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## 5 Admission to Practice and Application for Readmission

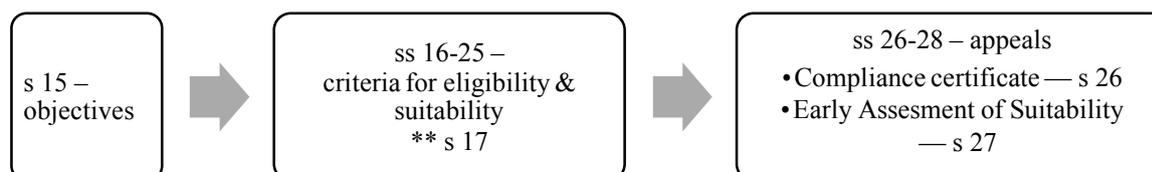
### Nature and Purpose of Admission (and Disciplinary) Proceedings

- *Wentworth v NSW Bar Association* (1992) 176 CLR 239 per Deane, Dawson, Toohey & Gaudron JJ
- concerned with the protection of the public
- not directed to resolution of some contest as to private rights of disputing parties

See Also *Legal Profession Uniform Admission Rules 2015*

*LPUL – Legal Profession Uniform Law (NSW)*

Chapter 2 Part 2.2 Admission to the Australian Legal Profession



#### LPUL 15 Objective

The objective of this Part is to protect the administration of justice and the clients of law practices by providing a system under which persons are eligible for admission to the Australian legal profession only if-

- (a) they have appropriate academic qualifications and practical legal training, whether obtained in Australia or elsewhere; and
- (b) they are fit and proper persons to be admitted.

#### LPUL 16 Admission

(1) The Supreme Court of this jurisdiction may admit an individual aged 18 years or over to the Australian legal profession as an Australian lawyer, but only if-

- (a) the designated local regulatory authority has provided the Supreme Court with a compliance certificate in respect of the person and the certificate is still in force; and

#### LPUL 17 Prerequisites for compliance certificates

- **attained specified academic qualifications prerequisites** – sub-s (1)(a)
- **completed PLT requirements** – sub-s (1)(b)
- **is a fit and proper person** – sub-s(1)(c)
  - o sub-s (2)(a): the designated local regulatory authority may have regard to any matter relevant to the person’s eligibility or suitability for admission, however the matter comes to its attention; and
  - o sub-s (2)(b): the designated local regulatory authority must have regard to the matters specified in the Admission Rules for the purposes of this section

#### LPUL 18 Exemption from certain prerequisites

#### LPUL 19 Compliance certificates (appeal: s 26)

- sub-s (1): application
- sub-s (2): regulatory authority may require applicant to provide further information
- sub-s (3): regulatory authority to issue and provide compliance certificate to the Supreme Court
- sub-s (4): revoke compliance certificate on basis of false, misleading, incomplete information
- sub-s (5): revocation does not in itself affect admission if already admitted
- sub-s (6): regulatory authority to give notice of application on website
- sub-s (7): any person may object to a person being issued a compliance certificate
- sub-s (8): authority is not to issue a certificate until it has issued a certificate under sub-s (6)

#### LPUL 21 Early Assessment of Suitability for Compliance certificate (appeal: s 27)

#### LPUL 22 Supreme Court roll

#### LPUL 23 Removal from Supreme Court roll

#### LPUL 25 Australian lawyer is officer of Supreme Court

#### LPUL 29 Accreditation of law course and providers of PLT

*\*\* Supreme Court can only admit or enrol person as Australian lawyers, and not as barrister, solicitors or legal practitioners*

cross-reference:  
*PUL Admission Rules* r 12(2):  
publish on a website

## 1 Educational Criteria – LPUL s 17(1)(a)-(b)

- To ensure that ‘who follow the high calling of a legal practitioner are **competent and skilled** to advise their clients and to attend to their affairs’ – *Legal Practice Board v Ridah* [2004] WASC 263 (at [13] per McKechnie J)
- [1] **Academic performance** (at university or extension school which is the equivalent of at least three years’ full time study of law): determined by professional societies, Legal Practitioners Admission Board and accredited universities,
- [2] **Practical training** under supervision (College of Law or other similar schemes - instructional and work experience components): determined by professional societies and LPAB

## 2 Character Criteria – LPUL s 17(1)(c)

- Inspire public confidence

### A Good Fame and Character and Fit and Proper Person Test

- Assume its ordinary meaning, not technical/special meaning
- Dal Pont:
  - o historically used as exclusionary tool against certain groups
  - o Absence of empirical evidence linking prior misconduct with misconduct as a lawyer
  - o **Re B [1981] 2 NSWLR 372** (at 380 per Moffitt P) ‘it hardly need be said there is no other discretionary bar to admission, whether on the basis of race, colour, religion, sex, political outlook or otherwise... 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.’
  - o Tax evasion recently considered relevant to misconduct

### B Importance of Disclosure

#### Rule 10 LPU Admission Rules 2015

Admission Board is to have regard to

- (a) any statutory declaration as to the person’s character, referred to in rule 16;
- (b) any **\*\*disclosure statement** made by the person under rule 17;
- (c) any **police report** provided under rule 18;
- (d) any **student conduct report** provided under rule 19;
- (e) any certificate of good standing provided under rule 20; [*Australian non-participating jurisdiction or foreign jurisdiction*]
- (f) whether the person is currently of **good fame and character**;
- (g) whether the person is or has been a bankrupt or subject to an arrangement under Part 10 of the Bankruptcy Act or has been an officer of a corporation that has been wound up in insolvency or under external administration;
- (h) whether the person has been **FOUND GUILTY OF AN OFFENCE** including a spent offence in Australia or in a foreign country, and if so –
  - (i) the **nature** of the offence; and
  - (ii) **how long ago** the offence was committed; and
  - (iii) the **person’s age** when the offence was committed;
- (i) whether the person has been the subject of any **DISCIPLINARY ACTION**, howsoever expressed, in any profession or occupation in Australia or in a foreign country;
- (j) whether the person has been the subject of disciplinary action, howsoever expressed, in any profession or occupation that involved a finding adverse to the person;
- (k) whether the person is currently unable satisfactorily to carry out the inherent requirements of practice as an Australian legal practitioner;
- (l) whether the person has a sufficient knowledge of written and spoken English to engage in legal practice in this jurisdiction.

r 17(1): any matter to which a reasonable applicant would consider that the Board might regard as not being favourable to the applicant when considering whether the applicant is currently of good fame and character and a fit and proper person

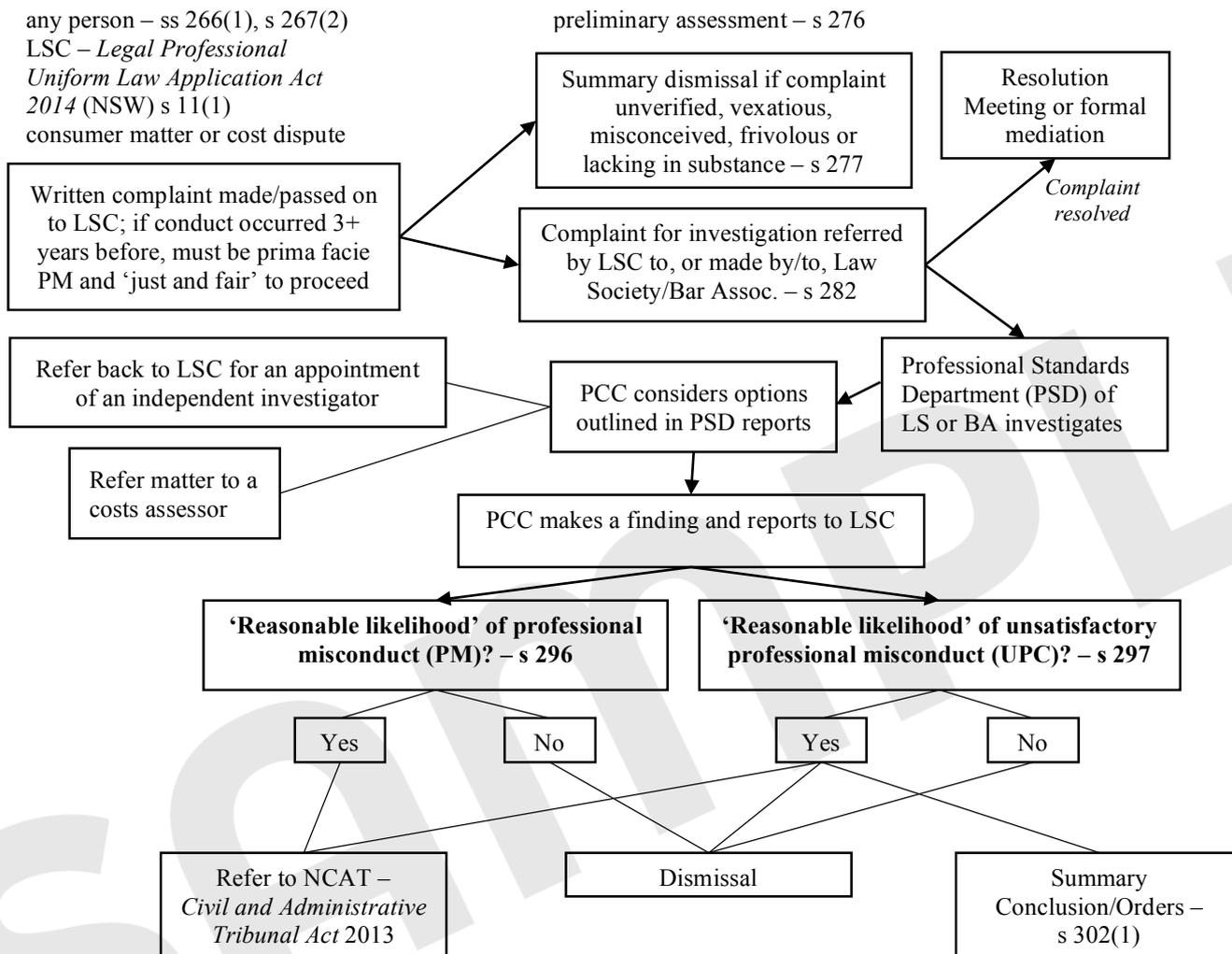
Examples: Criminal charges, academic misconduct, AVOs, Infringement notices, traffic offences, etc.

- **'professional misconduct' (PM)**
  - **substantial or consistent failure** to reach or maintain a reasonable standard of competence and diligence, and conduct whether or not happening in connection with the practice of law that would justify a finding that the lawyer is not a fit and proper person to engage in legal practice
  - 'a dangerous lack of knowledge or elementary law and procedure', or has engaged in a gross failure to properly supervise an employee or partner, who then engages in misconduct
- Examples
  - contravene legal profession rules
  - charging excessive legal costs (charging more than fair and reasonable amount; LPUL in NSW and VIC)
  - conviction for a serious offence, tax offence, **offence involving dishonesty**
  - failing to comply with disciplinary orders
- **Disciplinary Orders**
  - Depends on **seriousness or gravity of the misconduct**; which is determined by the potential impact of the conduct on the protection of the public and the reputation of the profession
  - **Striking off:**
    - if nothing lesser can properly protect the public and/or preserve the reputation of the profession
    - dishonesty
    - could also be used in cases where there is no professional misconduct, e.g. mental illness; loss of faculties by reason of age
  - **Suspension:**
    - fallen below the high standards expected 'but not in such a way as to indicate that he lacks the qualities of character and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner'
  - **Reprimand:**
    - isolated nature of the conduct and of the lawyer's good character
- **Factors Impacting Disciplinary Orders**

<b>Frequency of misconduct</b>	- how it reflects upon the lawyer's honesty and integrity - <i>Council of the Queensland Law Society Inc v Cummins</i> : admitted trust account breaches, isolated incident in 33 years' career, absence of dishonesty – 12-month suspension and a fine - cf. persistent misconduct which evidences dishonesty, recklessness, or neglect
<b>Previous disciplinary findings</b>	- lawyer has not learned from previous experience - cumulative effect of recurring misconduct - <i>Legal Practitioners Conduct Board v Kerin</i> : <b>repeated misconduct soon after his resumption of practice</b> following suspension
<b>Attitude</b>	- Must not conceal or downplay seriousness of misconduct - Honest and frank response to inquiries - Timely guilty plea; Genuine remorse Restitution - May be probative on future application for readmission
<b>Appreciation of wrongdoing</b>	- misconception of duty potentially amounts to misconduct - e.g. pleading ignorance: <i>Law Society of New South Wales v Moulton</i> (Hope JA)
<b>Level of experience</b>	- double-edged - singular breach in extensive practice – mitigating - extensive experience suggests lawyer should have known better? – aggravating - youth, inexperience
<b>Illness and external stressors</b>	- does not ordinarily carry great weight (protective nature) - stressors may be mitigating factor if behaviour linked to neglect or oversight
<b>Testimonials and Opinions by 3<sup>rd</sup> parties</b>	- of limited assistance unless it addresses question of misconduct - must be of full appreciation of lawyer's methods, not opinions of past

	- Evidence of good reputation and integrity carries weight for isolated minor breach
<b>Loss Suffered by Others</b>	- does not alter its character and should not influence order - clients benefit from breach of fiduciary duty not mitigating ground
<b>Loss Suffered by Lawyer</b>	- strictly speaking irrelevant

### Disciplinary Procedure



“disciplinary matter” is so much of a complaint about a lawyer or a law practice as would, if the conduct concerned were established, amount to unsatisfactory professional conduct or professional misconduct (s 270)

“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 (s 296)

“professional misconduct” includes (s 297)

- 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
- conduct of a lawyer 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 lawyer is not a fit and proper person to engage in legal practice.

**Dyers v R (2002) 210 CLR 285** – ‘Jones v Dunkel inference’ **should NOT be drawn** about failure to call a witness **in a criminal trial**

- Jones v Dunkel inference: Court can infer that evidence of that person would not have assisted that party

repeated rhetorical Q by prosecutor in final address

**R v Russo [2004] VSCA 206**

- Held: Prejudicial and miscarriage of justice → Appeal allowed and new trial ordered
- Nettle J (at [38], Winneke P agreeing): The question invite the jury to speculate the likelihood of someone other than the accused having been responsible; effect of the questions is to reverse the onus of proof
  - o ‘Prosecutors should not be permitted y rhetorical flourishes or otherwise to neutralise or reduce the effect of [judicial] directions’
- Winneke P: **Persistent** rhetorical question had effect of **inverting the onus of proof**, upsetting the balance of fairness in trial (at [9]-[10])

‘Who else but the applicant would have committed these murders?’

Made prejudicial comments, insulting and overbearing during the trial, disparaging of defence counsel

**Randall v R [2002] 1 WLR 2237**

- Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, where appropriate, they are the subject of a clear judicial direction (at [28])
- ‘when the departure from good practice is **so gross, or so persistent, or so prejudicial, or so irremediable** that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.’ (at [28])

**Livermore v R [2006] NSWCCA 334**

- Grounds of Appeal, *inter alia*: (1) The address to the jury by the Crown Prosecutor gave rise to a miscarriage of justice; (2) The trial judge erred in that he failed to give appropriate directions to the jury to cure inappropriate and unfair comments by the Crown Prosecutor in his address to the jury
- referring to dicta on McCullough at [24] – ‘...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...** it is wrong for Crown counsel to become so much the advocate that he is fighting for a conviction and quite impermissible to embark upon a course of conduct calculated to persuade a jury to a point of view by the introduction of factors of prejudice or emotion. If such a situation should develop and there is a real risk that the conduct complained of may have tipped the balance against the accused then an appellate court will not hesitate to follow the safe course and order a new trial.’
- The adverse impact upon the administration of justice, in these circumstances, is clear. It is expected that Crown prosecutors will comply with professional ethical rules and statutory guidelines issued by the Director of Public prosecutions which are consistent with judicial statements emphasising the duties of a prosecutor in a criminal trial (at [54])

# 18 Conflicts of Loyalty and Interest: Acting Against a Former Client (Successive) Conflict

BR 114-117; SR 9-10

## Former Client Conflicts

- Lawyer is retained to act against a former client
- Cannot avoid conflict by passing on the retainer to another lawyer within the same firm

**Decision to Disqualify:** balancing of competing interests

- [1] **Former client's interests in preserving confidentiality:** *Prince Jefri Bolkiah*
  - o **Focus Beyond confidentiality?** – *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501 (at [52]-[57] per Brooking JA) see Dal Pont [8.35]-[8.40]
    - equitable obligation of 'loyalty' to a former client which restrains a lawyer from acting against a former client *in the same or a related matter notwithstanding the absence of any relevant confidential information*
    - could have also founded on basis of Court's **inherent supervisory jurisdiction** to protect the integrity of the judicial process
  - o **Consent of former client to successive conflict:** fully informed of extent of use and consequences (independent legal advice)
    - delay of former client with knowledge to apply to disqualify may be held to have waived their entitlement to confidentiality
- [2] **Interest of general public – Appearance**
- [3] **Current client's interest in choice of legal representative**
  - o fundamental to adversarial process
  - o carries greater weight when evidence of potential misuses is slight
- [4] **Current client's interest in speedy and efficient dispute resolution**

## SR 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 information which is confidential to 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.

***Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222** (Lord Millett)

**Former client to establish** (at 235)

- firm in possession of confidential information
- information is/may be relevant to new matter in which the interest of the other client is or may be adverse to his own



**Evidential burden on Firm to show** (at 237)

- there is no risk that the information will come into possession of those now acting or the other party  
i.e. effective measures

Dal Pont: 'might reasonably be concluded' = objective nature of inquiry

firm of accountants provided litigation support to former client and thus has possession of confidential information – can he undertake work for another with an adverse interest

- Court jurisdiction is NOT based on conflict of interest (there is none)
- Fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer – solicitor has no obligation to defend and advance the interest of his former client
- Upon termination of the client relationship, there is only a **continuing duty to preserve the confidentiality** of information imparted during its subsistence (at 235)
- **Incumbent on former client to establish** (at 235)
  - o (1) the solicitor is **in possession of information which is confidential** to him and to the disclosure of which he has not consented