting the appellant was given in November 1993. Higgins J noted the law as developed by the High Court in *Jago*, and further stated (at 251) that—

> 'It is clear from the decision of *Wilson and Grimwade* [1995] VicRp 11; (1994) 73 A Crim R 190 that a protracted trail process may itself be so unfair as to require a conclusion that a person has not had a fair trial.'

In that case his Honour set aside the conviction, and permanently stayed further proceedings. This decision was confirmed on appeal to the Full Federal Court in *Dau v Emanuele* (1995) A Crim R 197.

[16] It seems to me that as a matter of common law, delay can be a factor that can enliven the discretion vested in this Court to order a stay of criminal proceedings, at least where there

is prejudice to the accused by reason of the delay. In the Australian Capital Territory, with the passing of the Human Rights Act, it is necessary in construing any statute to adopt an interpretation of a statutory provision that is consistent with human rights.

10.9 In *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 77; (2005) 80 ALJR 367 (14 December 2005), the issue was whether a decision of the Refugee Review Tribunal, which upheld a finding that the appellants were not persons to whom Australia had protection obligations, and that they were not entitled to visas under the Migration Act 1958 (Cth), involved jurisdictional error in the form of denial of procedural fairness. The unfairness was said to have resulted from 'extraordinary delay'. The High Court (by majority) allowed the appeal. In the course of his judgment, Gleeson CJ noted at 371–2:

> Undue delay in decision-making, whether by courts or administrative bodies, is always to be deplored. However, that comfortable generalisation does little to advance the task of legal analysis when it

becomes necessary to examine the consequences of delay. The circumstances in which delay, of itself, will vitiate proceedings, or a decision, are rare. Of course, statutes of limitation impose a legislative direction that certain delays will bar proceedings; and analogous consequences may flow from the application of equitable principles. There is, however, nothing in the Act that prescribes a time limit for decisions of the Tribunal, and this Court has no power to determine some such limit. A court may have power to relieve against oppressive conduct of a complainant, or a prosecutor, and delay may be a factor in the oppression. In such circumstances, the ground for relief is the oppression, not the delay. A court of appeal, reviewing a decision of a primary judge, may conclude that delay in giving judgment has contributed to error, or made a decision unsafe. Again, the ground of appellate intervention is the error, or the infirmity of the decision, not the delay itself. Where delay gives rise to a ground of supervisory or appellate intervention, the remedy must be tailored to the circumstances and justice of the case. In adversarial litigation, for example, neither party may be at fault, and it may be unnecessary and unjust to visit the successful party with all the consequences that flow from having to start again. Remedies available where delay has caused problems may be discretionary. (In the present case, counsel for the first respondent disclaimed any reliance upon a discretionary argument.) In some cases, mandamus may be an available remedy for dilatory behaviour, and failure to seek mandamus could constitute a discretionary reason to deny later relief.

The context in which delay occurs will affect any legal consequences that may flow. In this case, the Federal Court was not sitting as a court of appeal, considering whether there were material factual errors in the reasoning of the Tribunal, and deciding whether to uphold or set aside the Tribunal's decision by reference to the principles which guide appellate intervention in the administration of civil or criminal justice. Here the focus was upon alleged jurisdictional error, specifically in the form of denial of procedural fairness, in administrative decision-making. [footnotes omitted]

10.10 Kirby J noted at 383–4:[9]

> *Significance of delay*: Two hundred years ago, Lord Eldon explained his delay of twenty years in delivering reasons for a decision by reference to the need he had felt to give the

> question thorough consideration. Since his Lordship's time, courts throughout the common law world, and beyond, have adopted a more timely standard not only in respect of judicial decisions but (as I shall show) in respect of the decisions of administrative tribunals.
>
> As numerous authorities attest, the issue presented by the complaint of delay is rarely, if ever, about the delay itself. The issue is ordinarily about the effect of the delay upon the decision that is impugned. As Mummery LJ pointed out in *Bangs v Connex South Eastern Ltd*, what is a reasonable time for the provision of a decision:
>
> > 'depends on all the circumstances of the particular case: the nature of the tribunal, its jurisdiction, constitution and procedures, the subject matter of the case, its factual and legal complexity and difficulty, the conduct of the tribunal and of the parties and any other special features of the situation in which delay has occurred.
> >
> > 'The likely effects of delayed decision-making, which can be serious, are relevant in determining what is a reasonable time.'
>
> A similar point was made in the Supreme Court of Canada by Bastarache J in a case involving delay on the part of an administrative body that was alleged to have lost its jurisdiction in the matter because of its unreasonable delay in processing complaints. The Supreme Court concluded that delay *per se* did not occasion an abuse of

process. However, proof of unacceptable delay that caused relevant prejudice could taint the proceedings:

> 'The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. … [It] is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.'

A like approach to the significance of delay has been adopted by the European Court of Human Rights in giving meaning to Art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. That provision, which draws no distinction between courts and administrative tribunals, has been interpreted as requiring that all stages of legal proceedings before such bodies must be resolved within a reasonable time. What is reasonable has been held to depend on 'the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute'. [footnotes omitted]

10.11 In relation to the Professional Rules of Conduct concerning the completion of the client's instructions in a timely and diligent manner, see **Chapter 6**.[10]

10.12 Consider the following scenario, which raises a number of ethical and legal issues: You are acting in a civil matter for a well-

known company, taking instructions from the executive director in relation to litigation against a rival company which is in financial trouble. The executive director states that his company is not really interested in the litigation as such, but is using it as a means of forcing the other company into liquidation. He instructs you to:

- Take every interlocutory step that is available even if, eventually, you have costs orders made against his company;
- Bring an interlocutory step a week before the executive director of the other company is due to travel to Japan to arrange further financial backing, and subpoena that person to appear in the court whether he may be needed or not. He tells you that this is to disrupt the above business trip;
- Brief every QC and SC in town who does commercial litigation to give advice on your client's prospects of success in order to prevent them from possibly acting for the other company;
- Deliver all of your material late to the other side, so that they will not have adequate time to consider it and take instructions before the case is due to be heard in court; and
- Allege fraud against the other company (although the executive director does not give you any particulars of such fraud). He says that he wants you to do this so he can subsequently have the allegation published in a newspaper, thereby damaging the financial credit of the other company.

Identify the professional issues raised by your client's instructions and discuss how you would respond to them.

INTERFERENCE WITH WITNESSES AND OTHERS

10.13 Various legislative provisions in each jurisdiction make it

a criminal offence to induce the giving of false testimony or to intimidate or harass a witness. Thus, although there is no property in a witness, and there is nothing which prohibits a practitioner from telling a witness that they need not agree to being interviewed. Going beyond this point and seeking to persuade a witness not to give evidence or to change their evidence, may constitute obstructing the course of justice in the sense that relevant evidence might not be given.[11]

10.14 In *Legal Practitioners Complaints Committee v Pepe* [2009] WASC 39, a practitioner was struck off for attempting to influence another client not to give evidence in a criminal matter. Murray and Beech JJ noted at [37]–[38]:

> [37] Legal practice is not only a great privilege, but if the profession of the law is to maintain its capacity to serve the community in the way described, its practitioners must accept that they are subject to rigorous ethical standards. They must merit the trust and confidence in their propriety, of their clients, other legal practitioners, the courts and the community as a whole.
>
> [38] What the respondent did, when she attempted to pervert the course of justice, amounted to a complete abandonment of those standards of behaviour required of legal practitioners.

10.15 The concern the courts have when lawyers interfere with witnesses was demonstrated as far back as 1939 in *Kennedy v Council of the Incorporated Law Institute of New South Wales* (1939) 13 ALJR 563. In that case, the appellant was solicitor for the plaintiff, in an action brought to recover compensation from the Commissioner for Railways under the Compensation to Relatives

Act 1897 (NSW), by the son of a man who had lost his life by falling through the open door of a carriage of an electric train. An important matter in dispute at the trial was whether the deceased had been precipitated through the open door by a jolt of the train, or had lost his grip or balance while leaning out to vomit.

10.16 The charge against the appellant concerned a visit he had made on the evening of the day on which his client's case closed to one of the three witnesses for the defendant, Bradshaw. As she sat outside the court waiting to be called to appear for the defendant, the appellant's brother engaged her in conversation, found that she said the deceased had been sick, and obtained her address. That evening, the appellant drove from his home, presented himself at Bradshaw's home and asked to see her. She came to the front door to see him. He told her that he was the plaintiff's solicitor and that he wanted her to make a statement for him. She said that she had made one and would not make another. He pressed her to give him a statement and asked her to allow him to come into the house. Upon her refusing, he proceeded to assert that the deceased had been jerked or jolted out of the train. On her saying that this was not so, the appellant repeated the assertion. With some persistence, he maintained that the deceased had been jerked from the train, that Bradshaw knew it, and that it might happen to her own husband. He said that she might find herself in need of his help, that his client was a poor woman striking out for her children, and that Bradshaw should think of her. He stood with his foot in the doorway, and although he was at first courteous and at no time adopted a bullying tone, he was importunate in pressing on her the view, which she disputed, that the deceased had been thrown out of the railway carriage door and had not fallen out, and in his request for a written statement. At length, upon the appellant saying that he had a subpoena for Bradshaw, and producing it, she said that she

would send for the police and left him. The appellant then asked her husband, who was present, to tell her not to go for the police. He said that he was entitled to serve her with a subpoena, but left without doing so.

10.17 The Statutory Committee of the Incorporated Law Institute of New South Wales removed the appellant's name from the roll of solicitors on the ground of misconduct. The High Court dismissed the appeal by the solicitor.

10.18 Rich J at 563 and 564 said that a charge of misconduct as relating to a solicitor need not amount to an offence under the law. Rather, it was enough that it amounted to grave impropriety affecting their professional character, and was indicative of a failure either to understand or to practise the precepts of honesty or fair dealing in relation to the courts, their clients, or the public. The particular transaction the subject of the charge must be judged as a whole, and the conclusion whether it betokened unfitness to be held out by the court as a member of a profession in whom confidence could be placed, or, on the other hand, although a lapse from propriety, was not inconsistent with general professional fitness and habitual adherence to moral standards, was to be reached by a general survey of the whole transaction. The appellant's enterprise, said his Honour, was part of a campaign to win the case, a campaign in the course of which, his Honour noticed, two other witnesses for the defence were talked to. The appellant was engaged in a course of aggressive

interference with the ordinary course of calling evidence on behalf

of the defendant, whose case had already been entered upon. He clearly strove to influence a witness in what she would say, and did so in an improper manner. In his Honour's opinion, the appellant was interfering with the ordinary course of justice, and in all the circumstances showed that his misconduct manifested a definite unfitness for him to be trusted to discharge the duties of a solicitor, particularly in relation to the court.

10.19 Starke J at 564 noted that Bradshaw, her husband, and the appellant, were examined before the Statutory Committee, which accepted Bradshaw's evidence rather than the appellant's. Under those circumstances, said his Honour, no Court of Appeal ought to reverse the decision of the Statutory Committee merely because it entertained doubts whether the decision was right; it should be convinced that the Statutory Committee was wrong.

10.20 In the case of *Nauru Phosphate Royalties Trust v Business Australia Capital Mortgage; Andrew Hugh Jenner Wily v Nauru Phosphate Royalties Trust* [2008] NSWSC 833, a solicitor for one of the defendants (Mr Nikolaidis) prepared and disseminated a discussion paper with the intention that it would be seen by the opposing party, thereby causing suspicion on their part as to the advice they were being given by their legal advisers. This was done in an attempt to pressure the other party to compromise the proceedings. McDougall J noted at [26]–[37]:

> [26] In my view it is clear from the whole of Mr Nikoladis' evidence that his intention was that the discussion paper, or at least the allegations in it, would go to those who had influence over NPRT, with a view to influencing NPRT and the other Nauru parties to terminate the retainer of HDY and compromise the current proceedings.
>
> [27] In this context, I refer to Mr Nikolaidis evidence set out at sub-paras (11) and (12) above. I do not understand what purpose there

was to the document other than to cause NPRT to mistrust both the advice it was getting and the motives of those who gave it that advice, and to cause NPRT to terminate HDY's retainer and negotiate a compromise.

[28] Two points should be noted. The first is that I do not accept Mr Miller's submission that Mr Nikolaidis' evidence was frank and forthright, or truthful and frank. On the contrary, I thought that Mr Nikolaidis gave his evidence in a manner characterised by evasion and that he sought to conceal his motives acting the way he had done, under a veneer of respectability. I think indeed the way Mr Nikolaidis gave evidence confirms that he was well aware of the questionable nature of his activities.

…

[32] Mr Forster [for the Nauru parties] relied on the decision of the Court of Appeal in *Harkianakis v Skalkos* (1997) NSWLR 42. That was a case of criminal contempt. The contempt was constituted by the publication in a Greek language newspaper of articles calculated to put pressure on the plaintiff to discontinue his defamation case against the defendant. Mason P (with whom Beazley JA agreed) said at 32 that the law was concerned 'to protect from improper interference the litigant's freedom to choose whether or not to initiate, continue or discontinue legal proceedings. …'

…

[page 452]

[35] In my view, Mr Nikolaidis' conduct in preparing the discussion paper and disseminating it with the intention that at least the contents should come to the attention of opposing party was underhanded and wrong. It was conduct calculated to induce in the Nauru parties suspicion of their legal advisers and of the advice that those advisers might give. It was conduct intended to persuade the Nauru parties,

without having proper advice, to abandon their proceedings. In my view it was an interference in proceedings such to entitle of the Court to intervene.

[36] Further in my view, the Court is entitled to intervene on the basis that Mr Nikolaidis is an officer of the Court. I have no doubt that reasonable legal practitioners could consider that Mr Nikolaidis conduct as I have described it was reprehensible. Whether or not it amounts to professional misconduct within s 497 of the Legal Profession Act 2004 is a matter for others. It is sufficient to say that the conduct in question is conduct in relation to proceedings before the Court that the Court should restrain. The Court should so act firstly to enable those proceedings to continue in a fair and even-handed way; and secondly to prevent one of its officers from engaging in conduct of which the Court disapproves. The conduct in question is an unwarrantable, unjustifiable inference in the affairs of an opposing party. It is conduct that the Court should not tolerate in its officers.

[37] I am satisfied on the basis of Mr Nikolaidis' evidence (especially that referred at sub-paras (13) and (14) above) that there is a real risk that he will continue with the conduct in question unless restrained by an order or undertaking from doing so. I am not satisfied that a mere finding as to the impropriety of that conduct would be sufficient to deter him.

10.21 Is it possible to reconcile the notion of 'doing everything you legally can for your client' with the notion of 'acting fairly, without undue delay and without unfair tactics'?

10.22 Apart from being actionable under the general law of contract, tort, or equity, a failure by the practitioner to act with candour, integrity, and diligence can, in certain circumstances, result in disciplinary proceedings based on a breach by the practitioner of the Professional Conduct Rules.[12]

10.23 The following is an extract from the Law Society of the

Northern Territory's Rules of Professional Conduct and Practice 2005:

Integrity of evidence

17.28 A practitioner must not suggest or condone another person suggesting in any way to any prospective witness (including a party or the client) the content of any particular evidence which the witness should give at any stage in the proceedings.

17.29 A practitioner will not have breached Rule 17.28 by expressing a general admonition to tell the truth, or by questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not coach or encourage the witness to give evidence different from the evidence which the witness believes to be true.

17.30 A practitioner must not confer with, or condone another practitioner conferring with, more than one lay witness (including a party or client) at the same time, about any issue:

(a) as to which there are reasonable grounds for the practitioner to believe it may be contentious at a hearing; or

(b) which could be affected by, or may affect, evidence to be given by any of those witnesses.

17.31 A practitioner will not have breached Rule 17.30 by conferring with, or condoning another practitioner conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.

…

26. Communications

A practitioner must not, in any communication with another person on behalf of a client:

26.1 represent to that person that anything is true which the practitioner knows, or reasonably believes, is untrue; or

26.2 make any statement that is calculated to mislead or intimidate the other person, and which grossly exceeds the legitimate assertion of the rights or entitlement of the practitioner's client; or

26.3 threaten the institution of criminal proceedings against the other person in default of the person's satisfying a concurrent civil liability to the practitioner's client.

10.24 The following is an extract from the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 applicable in New South Wales,[13] and mirrored in Queensland,[14] South Australia,[15] Victoria,[16] and the Australian Capital Territory:[17]

23. OPPOSITION ACCESS TO WITNESSES

23.1 A solicitor must not take any step to prevent or discourage a prospective witness or a witness from conferring with an opponent or being interviewed by or on behalf of any other person involved in the proceedings.

23.2 A solicitor will not have breached Rule 23.1 simply by telling a prospective witness or a witness that the witness need not agree to confer or to be interviewed or by advising about relevant obligations of confidentiality.

24. INTEGRITY OF EVIDENCE — INFLUENCING EVIDENCE

24.1 A solicitor must not:

24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or

24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.

24.2 A solicitor will not have breached Rules 24.1 by:

24.2.1 expressing a general admonition to tell the truth;

24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness; or

24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not encourage the witness to give evidence different from the evidence which the witness believes to be true.

25. INTEGRITY OF EVIDENCE — TWO WITNESSES TOGETHER

25.1 A solicitor must not confer with, or condone another solicitor conferring with, more than one lay witness (including a party or client) at the same time:

25.1.1 about any issue which there are reasonable grounds for the solicitor to believe may be contentious at a hearing; and

25.1.2 where such conferral could affect evidence to be given by any of those witnesses, unless the solicitor believes on reasonable grounds that special circumstances require such a conference.

25.2 A solicitor will not have breached Rule 25.1 by conferring with, or condoning another solicitor conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.

…

34. DEALING WITH OTHER PERSONS

34.1 A solicitor must not in any action or communication associated with representing a client:

34.1.1 make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person;

34.1.2 threaten the institution of criminal or disciplinary proceedings against the other person if a civil liability to the solicitor's client is not satisfied; or

34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.

34.2 In the conduct or promotion of a solicitor's practice, the solicitor must not seek instructions for the provision of legal services in a manner likely to oppress or harass a person who, by reason of some recent trauma or injury, or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the solicitor at the time when the instructions are sought.

10.25 In Tasmania, issues concerning the interference with witnesses or the opposing party are dealt with in accordance with the common law.

10.26 The following extract is from the Law Society of Western Australia's Legal Profession Conduct Rules 2010:

39. Integrity of evidence — influencing evidence

(1) A practitioner must not suggest to or advise a witness that the witness should give false evidence.

(2) A practitioner must not make a suggestion to, or condone

a suggestion being made to, a prospective witness about the content of evidence which the witness should give at any stage in the proceedings.

(3) A practitioner who—

(a) advises a prospective witness to tell the truth; or

(b) questions and tests in conference the version of evidence to be given by a prospective witness; or

(c) draws the witness's attention to inconsistencies or other difficulties with the witness's evidence, has not, by that action, breached subrule (1) or (2).

40. Integrity of evidence — 2 witnesses together

(1) A practitioner must not confer with, or condone another practitioner conferring with, 2 or more lay witnesses at the same time about an issue if—

(a) there are reasonable grounds for the practitioner to believe that the issue may be contentious at a hearing; and

(b) one of the witnesses may be affected by, or may affect, evidence to be given by another of the witnesses, unless the practitioner believes on reasonable grounds that special circumstances require such a conference.

(2) Subrule (1) does not apply in respect of an issue about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.

DUTY OF CANDOUR AND FRANKNESS

10.27 The duty of candour relates to the duty of full and frank disclosure so that the court can properly determine the issues between the parties, and the public can have confidence in

the administration of Justice.[18] It relates not only to questions of evidence and the testimony of witnesses, but also to the use of authorities and ensuring that the court is fully informed of the relevant law. Furthermore, it incorporates the notion of not making inferences in an opening address to the court that cannot be reasonably proven.[19] In the case of a criminal trial, this would include the duty of the prosecution to bring to court all relevant and reliable witnesses.[20] Failure to meet this professional obligation of candour and frankness can amount to professional misconduct and removal from the Roll of Practitioners.[21]

10.28 Barristers and solicitors are officers of the court and owe a duty to the court which may from time to time conflict with their duty to the client. When it does, the duty to the court overrides the duty to the client. In *Australian Capital Territory v Revolve* [2011] ACTSC 61 (15 April 2011), Master Harper noted at [19]:

> … Barristers and solicitors have a duty of frankness and candour, and a duty to inform the court of any applicable legislation or decision even where it may appear contrary to the interests of the client to do so. Courts are able to rely on the integrity of barristers and solicitors and it is fundamental that the courts be able to do so with confidence. (See also *Legal Services Board v McGrath* [2010] VSC 266 (17 June 2010) per Warren CJ at [26].) It follows from this that if a practitioner becomes aware of the fact that they have misled the court on some matter they should remedy that situation by correcting the error. In *Perpetual Trustee Company Limited v Cowley* [2010] QSC 65 (15 March 2010) Atkinson J noted at [17]:
>
> > 'A legal practitioner's duty to the court and therefore to the public administration of justice imposes duties of honesty,

> candour and integrity. A legal practitioner may not intentionally mislead the court. If it comes to the legal practitioner's attention that he or she has unintentionally misled the court then the duty of the legal practitioner is to inform the court to correct the error.'

10.29 As Viscount Maugham said in *Myers v Elman* [1940] AC 282 at 294:

> A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false owes to the court to put the matter right at the earliest date, if he continues to act as solicitor upon the record.

10.30 In *Walsh v Legal Practitioners Conduct Board* [2016] SASCFC 52 (13 May 2016), Stanley J (Parker and Doyle JJ agreeing), noted at [1], [43], [79]:

> [1] This is an appeal against findings by the Legal Practitioners Disciplinary Tribunal ('the Tribunal') that the appellant ('the practitioner') was guilty of unsatisfactory and

> unprofessional conduct. The Tribunal found the practitioner guilty of unsatisfactory conduct in that he provided information to Federal Magistrate Simpson (as he then was) ('Simpson FM') being reckless as to whether the information was misleading. The Tribunal further found the practitioner guilty of unprofessional conduct in that between 23 July 2009 and 22 August 2010 he provided information to the Legal Practitioners Conduct Board ('the Board') knowing that the information was misleading.
>
> …
>
> [43] Candour and honesty are essential ingredients of a practitioner's

obligation to the court. Accordingly, a practitioner who makes a false assertion in submissions to the court about the facts, in the absence of any genuine belief that the evidence supports such an assertion, would ordinarily be acting dishonestly towards the court even if the practitioner did not know that the statement was misleading. Equally, a practitioner who makes a submission to the court about the law, in the absence of any genuine belief that the submission correctly states the law, would ordinarily be acting dishonestly towards the court even if the practitioner did not know that the submission was misleading.

…

[79] Accordingly, I reject the submission that the Tribunal erred in failing to conclude that the 'cavalier approach' of the practitioner in the discharge of his duty of complete candour and frankness towards the Court takes his conduct out of the category of 'unsatisfactory conduct' and into the category of 'unprofessional conduct'. I do not consider that there has been an error in the exercise of the evaluative judgment required by the Tribunal in characterising whether the practitioner's conduct was or was not a substantial failure to meet the standard of conduct observed by competent legal practitioners of good repute. [references omitted]

The appeal was dismissed.

10.31 This is not to say that a practitioner must advise the court of opposing arguments that would be inconsistent with their instructions, or seek to remedy some deficiency in an opponent's evidence. There is still an expectation that each party, when present and represented, will put their best case before the court, while at the same time ensuring that the court is not misinformed as to the law. In *Satz v ACN 069 808 957 Pty Ltd* [2010] NSWSC 365 (30 April 2010), Barrett J noted at [61]–[64]:

[61] In *Kavia Holdings Pty Ltd v Werncog Pty Ltd* [1999] NSWSC 839, Santow J said (at [1]):

> 'It is well settled that if an applicant for an injunction fails to disclose to the Court all relevant facts which the duty of candour to the Court requires to be disclosed, and in a way which is not misleading, the Court has a discretion to discharge the injunction. The Court may in some cases exercise its discretion by maintaining the injunction, though penalising the applicant by an appropriate order as to costs or by calling upon the Plaintiffs' undertaking as to damages. See for example, *Holden v Waterlow* (1866) 15 WAR 139 and *Thomas A Edison v Bullock* [1912] HCA 72; (1912) 15 CLR 679 at 682 and the discussion in Spry 'The Principles of Equitable Remedies' LBC 1997 at 494-500. While that duty of candour applies with especial stringency to ex parte applications (see for example *Frigo v Culhaci* (Court of Appeal,

> 17 July 1998, unreported)), its scope extends to any application, contested or not, where evidence is presented to the court in support of an application. Those duties apply to the parties.'

[62] It appears however that this position was based to some extent, although it is not clear to what degree, upon the duty to the court owed by legal advisers. His Honour continued at [2]:

> 'A legal advisor depends on the instructions given. Nonetheless the legal advisor should remain alert to the importance of ensuring he or she can fulfil the personal duty of candour he or she owes to the Court.'

[63] And at [11]:

> 'This is because the duty of candour is firstly a duty of the party involved, though reinforced by the legal advisor's corresponding duty to the Court.'
>
> [64] As I said in *J Aron Corporation v Newmont Yandal Operations Pty Ltd* [2004] NSWSC 533; (2004) 183 FLR 90, I find it difficult to justify the imposition of such a broad duty on parties and their legal advisers in adversarial litigation where the parties are present and represented. Solicitors and counsel, as officers of the court, will always have, in the first place, a duty to the court. That duty includes a clear obligation to be frank and 'not to keep back from the court any information that ought to be before it': *Re Gruzman; Ex parte The Prothonotary* (1968) 70 SR (NSW) 316 at 323. But where both parties are before the court and represented, I do not think that they have a duty to 'supply the place of the absent party'. As long as litigation remains adversarial, a party can be presumed — indeed expected — to put their best case forward. That is not to say that a wilful misleading of the court will pass without remedy, but a mere failure to present a neutral case or to seek to remedy some deficiency in an opponent's evidence (or, as it was here, entire absence of evidence) cannot lay the foundation for subsequent intervention.

10.32 The duty of candour and frankness operates not just after admission in the practitioner's capacity as an officer of the court, but also at the time an applicant is seeking admission as a barrister and/or solicitor. In *Re an Application by Mariel Jessica Sutton* [2016] NTSC 9 (19 February 2016),[22] Hiley J noted at [6], [127]–[130]:

> [6] In support of an application for admission the applicant must file an affidavit specifying that the applicant is of good fame and character, and must also disclose if the applicant has been convicted of an offence other than an excluded offence. In so doing the applicant is obliged to approach the Board, and later the Court, 'with the utmost good faith and candour, comprehensively disclosing any matter which may reasonably be taken to bear on an assessment of fitness for

practice'. The obligation is upon the applicant to make candid and comprehensive disclosure regarding anything which may reflect adversely on the fitness and propriety of the applicant to be admitted to practise. The obligation of candour does not permit deliberate or reckless misrepresentation pretending to be disclosure. The applicant

must be frank with the Board and, through it, the Court. Full and accurate information must be provided to the Board by the applicant. It is not sufficient if such information is incomplete, or if the whole of the relevant information only emerges in response to enquiries from the Board.

…

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

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

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

relation to personal matters and also when dealing with fellow lawyers and the Court.

[130] I am satisfied that the Applicant is now a fit and proper person to be admitted as a lawyer. [footnotes omitted]

10.33 The same duty of candour and frankness applies where a legal practitioner is responding to a request for information from their professional association, such as a bar association or law society.[23]

10.34 This duty of candour and frankness rests more heavily on the Crown in a criminal case, and more heavily on a party in an *ex parte* hearing. In *Garrard (t/a Arthur Andersen & Co) v Email Furniture Pty Ltd* (1993) 32 NSWLR 662, the New South Wales Court of Appeal held by majority that an order obtained in breach of an *ex parte* applicant's duty of candour will almost invariably be set aside, even if on a fresh application following full disclosure the applicant would be entitled to an order in similar terms. In that case, a firm of solicitors sought *ex parte*, and obtained from the taxing officer, a certificate of taxation in respect of the amount claimed in the bill of costs. The firm did not inform the taxing officer that an application for an extension of time for the filing of an objection to the bill had been made.

10.35 In *Re a Solicitor* (1916) 33 WN (NSW) 62, the court refused an application by a solicitor to be restored to the roll of practitioners. This was on the ground that in his affidavits he did not candidly state the cause of his removal, but misrepresented the nature of the offence.

10.36 This duty of disclosure applies equally in cases where the legal practitioner is engaged in personal litigation. In *New South Wales Bar Association v Cummins* [2001] NSWCA 284 (31 August 2001), the Court of Appeal noted at [59]:

> In *Re Thom; Ex parte The Prothonotary* (1964) 80 WN (NSW) 968 the Full Court of the Supreme Court expressly found that wilful non-disclosure by a solicitor with respect to his own divorce proceedings constituted professional misconduct. The solicitor had knowingly failed to admit to his own adultery in circumstances where a litigant was obliged to do so and, accordingly, deceived the court in the exercise of its matrimonial causes jurisdiction. Fulfilment of a duty of candour to the court is a quality required of legal practitioners and its breach, even in personal litigation, manifested the absence of that quality.

10.37 Consider the following scenario, which raises the duties of fairness and candour when acting in a criminal law matter: You are acting for a client charged with a criminal offence. The client has given a statement to the police that he was not at the scene of the crime and so knows nothing of the matter. Subsequently, the client makes a statement to you that he was actually at the scene with a companion, but has no memory of the matter, as he was too affected by alcohol or drugs to remember any of the events that may have taken place there. About one week before trial, while in conference with the client, the client tells you that he can now remember the matter and that he committed the act for which he had been charged, but wants to plead not guilty. Discuss whether there is or should be a duty on the part of the solicitor or barrister to disclose the confession to the Court.

10.38 Do you think that the cause of justice is served by requiring the Crown to produce all relevant witnesses, even those adverse to the Crown's case, and disclose all relevant material,

when no such requirements are placed on the defence? Discuss the differing views of Callinan and McHugh JJ in *Dyers v R* (2002) 210 CLR 285; 192 ALR 181; [2002] HCA 45 (9 October 2002).

10.39 The following Professional Conduct Rules[24] relate to practitioners' obligations concerning diligence, integrity, and candour — for example, with respect to the preparation of court documents, the responsible use of court processes and privilege, and communications with opponents.

10.40 The following extract is from the Law Society of the Northern Territory's Rules of Professional Conduct and Practice 2005:

> 10A.6 A practitioner must (unless circumstances warrant otherwise, in the practitioner's considered opinion) advise a client who is charged with a criminal offence about any law, procedure or practice which in substance holds out the prospect of some advantage (including diminution of penalty) if the client pleads guilty or authorises other steps towards reducing the issues, time, cost or distress involved in the proceedings.
>
> 10A.7 A practitioner must bear in mind the cost and risk to the client of litigating and give advice so as to allow the client to properly appreciate the risks and costs of litigation.
>
> …
>
> **11. Preparation of Affidavits**
>
> **11.1** If a practitioner is:
>
> 11.1.1 Aware that a client is withholding information required by an order or rule of a court, with the

intention of misleading the court; or

11.1.2 Informed by a client that an affidavit, of the client, filed by the practitioner, is false in a material particular;

and the client will not make the relevant information available, or allow the practitioner to correct the false evidence; the practitioner must, on reasonable notice, terminate the retainer and, without disclosing the reasons to the court, give notice of the practitioner's withdrawal from the proceedings.

11.2 A practitioner must not draw an affidavit alleging criminality, fraud, or other serious misconduct unless the practitioner believes on reasonable grounds that:

11.2.1 factual material already available to the practitioner provides a proper basis for the allegation;

11.2.2 the allegation will be material and admissible in the case, as to an issue or as to credit; and

11.2.3 the client wishes the allegation to be made after having been advised of the seriousness of the allegation and of the possible consequences for the client if it is not made out.

12. Preparation of Court Documents

A practitioner must not draw or settle any court document alleging criminality, fraud or other serious misconduct unless the practitioner believes on reasonable grounds that:

12.1 factual material already available to the practitioner provides a proper basis for the allegation if it is made in a pleading;

12.2 the evidence in which the allegation is made, if it is made in evidence, will be admissible in the case, when it is filed; and

12.3 the client wishes the allegation to be made, after having been

advised of the seriousness of the allegation and of the possible consequences for the client if it is not made out.

13. Practitioner a Material Witness in Client's Case

A practitioner must not appear as an advocate and, unless there are exceptional circumstances justifying the practitioner's continuing retainer by the practitioner's client, the practitioner must not act, or continue to act, in a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the court.

…

15. Admission of Perjury

If a practitioner's client admits to the practitioner, during or after any proceedings, while judgment is reserved, that the client has given materially false evidence or tendered a false or misleading document in the proceedings, the practitioner must—

15.1 advise the client that the Court should be informed of the false evidence, and request the client's authority to inform the Court and correct the record; and

15.2 if the client refuses to provide that authority, withdraw from the proceedings immediately, and terminate the retainer.

10.41 The following rules applicable to Queensland,[25] New South Wales,[26] South Australia,[27] Victoria,[28] and the Australian Capital Territory,[29] are set out in **Chapter 9**:

- Rule 19: Frankness in Court;
- Rule 21: Responsible use of court process and privilege;
- Rule 22: Communication with opponents; and
- Rule 27: Solicitor as material witness in client's case.

10.42 In addition to the above, there are a number of other

Solicitor's Conduct Rules that relate to the general obligation of fairness, candour, and frankness. These include:

30. Another Solicitor's or Other Person's Error

30.1 A solicitor must not take unfair advantage of the obvious error of another solicitor or other person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact.

31. [Concerning the inadvertent disclosure of material known or reasonably suspected of being confidential.]

[page 463]

32. [Concerning the making of unfounded allegations.]

…

34. Dealing with other persons

34.1 A solicitor must not in any action or communication associated with representing a client:

34.1.1 Make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person.

34.1.2 Threaten the institution of criminal or disciplinary proceedings against the other person if a civil liability to the solicitor's client is not satisfied; or

34.1.3 Use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.

34.2 In the conduct or promotion of the solicitor's practice, the solicitor must not seek instructions for the provision of legal services in a manner likely to oppress or harass a person who,

by reason of some recent trauma or injury, or other circumstances, is or might reasonably be expected to be, at a significant disadvantage in dealing with the solicitor at the time when the instructions are sought.

10.43 In Tasmania, issues concerning the duties concerning candour and frankness are dealt with in accordance with the common law.

10.44 The following extract is from the Law Society of Western Australia's Legal Profession Conduct Rules 2010:

> **34 Another practitioner's error**
>
> A practitioner who observes that another practitioner is making or is likely to make a mistake or oversight which may involve the other practitioner's client in unnecessary expense or delay—
>
> (a) must not do or say anything to induce or foster the mistake or oversight; and
> (b) must draw the attention of the other practitioner to the mistake or oversight if—
> (i) doing so is unlikely to prejudice the interests of the first-mentioned practitioner's client; or
> (ii) the first-mentioned practitioner's client consents.
>
> **34 Inadvertent disclosure**
>
> A practitioner to whom material is disclosed by another practitioner in circumstances where the first mentioned practitioner knows or reasonably suspects that the material is privileged and that the disclosure was inadvertent—
>
> (a) must not disclose the material or its substance to the practitioner's client or use the material in any way; and
> (b) must immediately, in writing, notify the practitioner's client and the other practitioner—
> (i) that the material has been disclosed; and

(ii) that the practitioner will return, destroy or delete the material (as appropriate) at a time set out in the notice (being not less than 2 clear business days and not more than 4 clear business days from the date of the notice); and

(c) must return, destroy or delete the material as set out in the notice; and

(d) must notify the practitioner's client and the other practitioner in writing as soon as the practitioner has returned, destroyed or deleted the material.

10.45 See also the following Western Australian Legal Profession Conduct Rules set out in **Chapter 9**:

- Rule 34 — Frankness in Court;
- Rule 36 — Responsible use of court process and privilege;
- Rule 37 — Communication with opponents; and
- Rule 42 — Practitioner as material witness in client's case.

THE GIVING OF UNDERTAKINGS

10.46 The giving of an undertaking is held to be a solemn promise to the court, and represents a trust between colleagues and between lawyers and the court. Solicitors and barristers are officers of the court.[30] In *Legal Services Commissioner v Sapountzis (Legal Practice)* [2010] VCAT 1124 (24 June 2010), Butcher M noted at [17] that an undertaking:

> … is a personal promise by a legal practitioner and it is a mechanism whereby practical courses of action can be taken based upon the reliance by one legal practitioner upon the undertaking of another that the contents of that undertaking will be observed, again I use the

word with emphasis strictly. If there was not such a requirement there would be a breakdown in what is a very important mechanism employed by members of the legal profession. The breach of an undertaking strikes at the heart of such a system.

10.47 In *Indoor Holdings Pty Ltd v Bennett* [2010] WASC 242 (9 September 2010), Le Miere J noted at [32]:

> … The proper interpretation of an undertaking is not a matter of ascertaining the mutual intention of the parties. In *Smith Kline Beecham Plc v Apotex Europe Ltd* [2005] EWHC 1655; [2006] 1 WLR 872 Lewison J said:
>
> > 'It is important to recall at the outset that a cross-undertaking is not given to a party to the proceedings; it is given to the court. As Lord Diplock explained in *Hoffmann-La Roche* at 361:
> >
> > > "The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit. …"
>
> [page 465]
>
> > 'It follows from this that the proper interpretation of a cross-undertaking is not a question of divining the mutual understanding of the parties to the litigation, for the terms of the cross-undertaking are a matter for the court [42]–[43].'

10.48 In *Australian Competition and Consumer Commission v*

Allphones Retail Pty Ltd (No 4) [2011] FCA 338 (12 April 2011), Nicholas J noted at [7]–[12]:

> It is convenient to set out some general principles applicable to the determination of a charge of civil contempt arising out of an alleged contravention of an undertaking given to the Court.
>
> First, such an undertaking is equivalent to an injunction. A person who contravenes an undertaking given by him or her to the Court is guilty of a contempt in the same way as if he or she had contravened an order of the Court (*Australian Consolidated Press Limited v Morgan* [1965] HCA 21; (1964) 112 CLR 483 at 496 per Windeyer J).
>
> Secondly, an allegation that a person has committed a contempt of court is a serious allegation which must be proved beyond reasonable doubt. Every element of each charge must be proved to that standard (*Witham v Holloway* (1995) 183 CLR 525 at 534 per Brennan, Deane, Toohey and Gaudron JJ and McHugh J at 535). *In Consolidated Press Ltd v McRae* [1955] HCA 11; (1955) 93 CLR 325 Dixon CJ and Kitto and Taylor JJ said (at 333):
>
> > 'Like every other offence the facts by which it is made out must be proved by admissible evidence to the satisfaction beyond reasonable doubt of the tribunal. Uncertain inferences from inexact proofs will not support such a charge. While that was a case involving an alleged criminal contempt, what was said also applies to proof of charges involving an alleged civil contempt.'
>
> Thirdly, the proper construction of an undertaking is a matter of law. That is not to say that there might not be facts requiring proof which are relevant to an issue of construction. However, the proper construction of the undertakings with which I am concerned is not a matter for proof or disproof.
>
> Fourthly, in attempting to resolve an issue as to the proper construction of an undertaking the Court may come to the view that the order or undertaking is not merely ambiguous in the sense that it

is reasonably susceptible to more than one interpretation, but that it is also of uncertain application in the circumstances giving rise to the alleged contravention. A charge based upon an alleged contravention of an undertaking which has uncertain application to the facts alleged to give rise to such a contravention cannot be sustained (*Universal Music Australia Pty Ltd v Sharman Networks Ltd* [2006] FCAFC 41; (2006) 150 FCR 110 at [36]).

Fifthly, even if the Court is satisfied that words used in an undertaking should be given a particular meaning or denotation, it may also need to consider whether such meaning or denotation might fairly be expected to have been within the contemplation of the person alleged to have contravened the undertaking at the time he or she gave it: *Australian*

Consolidated Press v Morgan [1965] HCA 21; (1965) 112 CLR 483 at 491 per Barwick CJ. Windeyer J said (at 503):

> 'His Honour said that the appellant's having acted on a mistaken construction of the undertaking did not mitigate the breach of it, construed as his Honour held it should be construed. But, with respect, I cannot altogether agree. This is not a case in which the extent of obligations undertaken is ascertainable simply by construing the undertaking according to ordinary grammatical rules. If that were so, I would agree that a mistake in construction could not excuse disobedience, although it might perhaps mitigate its consequences. Those who give undertakings to a court are bound by the language they use. If its true meaning, although not immediately plain, can be ascertained according to ordinary rules of construction, then the person giving the undertaking is bound by it in that sense. But the

> uncertainties that lurk in the words of this undertaking, and which were exposed during the argument, cannot be resolved in that way, for they do not arise from a debatable construction but from an uncertain denotation.'

10.49 A failure by a lawyer to honour an undertaking can amount to contempt and the lawyer can be ordered to pay costs.[31] For this reason, undertakings should not be given unless the practitioner is satisfied that the promise can be kept — for if it is not, the practitioner may personally be held accountable.[32] Personal liability will only be avoided if such liability is expressly disclaimed in the undertaking itself. An undertaking given by a lawyer on behalf of a client is only enforceable if it is given with the client's express authority. The consequences for a client who has breached an undertaking are not as severe as for a solicitor who has done so, due to the duty owed by the solicitor to the court. In *Law Society of New South Wales v Malouf* [2007] NSWADT 54 (29 November 2006), the Administrative Decisions Tribunal at [44] stressed the significance of undertakings given by practitioners:

> The mere fact that an undertaking entered into by a practitioner offends public policy, or is for any reason unenforceable, will not, without more, excuse the practitioner who fails to comply with his or her undertaking. The obligation of a practitioner who enters into an undertaking, is to ensure a full understanding of the obligations imposed by that undertaking. A practitioner called upon to give an undertaking in terms that are too wide, offend public policy, or are objectionable for any other reason, should decline to give such an undertaking, and bring to the attention of the practitioner seeking it, the proper purpose of undertakings between practitioners. The respondent failed to meet his professional responsibilities to the extent that he did not turn his mind to the full ramifications of the undertaking he signed. To that extent he came perilously close to a finding by this Tribunal of unsatisfactory professional conduct. For

the reasons given he has escaped such a finding, but practitioners should be aware of the grave obligations consequent upon the giving of

undertakings, and the risk to professional reputation of those who give them lightly or thoughtlessly.

10.50 The failure to honor undertakings comes within the long accepted definition of common law professional misconduct.[33] In *Law Society of New South Wales v Malouf* [2007] NSWADT 54 (29 November 2006), the court noted at [25]–[26]:

> [25] Compliance with undertakings given by a lawyer in the course of his or her professional practice is an important component of the trust reposed in a legal practitioner when admitted to practise. A member of the profession should be confident that reliance can be placed upon an undertaking given by a fellow practitioner. In the ordinary course of dealing, it will frequently be necessary, for one practitioner to give, and another practitioner to receive, an undertaking. The giving of an undertaking is a matter of weight and gravity, not to be undertaken lightly.
>
> [26] There is abundant authority for the proposition that a legal practitioner's breach of an undertaking is to be regarded as a serious breach of professional standards. …

10.51 The following Professional Conduct Rules relate to the practitioner's obligations concerning the giving of promises or undertakings, for example, to other practitioners.[34]

10.52 The following extract is from the Law Society of the Northern Territory's Rules of Professional Conduct and Practice 2005:

19. Undertakings

A practitioner who, in the course of the practitioner's practice, communicates with another practitioner orally, or in writing, in terms which expressly, or by necessary implication, constitute an undertaking on the part of the practitioner, to ensure the performance of some action or obligation, in circumstances where it might reasonably be expected that the other practitioner will rely on it, must honour the undertaking so given strictly in accordance with its terms, and within the time promised, or, if no precise time limit is specified, within a reasonable time.

19A. A practitioner must not give to another practitioner an undertaking compliance with which requires the co-operation of a third party, who is not a party to the undertaking, and whose co-operation cannot be guaranteed by the practitioner.

20. A practitioner must not, in the course of the practitioner's practice, seek from another practitioner or that practitioner's employee, an undertaking, compliance with which would require the co-operation of a third party who is not a party to the undertaking,

and whose cooperation could not be guaranteed by the practitioner or employee asked to give the undertaking.

…

25. Undertakings

A practitioner who, in the course of providing legal services to a client, and for the purposes of the client's business, communicates with a third party orally, or in writing, in terms which, expressly, or by necessary implication, constitute an undertaking on the part of the practitioner to ensure the

performance of some action or obligation, in circumstances where it might reasonably be expected that the third party will rely on it, must honour the undertaking so given strictly in accordance with its terms, and within the time promised (if any) or within a reasonable time.

10.53 The following extract is applicable to Queensland,[35] New South Wales,[36] South Australia,[37] Victoria,[38] and the Australian Capital Territory:[39]

Undertakings

6.1 A solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, unless released by the recipient or by a court of competent jurisdiction.

6.2 A solicitor must not seek from another solicitor, or that solicitor's employee, associate, or agent, undertakings in respect of a matter, that would require the co-operation of a third party who is not party to the undertaking.

10.54 In Tasmania, obligations concerning undertakings are dealt with in accordance with the common law.

10.55 The following extract is from the Law Society of Western Australia's Legal Profession Conduct Rules 2010:

22. Undertakings

(1) In this rule—

undertaking means an undertaking intended to bind the person giving the undertaking.

(2) A practitioner must ensure the timely and effective performance of an undertaking given by the practitioner to another practitioner unless—

(a) the other practitioner would not reasonably be expected to rely on the undertaking; or

(b) the practitioner is released by the recipient of the undertaking or by a court of competent jurisdiction.

(3) A practitioner must ensure the timely and effective performance of an undertaking given by the practitioner to a third party in the course of providing legal services to a client or for the purposes of the client's business unless released by the recipient of the undertaking or by a court of competent jurisdiction.

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1. Per Dixon CJ, McTiernan, Fullagar, Menzies, and Windeyer JJ at 200.
2. Indemnity costs are all costs, including fees, charges, disbursements, expenses, and remuneration, incurred by a party to litigation in undertaking proceedings, provided they have not been unreasonably incurred or are not of an unreasonable amount. In *Crawford Giles and Associates Pty Ltd v Spencer Grove Estate Pty Ltd and James Edward Spencer (No 2)* [2015] NSWSC 1398, Bellew J noted at [5]: 'The circumstances in which an order can be made for indemnity costs are not fixed. Examples of situations in which such orders have been made include circumstances where a party has misled the court, or where a party has maintained proceedings that they should have known had no real prospects of success. Indemnity costs have also been adjudged as appropriate where proceedings have been maintained for an ulterior purpose, or where the conduct of the proceedings has caused unreasonable delay and expense. All of these are simply examples of circumstances in which orders for indemnity costs have been determined to be appropriate. They do not, in any way, constitute an exhaustive list of those circumstances.'
3. See *Mellifont v Queensland Law Society Inc* [1981] Qd R 17 at 28; *Pawlowski v Tottrup; Re Estate of Andrew Pawlowski (No 2)* (NSW Supreme Court, Young J, 28 August 1995, unreported).
4. See *Queensland Trustees Ltd v Drysdale Hendy & Co* [1992] 2 Qd R 625.

5. See *Sinclair-Jones v Kay* [1988] 2 All ER 611; *Myers v Elman* [1940] AC 282.
6. See, for example, Supreme Court Civil Rules 2006 (SA) rr 274 and 275.
7. See *Tyler v Custom Credit Corp Ltd* [2000] QCA 178 (19 May 2000); *Raso v Bayliss* [2005] ACTSC 94 (29 September 2005).
8. See *Batistatos v Roads and Traffic Authority of New South Wales; Batistatos v Newcastle City Council* [2006] HCA 27 (14 June 2006).
9. See also *R v Thomson (No 3)* [2015] ACTSC 379 (13 November 2015).
10. In relation to the Barristers' Rules of the various jurisdictions, see Bar Association of Queensland, Barristers' Conduct Rules 2011; New South Wales, Legal Profession Uniform Conduct (Barristers) Rules 2015; Victoria, Legal Profession Uniform Conduct (Barristers) Rules 2015; South Australian Barristers' Rules 2013; Western Australian Barristers' Rules 2013; for the Northern Territory, the Barristers' Conduct Rules 2002.
11. See *R v Miras* (1986) 84 FLR 273; *R v Carroll* [1913] VLR 380; *R v Russell* [1932] QWN 37; *R v Danahay* [1993] 1 Qd R 271; *Mathews v R* [1993] 2 Qd R 316; *R v Shepherd* [2001] 1 NZLR 161.
12. In relation to the Barristers' Rules, see Bar Association of Queensland, Barristers' Conduct Rules 2011; New South Wales, Legal Profession Uniform Conduct (Barristers) Rules 2015; Victoria, Legal Profession Uniform Conduct (Barristers) Rules 2015; South Australian Barristers' Rules 2013; Western Australian Barristers' Rules 2013. The Tasmanian Rules of Practice 1994, define a 'practitioner' as a person practising as a barrister or legal practitioner; Pt 8 applies solely to those who practise as a barrister. In the Northern Territory, see the Barristers' Conduct Rules 2002.
13. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW).
14. Queensland Law Society, Australian Solicitors Conduct Rules 2012.
15. The Law Society of South Australia, Australian Solicitors' Conduct Rules 2015.
16. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Vic).
17. Legal Profession (Solicitors) Rules 2015.

18. See *Legal Practitioners Conduct Board v Vaaezi* [2009] SASC 271 (3 September 2009) per Nyland J at [23] and [24].
19. See, for example, *Taylor v Edwards* [1967] 1 NSWR 689; *White Industries (Qld) Pty Ltd v Flower and Hart* (1998) 156 ALR 169; (1999) 87 FCR 134.
20. See **Chapter 9**.
21. See, for example, *Council of the New South Wales Bar Association v John Peter Hart* [2011] NSWCA 64 (21 March 2011), where the respondent on a number of occasions made false statements to the presiding judicial officer with the intention of misleading the Court, and also practised without holding a current practising certificate.
22. See also *Roulstone v New South Wales Bar Association* [2015] NSWSC 1749, which involved an appeal from the refusal of the defendant association of the plaintiff's application for a barrister's practising certificate. See the comments of Hall J at [231] and [303]–[306].
23. See *New South Wales Bar Association v Butland* [2008] NSWADT 120 (23 September 2008) at [84] and [128]; *Dupal v Law Society of New South Wales* (NSWCA, 26 April 1990, unreported), referred to in *Council of the Law Society of New South Wales v Bharati* [2010] NSWADT 159 at [117] and [135]; and *Council of the Law Society of New South Wales v Hussein* [2010] NSWADT 182 (27 July 2010) at [135].
24. See also the Rules referred to in **Chapter 9**, which relate to principles of candour and frankness in the context of the adversarial system — for example, independence and the avoidance of personal bias, frankness in court, the responsible use of privilege, the integrity of evidence, the duty to the opponent, and the integrity of hearings. In relation to the Barristers' Rules, see the Bar Association of Queensland, Barristers' Conduct Rules 2011; New South Wales, Legal Profession Uniform Conduct (Barristers) Rules 2015; Victoria, Legal Profession Uniform Conduct (Barristers) Rules 2015; South Australian Barristers' Rules 2013; Western Australia Barristers' Rules 2013. The Tasmanian Rules of Practice 1994, define a 'practitioner' as a person practising as a barrister or legal practitioner; Pt 8 applies solely to those who practise as a barrister. In the Northern Territory, see the Barristers' Conduct Rules 2002.

25. Queensland Law Society, Australian Solicitors Conduct Rules 2012.
26. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.
27. Law Society of South Australia, Australian Solicitors' Conduct Rules 2015.
28. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.
29. Law Society of the Australian Capital Territory, Legal Profession (Solicitors) Conduct Rules 2015.
30. See *Myers v Elman* [1940] AC 282; *Lemoto v Able Technical Pty Ltd* [2005] NSWCA 153.
31. See *Specifier Publications v Long* (1997) AIPC 91-315.
32. See *Fraketon v Athow* (1910) 10 CLR 522; *Hawkins v Gaden* (1925) 37 CLR 183; *Bechara (t/a Bechara & Co) v Atie* [2005] NSWCA 268; *Law Society of New South Wales v Waterhouse* [2002] NSWADT 204 (18 October 2002).
33. See *Re Hodgekiss* [1962] SR(NSW) 340 at 351; *Kennedy v Council of the Incorporated Law Institute of New South Wales* (1939) 13 ALJR 563.
34. In relation to the Barristers' Rules, see Bar Association of Queensland, Barristers' Conduct Rules 2011; New South Wales, Legal Profession Uniform Conduct (Barristers) Rules 2015; Victoria, Legal Profession Uniform Conduct (Barristers) Rules 2015; South Australian Barristers' Rules 2013; Western Australian Barristers' Rules 2013. The Tasmanian Rules of Practice 1994 define a 'practitioner' as a person practising as a barrister or legal practitioner; Pt 8 applies solely to those who practise as a barrister. In the Northern Territory, see the Barristers' Conduct Rules 2002.
35. Queensland Law Society, Australian Solicitors Conduct Rules 2012.
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