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| **JURISDICTION** | : | STATE ADMINISTRATIVE TRIBUNAL |
| **ACT** | : | LEGAL PROFESSION ACT 2008 (WA) |
| **CITATION** | : | LEGAL SERVICES AND COMPLAINTS COMMITTEE and McCARDLE [No 2] [2023] WASAT 131 |
| **MEMBER** | : | PRESIDENT PRITCHARD<br>MR D AITKEN, SENIOR MEMBER<br>MR R POVEY, MEMBER |
| **HEARD** | : | 5 MAY 2022, LAST WRITTEN SUBMISSIONS FILED 17 APRIL 2023 |
| **DELIVERED** | : | 22 DECEMBER 2023 |
| **PUBLISHED** | : | 22 DECEMBER 2023 |
| **FILE NO/S** | : | VR 133 of 2019 |
| **BETWEEN** | : | LEGAL SERVICES AND COMPLAINTS COMMITTEE<br>Applicant<br><br>AND<br><br>ROXANNE MAREE McCARDLE<br>Respondent |

*Catchwords:*

Vocational regulation – Disciplinary proceedings – Legal practitioner – Allegations of professional misconduct – Findings of professional misconduct – ***Kyle*** test – Section 403 definition of professional misconduct includes the ***Kyle*** test – Statutory interpretation

Proceedings commenced and/or maintained when those proceedings had no, or no proper basis – Proceedings commenced and/or maintained were an abuse of process - Proceedings commenced and/or maintained were conducted in a manner which was oppressive to the other party – Proceedings commenced and/or maintained had the potential to diminish public confidence in the administration of justice and/or had the potential to bring the profession into disrepute – Application to restrain the other party's counsel from acting commenced and/or maintained when that application had no proper basis – Application for presiding judge to be disqualified from hearing the appeal commenced and/or maintained when that application had no proper basis – Oral submissions had the potential to mislead the Court – Where respondent filed a document and sent emails to the Court, which were discourteous, intemperate, scandalous or which had no reasonable basis, and which had the potential to diminish public confidence in the administration of justice or to bring the profession into disrepute – Where respondent prepared, swore, filed, and failed to correct, an affidavit which she knew was false and/or misleading, or was recklessly indifferent about whether it was false and/or misleading

Where the practitioner is an Australian lawyer – Significance of practitioner not currently engaging in legal practice – Whether significant that course of conduct subject of proceedings engaged in as self-represented litigant – Where conduct occurred while the respondent was living or working outside Western Australia

*Legislation:*

*Constitution*, Ch III, s 75(iv)
*Evidence Act 1906* (WA)
*Interpretation Act 1984* (WA), s 37, s 37(1), s 37(1)(b), s 37(1)(d), s 37(1)(f)
*Legal Profession Act 2004* (NSW), s 499(1)(b), s 500(1)
*Legal Profession Act 2007* (Qld)
*Legal Profession Act 2008* (WA), Pt 13, Div 10, s 4(a), s 5(a), s 402, s 403, s 403(1), s 403(1)(a), s 403(1)(b), s 403(1)(b), s 403(2), s 404, s 405, s 405(1)(b), s 406, s 407, s 407(2), s 428, s 428(1), s 438, s 438(2), s 438(3), s 438(4), s 439 - s 442, s 452(8),
*Legal Profession Conduct Rules 2010* (WA), r 6(2)(b), r 6(2)(c), r 34(1), r 34(2)
*Legal Profession Uniform Law Application Act 2022* (WA), Div 7, Sch 4, cl 26, cl 27, s 6(2), s 57, s 220(2), s 260(a), s 261, s 266(2), s 269, s 313, s 315(2), s 316, s 317, s 318, s 319, s 325, Pt 15, Pt 16
*Magistrates Court (Civil Proceedings) Act 2004* (WA), s 17(2), s 17(3), s 43(3)
*Restraining Orders Act 1997* (WA), s 69(2)
*State Administrative Tribunal Act 2004* (WA), s 3, s 8, s 13, s 13(1), s 14,

s 15(1), s 32(2), s 32(4)
*Supreme Court (Court of Appeal) Rules 2005* (WA)
*Vexatious Proceedings Restriction Act 2002* (WA), s 4(2)(c)(i)

*Result:*

The practitioner engaged in professional misconduct

*Category:* B

**Representation:**

*Counsel:*

| | | |
|---|---|---|
| Applicant | : | Mr A J Musikanth SC with Mr S Clark |
| Respondent | : | No appearance |

*Solicitors:*

| | | |
|---|---|---|
| Applicant | : | Legal Services Complaints Committee |
| Respondent | : | No appearance |

**Cases referred to in decision(s):**

Batistatos v Roads and Traffic Authority (NSW) [2006] HCA 27; (2006) 226 CLR 256
Blair v Curran (1939) 62 CLR 464
Blake v Albion Life Assurance Society (1876) 45 LJQB 663
Branir Pty Ltd v Wallco Pastoral Co Pty Ltd [2006] NTSC 70; (2006) 18 NTLR 127
Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 33
Burns v Corbett [2018] HCA 15; (2018) 265 CLR 304
C.T. Bowring and Co (Insurance) Ltd v Corsi Partners Ltd [1994] 2 Lloyd's Rep 567
Cashin v Craddock (1876) 3 Ch D 376
Cavill Business Solutions Pty Ltd v Jackson [2005] WASC 138
Chamberlain v Law Society of the Australian Capital Territory [1993] FCA 527; (1993) 43 FCR 148
Chandrasekaran v Commonwealth (No. 3) [2020] FCA 1629
Christie v Christie (1873) LR 78 Ch App 499
Citta Hobart Pty Ltd v Cawthorn [2022] HCA 16; (2022) 96 ALJR 476
Coyle v Cumin (1879) 40 LT 455

Dixon v Legal Practice Board of Western Australia [2012] WASC 79
Fidock v Legal Profession Complaints Committee [2013] WASCA 108
Giudice v Legal Profession Complaints Committee [2014] WASCA 115
Griffin v Council of the Law Society of New South Wales [2016] NSWCA 364
Harman v Secretary of State for the Home Department [1983] 1 AC 280
Hongkong Xinhe International Investment Co Ltd v Bullseye Mining Ltd [No. 3] [2021] WASC 260
In re Davis (1947) 75 CLR 409
Jackson v Goldsmith (1950) 81 CLR 446
Jeffery and Katauskas Pty Ltd v SST Consulting Pty Ltd [2009] HCA 43; (2009) 239 CLR 75
Kermani v Westpac Banking Corporation [2012] VSCA 42; (2012) 36 VR 130
Kowalski v Mitsubishi Motors Australia [2009] FCA 1289
Kyle v Legal Practitioners' Complaints Committee (1999) 21 WAR 56
Law Society of New South Wales v Foreman (1994) 34 NSWLR 408
Law Society of New South Wales v Jayawardena [2008] NSWADT 187
Le Lievre v Gould [1893] 1 QB 491
Legal Practice Board v Said (unreported, 1994, Lib No. 940003)
Legal Practitioner v Council of the Law Society of the Australian Capital Territory [2014] ACTSC 13
Legal Practitioners Complaints Committee and Segler [2009] WASAT 205
Legal Practitioners Complaints Committee v De Alwis [2006] WASCA 198
Legal Practitioners Complaints Committee v Thorpe [2008] WASC 9
Legal Profession Complaints Committee and A Legal Practitioner [2013] WASAT 37
Legal Profession Complaints Committee and Amsden [2014] WASAT 57
Legal Profession Complaints Committee and Barber [2015] WASAT 99
Legal Profession Complaints Committee and Bostock [2022] WASAT 100
Legal Profession Complaints Committee and Chang [2019] WASAT 67
Legal Profession Complaints Committee and Goldsmith [2022] WASAT 43
Legal Profession Complaints Committee and Goldsmith [2022] WASAT 43 (S)
Legal Profession Complaints Committee and Khosa [2023] WASAT 90
Legal Profession Complaints Committee and McCardle [2020] WASAT 51
Legal Profession Complaints Committee and Tang [2021] WASAT 117
Legal Profession Complaints Committee v Brennan[2010] WASC 198
Legal Profession Complaints Committee v Brickhill [2013] WASC 369
Legal Profession Complaints Committee v Lourey [2022] WASCA 114
Legal Profession Complaints Committee v Rayney [2017] WASCA 78, (2017) 51 WAR 142
Legal Services and Complaints Committee and Butler [2023] WASAT 124
Legal Services and Complaints Committee and Robertson [2023] WASAT 127
Legal Services Commissioner v Turley [2008] LPT 4

Legal Services Complaints Committee and Lourey [No 2] [2023] WASAT 77
Manolakis v Carter [2008] FCAFC 183
MCC Proceeds Inc v Lehman Bros International (Europe) [1998] 4 All ER 675
Michael Wilson & Partners Ltd v Nicholls [2011] HCA 48; (2011) 244 CLR 427
Mijatovic v Legal Practitioners Complaints Committee [2008] WASCA 115
Millington v Loring (1880) 6 QBD 190
Mineralogy v Sino Iron Pty Ltd [2015] WASC 454
Moore v Inglis (1976) 9 ALR 509
Mustac v Medical Board of Western Australia [2007] WASCA 128
Palmer v Dolman [2005] NSWCA 361
Papamihail v Legal Profession Complaints Committee [2023] WASCA 183
PNJ v The Queen [2009] HCA 6, (2009) 83 ALJR 384
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589
Powell v In de Braekt [2007] WASC 4
Prothonotary of the Supreme Court of New South Wales v Da Rocha [2013] NSWCA 151
QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd and Ors [2012] WASCA 186
QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2023) 409 ALR 65
Reichel v Magrath (1889) 14 App Cas 665
Ridgeway v The Queen [1995] HCA 66; (1995) 184 CLR 19
Rippon v Chilcotin Pty Ltd [2001] NSWCA 142; (2001) 53 NSWLR 198
Rogers v The Queen [1994] HCA 42; (1994) 181 CLR 251
Sarto v Sarto [2021] VSC 295
Sheraz Pty Ltd v Vegas Enterprises Pty Ltd [2015] WASCA 4; (2015) 48 WAR 93
State Bank of New South Wales Ltd v Alexander Stenhouse Ltd (1997) Aust Torts Reports 81–423
Thirteenth Corporation Pty Ltd v State [2006] FCA 979; (2006) 232 ALR 491
Tomlinson v Ramsey Food Processing Pty Limited [2015] HCA 28
Vogt v Legal Profession Complaints Committee [2009] WASCA 202
Walton v Gardiner [1993] HCA 77; (1993) 177 CLR 378
Western Australia v Cunningham (No 2) [2017] WASCA 197
Westgyp Pty Ltd v Northline Ceilings Pty Ltd [2018] WASC 244
Westpac Banking Corp v Anderson [2017] WASC 106
Wu v Avin Operations Pty Ltd (No 2) [2006] FCA 792
Ziems v Prothonotary of the Supreme Court of New South Wales [1957] HCA 46; (1957) 97 CLR 279

**REASONS FOR DECISION OF THE TRIBUNAL**:

1 In these proceedings, the Legal Profession Complaints Committee (**LPCC**) made an application (**Application**) alleging that on various dates between July 2012 and January 2017, the respondent (**practitioner**) had engaged in professional misconduct as described in s 403 of the *Legal Profession Act 2008* (WA) (**LP Act**).

2 There were three grounds for the Application, which in essence were as follows. First, the LPCC alleged that the practitioner commenced and/or maintained various legal proceedings against her former husband (**ex-husband**) when those proceedings had no, or no proper basis, were an abuse of process, were conducted in a manner which was oppressive to the ex-husband, had the potential to diminish public confidence in the administration of justice and/or had the potential to bring the profession into disrepute (**Ground 1**).

3 Secondly, the LPCC alleged that in the course of an application to reinstate an appeal that the practitioner commenced against orders made by the Federal Magistrates Court, the practitioner made an application to restrain the ex-husband's counsel from acting for him. The LPCC alleged that that application had no proper basis. Further, the LPCC alleged that the practitioner also made an application that the presiding judge be disqualified from hearing the appeal, which application had no proper basis. The LPCC also alleged that in the course of pursuing both of those applications, the practitioner made oral submissions which had the potential to mislead the appeal Court, and made oral submissions, filed a document and sent emails to the appeal Court, which were discourteous, intemperate, scandalous or which had no reasonable basis, and which had the potential to diminish public confidence in the administration of justice or to bring the profession into disrepute (**Ground 2**).

4 Thirdly, the LPCC alleged that in the course of pursuing the appeal against the decision of the Federal Magistrates Court, the practitioner prepared, swore, filed, and failed to correct, an affidavit which she knew was false and/or misleading, or was recklessly indifferent about whether it was false and/or misleading (**Ground 3**).

5 The LPCC alleged that the various instances of conduct alleged in each of Grounds 1, 2 and 3, either individually or collectively, constituted professional misconduct within the meaning of s 403 and s 438 of the LP Act because each was conduct which, if established, would justify a finding that the practitioner is not a fit and proper person to engage in

legal practice, or which would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, or which comprised a breach of rules 6(2)(b) and 6(2)(c) (and in the case of Ground 3, also of rules 34(1) and 34(2)) of the *Legal Profession Conduct Rules 2010* (WA) (**Conduct Rules**).

6 For the reasons which follow, the LPCC has proved that the practitioner has engaged in professional misconduct in each of the ways alleged in Grounds 1, 2 and 3.

7 We will now list the matter for a hearing in relation to the sanction which should be imposed in respect of our findings of professional misconduct, and to deal with any application for costs.

8 In these reasons, we deal with the following matters.

(a) The history of the proceedings;

(b) Confidential information and the publication of these reasons;

(c) The Tribunal's jurisdiction to deal with the Application;

(d) Professional misconduct under the LP Act – principles

(e) The onus and standard of proof;

(f) The nature of the LPCC's case;

(g) Some concepts underlying the LPCC's allegations;

(h) Arguments advanced by the practitioner in opposition to the Application;

(i) Ground 1 – allegations, evidence and findings;

(j) Ground 2 – allegations, evidence and findings;

(k) Ground 3 – allegations, evidence and findings;

(l) Conclusion and Orders.

## (a) The history of the proceedings

9 These proceedings were commenced in September 2019. From the outset, the practitioner disputed the Tribunal's jurisdiction to deal with the proceedings. The President made orders requiring that she file either an

interim application to strike out the proceeding, or a response to the Application by 19 November 2019.

10 The practitioner filed an Interim Application on 19 November 2019, which she amended on 10 February 2020 (**Interim Application**), to dismiss the proceedings on the basis that the Tribunal had no jurisdiction to deal with the proceedings (**jurisdictional argument**), or alternatively that the proceedings constituted an abuse of process.

11 We discuss the Interim Application, and the Tribunal's jurisdiction more specifically, later in these reasons.

12 The Interim Application was dismissed.[1]

13 Thereafter the President made the usual orders for the filing (by the practitioner) of a statement of issues, facts and contentions, for the parties to file the documents on which they wished to rely in the proceedings, and for the filing of witness statements setting out the evidence of any witness either party proposed to call.

14 The President subsequently made an order that if the practitioner wished to adduce any evidence at the final hearing, she was required to file any witness statement or book of documents not less than 21 days prior to that hearing.

15 The President listed the matter for a final hearing on 25 and 26 October 2021. The President also made an order to permit the practitioner to appear at the final hearing by telephone or video conference.

16 However, by an email dated 12 October 2021 to the Tribunal, the practitioner requested that 'this matter be transferred to the Qld regulator and tribunal as then I am not disadvantaged by being 4,500 kms away … . It is simply not possible for me to conduct my defence so far away.' However, the practitioner also claimed, elsewhere in her submissions, that when the LPCC wrote to her to request her consent to transfer the complaints so that could be dealt with by the Queensland regulator, she 'did not offer [her] consent because it would have meant that [she] was then dealing with a fourth regulator about the same matters and that would be grossly unfair'.[2]

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[1] ***Legal Profession Complaints Committee and McCardle*** [2020] WASAT 51 (***McCardle***).
[2] Practitioner's submissions as at 29 April 2022 at [10(f)].

17 On 18 October 2021, the LPCC consented to the vacation of the final hearing dates in order to permit it to make enquiries with the Queensland Legal Services Commission (**Qld LSC**) as to whether it considered it would have jurisdiction under the *Legal Profession Act 2007* (Qld) to conduct its own investigation into the conduct the subject of the Application and if so, whether it would be prepared to do so.

18 On 11 January 2022, the LPCC wrote to the Qld LSC making those enquiries. On 25 January 2022, the Qld LSC advised the LPCC that on the information available to it, it appeared that the practitioner had not been admitted in Queensland, and while she had previously had a Queensland restricted practising certificate, she no longer had a Queensland practising certificate. The Qld LSC was of the view that it did not have jurisdiction to deal with the conduct the subject of the Application, as the practitioner was not a 'local lawyer' or a local practitioner as defined in the *Legal Profession Act 2007* (Qld) and as the conduct occurred outside Queensland. The LPCC requested that the practitioner advise whether she was admitted in Queensland and asked to provide documentary evidence of her admission there. No such evidence was forthcoming, and, accordingly, the LPCC applied at the next directions hearing in relation to the Application, for orders programming the matter to a final hearing in the Tribunal.

19 On 22 February 2022, the President made orders listing the Application for a final hearing on 5 May 2022, to be conducted by videoconference. The President also made an order that if the practitioner wished to participate in the proceedings she was to advise the President's associate at any time and not later than 2 May 2022.

20 By an email dated 26 April 2022, the practitioner contacted the Tribunal and indicated that she 'will be seeking to file a Response to these allegations and to the comments by the LSB in Victoria, and the LPCC in SA'. She also raised, again, her view that the Tribunal did not have jurisdiction, and that the proceedings were vexatious, frivolous, and amounted to her being persecuted. The practitioner advised that her response:

> will, firstly, include an objection to the lack of jurisdiction given the complainants are interstate and the LPCC as a body corporate is a government entity and is not a corporation … and secondly, offer contrary evidence as to the actual facts of these complaints … to show there is misleading allegations in these complaints, discrimination and or persecution of me by the regulatory bodies.

> …
>
> Given the volume of documents at my end, it would be convenient if I could file a response which includes an affidavit that will necessarily refer to exhibited documents that will be scanned from a USB. …

21 In the same email, the practitioner also advised that 'if at all financially possible for me, I would like to attend the SAT on 5 May 2022, but I won't know if this is possible until later in the week or early next week. I think it's crucial because I would like to cross examine [officers of the regulatory bodies].'

22 We digress to observe that to the extent that the practitioner referred, in her email, to an objection to the Tribunal's jurisdiction, it appears to have been on the same basis as the jurisdictional argument determined by the President in 2020.

23 The Tribunal responded to the practitioner by an email dated 28 April 2022 and advised:

> First, you have indicated that you "will be seeking" to file a Response which you appear to suggest will include, amongst other things, an affidavit to which you appear to propose attaching a large number of documents.
>
> The Tribunal made orders for the filing of evidence (in the form of a bundle of documents and a signed statement) on 11 August 2020. The deadline set for compliance with those orders was, on 3 May 2021, extended to 1 June 2021. A very considerable amount of time has passed since the expiry of that deadline. Accordingly, you will need to seek the Tribunal's leave to file any such material. Submissions in support of any application for leave should be filed with the material.
>
> Secondly, you have said that you "would like" to attend the hearing in person "if [it is] at all financially possible". On 22 February 2022 the Tribunal made orders that the hearing is to be conducted by videoconference. Accordingly, neither party or their/its representatives will appear in person. You will be provided in due course with a Microsoft Teams link to allow you to participate by videolink.

24 The practitioner did not file any documents in the Tribunal between 26 April 2022 and the hearing date on 5 May 2022. She did not file an application for leave to file documents out of time, nor any submissions indicating why leave should be granted. The practitioner did not appear at the final hearing, either in person or by videoconference (although a link to the videoconference had been provided to her).

25 We note that at various times in the course of the lengthy history of this matter, the practitioner had indicated, by email to the Tribunal and the LPCC,[3] that she had no intention of appearing at a final hearing for a variety of reasons, including the jurisdictional argument, her claim that the LPCC had been engaging in bullying and dishonesty, or had acted in bad faith, and her assertion that the proceedings should have been transferred to Queensland.

26 At the commencement of the final hearing on 5 May 2022, when there was no appearance by the practitioner, the Tribunal called her telephone number but there was no answer. In all the circumstances, the Tribunal determined to proceed with the hearing.

27 The LPCC was granted leave to rely on a Further Amended Annexure A to its Application. The LPCC's case at the final hearing was entirely documentary and no witnesses were called to give evidence. The LPCC filed a book of documents and was granted leave to rely on two supplementary books of documents, as the evidence on which it relied at the final hearing.[4] In addition, the LPCC was granted leave to rely on amended submissions and a schedule of evidence filed on 4 May 2022. Finally, at the Tribunal's invitation, the LPCC filed supplementary submissions in relation to the effect of the repeal of the LP Act.

28 In determining the Application, we have taken into account the contents of the documents which were filed by the practitioner in the proceeding, namely:

(a) Statement of Contentions dated 25 May 2020 (**Practitioner's Contentions**);

(b) Statement of Response dated 27 January 2021 (**Practitioner's Response**);

(c) Submissions contained in, or forwarded under cover of, emails dated 12 February 2022, 19 February 2022, 29 April 2022, 5 May 2022 (submissions dated 4 May 2022), 23 May 2022, 2 December 2022 (submissions dated 30 November 2022); and

(d) Further Amended Supplementary Submissions on or before 14 April 2023 and dated 17 April 2023 (**Practitioner's Further**

[3] See, eg, emails of 4 June 2021; 4, 9 and 11 October 2021 and 12 February 2022.
[4] Exhibits 1, 2 and 3. The individual documents within each book of documents were identified as individual exhibits by reference to the order in which they were listed in the index for the book of documents (Exhibit 1.1, 1.2 etc, Exhibit 2.1, 2.2 etc and Exhibit 3.1).

**Amended Supplementary Submissions**), filed at the Tribunal's invitation in order to deal with the question of the effect of the repeal of the LP Act.

29 A number of arguments were advanced by the practitioner in the Practitioner's Contentions, the Practitioner's Response, and in the various submissions she filed. Some of those arguments necessarily fail because the practitioner did not attend and advance any evidence to support them. However, we have taken into account the balance of the practitioner's arguments – for example as to the existence of the Tribunal's jurisdiction, as to whether the Grounds have merit, and as to whether the LPCC's contentions should be accepted – as part of our assessment of whether the LPCC has proved its case, and as a matter of the utmost fairness to the practitioner. The various arguments raised by the practitioner are considered at appropriate junctures in the discussion below.

### (b) Confidential information and publication of these reasons

30 In the course of the Practitioner's Contentions, the practitioner submitted that the Tribunal should make an order for the suppression of any decision of any hearing in these proceedings so as not to prejudice other proceedings instituted by her or others, including regulatory bodies elsewhere, as she claimed to have 'a number of matters underway including a number of reviews and does not want to be prejudiced in these'.[5]

31 After the final hearing, the Tribunal invited the parties to make submissions in relation to whether the Tribunal's reasons for decision should be subject to any restrictions on publication. The practitioner submitted that her name should not be published.[6] The LPCC submitted[7] that there were limitations, or potential limitations, on the publication of certain information in relation to these proceedings, and advanced a number of options for how those limitations might be observed, while maintaining the transparency of the proceedings.

32 For the reasons set out below, we do not consider that the suppression of these reasons, in their entirety, is required or warranted. That is because:

(a) Some of the decisions on which the LPCC relies as evidence of the conduct of the practitioner have previously been published;

[5] Practitioner's Contentions page 4.
[6] Email dated 13 May 2022 from the practitioner to the LPCC and the Tribunal.
[7] Applicant's Amended Submissions on the Publication of Reasons for Decision dated 13 May 2022.

(b) There is a strong public interest in disciplinary proceedings against legal practitioners being determined in an open and transparent manner, so as to maintain public confidence in the legal profession. That public interest is reflected in the express statutory obligation on the Legal Practice Board to maintain a register of disciplinary action against a practitioner which includes their full name, home jurisdiction, and particulars of the disciplinary action taken;[8]

(c) We consider that it is possible to publish these reasons in a form which anonymises references to courts and individuals so as to preserve the confidentiality of information where required, and otherwise to redact certain specific information which, if published, might permit the identification of confidential information to be discerned.

33 We will provide these reasons, drafted in the manner described, to the parties, on a confidential basis, and provide them with the opportunity to make submissions as to whether any further redactions are required, before the reasons are published.

**(c) The Tribunal's jurisdiction to deal with the Application**

34 The practitioner submitted that the Tribunal had no jurisdiction to deal with the matters the subject of the Application, nor did it have the jurisdiction to transfer the matters to another jurisdiction. As we have noted, the practitioner made an Interim Application for the dismissal of the Application for want of jurisdiction. Despite the dismissal of that Interim Application, she continued to maintain that the Tribunal did not have jurisdiction to determine the Application and that it should therefore be dismissed as an abuse of process.[9]

35 Given that the practitioner has continued to maintain that the Tribunal does not have jurisdiction, it is appropriate to address, at the outset, the Tribunal's jurisdiction to determine the Application.

36 In this case, there are three issues relevant to the Tribunal's jurisdiction:

(i) the source of the Tribunal's jurisdiction – LP Act;

[8] See s 220(2) and s 325 of the *Legal Profession Uniform Law Application Act 2022* (WA) (**Application Act**), and s 452(8) of the LP Act.
[9] Practitioner's submissions as at 29 April 2022 – Orders sought.

(ii) whether the Tribunal continues to have jurisdiction in light of the repeal of the LP Act;

(iii) whether the Tribunal has jurisdiction having regard to the jurisdictional argument advanced by the practitioner.

37 We deal with each of those issues in turn below.

***(i) The source of the Tribunal's jurisdiction***

38 The Tribunal's jurisdiction derives from the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**) and from enabling Western Australian legislation which expressly confers authority on the Tribunal to determine applications for relief in its original jurisdiction or in its review jurisdiction.[10]

39 The Tribunal has a duty and concomitant authority – an incidental jurisdiction[11] – to ensure that a proceeding commenced in the Tribunal is, and remains, within its jurisdiction to hear and determine.[12]

40 In every case, in order to comply with its duty to ensure that it has jurisdiction, the Tribunal will, at the least, need to confirm that an application made to it is made pursuant to a provision of the SAT Act or of other enabling legislation.

***Section 438 of the LP Act – the source of the Tribunal's jurisdiction in this case***

41 The Application was referred to the Tribunal by the LPCC on 10 September 2019, pursuant to s 428(1) of the LP Act. That subsection permitted the LPCC to refer a matter to the Tribunal if the LPCC determined that it should be heard by the Tribunal. A provision of an enabling Act that enables an application to be made to the Tribunal gives the Tribunal jurisdiction to deal with the matter concerned.[13] A referral constitutes an 'application' for the purposes of the SAT Act.[14]

42 Under s 438 of the LP Act, the Tribunal is expressly conferred with jurisdiction 'to make a finding that an Australian legal practitioner has

[10] SAT Act, cf s 8, s 13 and s 14.
[11] ***Citta Hobart Pty Ltd v Cawthorn*** [2022] HCA 16; (2022) 96 ALJR 476 (***Citta***) at [25].
[12] ***Citta*** at [17]; see also at [63] and [65] (Edelman J).
[13] SAT Act, s 13(1).
[14] See the definition of 'application' in s 3 of the SAT Act.

engaged in unsatisfactory professional conduct or professional misconduct'.[15]

43 The Tribunal's jurisdiction to deal with a matter referred to it, and to make a finding of unprofessional conduct or professional misconduct, is original jurisdiction.[16]

***Is the practitioner an 'Australian lawyer'?***

44 For the purposes of s 438 of the LP Act, an 'Australian legal practitioner' is defined in s 5(a) of the LP Act to mean an Australian lawyer (that is, a person who is admitted to the legal profession under the LP Act or a corresponding law[17]) who holds a current local practising certificate or a current interstate practising certificate.

45 The LPCC alleged[18] that at all material times the practitioner was an Australian legal practitioner within the meaning of s 5(a) of the LP Act.

46 There was no evidence that the practitioner held a current practising certificate as at the date of the commencement of the proceedings in the Tribunal or thereafter. The question that arises is whether the Tribunal has jurisdiction under s 438 of the LP Act to make a finding of the kind sought against the practitioner.

47 The answer lies in s 405 of the LP Act, which provides that Part 13 of the LP Act (in which s 438 is located):

> … applies to an Australian legal practitioner in respect of conduct to which this Part applies, and so applies:
>
> (a) whether or not the practitioner is a local lawyer; and
>
> (b) whether or not the practitioner holds a local practising certificate; and
>
> (c) whether or not the practitioner holds an interstate practising certificate; and
>
> (d) whether or not the practitioner resides or has an office in this jurisdiction; and
>
> (e) whether or not the person making a complaint about the conduct resides, works or has an office in this jurisdiction.'

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[15] ***Papamihail v Legal Profession Complaints Committee*** [2023] WASCA 183 (***Papamihail***) at [47].
[16] Cf SAT Act, s 15(1).
[17] LP Act, s 4(a).
[18] Applicant's Further Amended Annexure A at [1].

48 For completeness, we note that s 406 of the LP Act makes clear that Part 13 of the LP Act applies to Australian lawyers and former Australian lawyers (that is, to persons who are admitted, but do not hold a current practising certificate):

> … in relation to conduct occurring while they were Australian lawyers, but not Australian legal practitioners, in the same way as it applies to Australian legal practitioners and former Australian legal practitioners, 'and so applies with any necessary modifications'.

49 In our view, the various provisions of Part 13 which refer to an Australian legal practitioner (including s 438 which confers jurisdiction on the Tribunal) must be construed in their context, including in light of s 405 and, accordingly, must be applied in a modified form to reflect the extended operation of Part 13 which is permitted under that section.

50 Relevantly for present purposes, it suffices to say that we are satisfied that the jurisdiction of the Tribunal under s 438 extends to making a finding about a person who is an Australian lawyer, but who, at the time of the finding, does not hold a current local practising certificate or a current interstate practising certificate, but who held a local practising certificate, or an interstate practising certificate, at the time of the alleged unsatisfactory professional conduct or professional misconduct.[19]

51 The practitioner was first admitted to the legal profession in South Australia. In a letter dated 20 April 2022 from the Law Society of South Australia to the LPCC,[20] the Acting Director (Ethics and Practice) confirmed, and on that basis we are satisfied, and we find, that the practitioner was first admitted to legal practice on 8 May 2006 in South Australia, and that as at the date of that letter, her name remained on the South Australian Roll of Legal Practitioners. There was no evidence to suggest that the practitioner had been removed from the South Australian Roll after 20 April 2022, and we infer, and on that basis, we are satisfied and we find, that the practitioner's name remains on the South Australian Roll of Legal Practitioners.

52 In a document dated 13 April 2022 from the Executive Director of the Legal Practice Board of Western Australia,[21] the Board confirmed, and on that basis we are satisfied, and we find, that the practitioner held an unrestricted Western Australian local practising certificate from 1 July

[19] Cf ***Law Society of New South Wales v Jayawardena*** [2008] NSWADT 187 at [137] – [139] in relation to s 499(1)(b) and s 500(1) of the *Legal Profession Act 2004* (NSW) which were relevantly in the same terms as s 405(1)(b) and s 406 of the LP Act.
[20] Exhibit 2.8.
[21] Exhibit 2.4.

2012 to 30 June 2015, and that she was employed at a solicitor at a legal practice in Busselton, in Western Australia, from 16 February 2012 to 16 January 2015.

53 By a letter dated 29 March 2022,[22] the Acting Assistant Manager, Enquiries and Review, of the Victorian Legal Services Board also confirmed, and on that basis we are satisfied, and we find, that the practitioner held a Victorian practising certificate, namely an employee practising certificate, without trust authorisation, for the period 1 July 2015 to 30 June 2016, and from 1 July 2016 to 30 June 2017.

54 Further, in a letter dated 21 April 2022, the Acting Assisting Manager, Enquiries and Review, of the Victorian Legal Services Board confirmed, and on that basis we are satisfied, and we find, that the practitioner was employed at a legal practice in Victoria, between 19 January 2015 and 19 May 2017.[23]

55 In short, we are satisfied, and we find, that the practitioner held a Western Australian local practising certificate, or a Victorian practising certificate, for the entire period in which the various instances of alleged professional misconduct are said to have occurred.

*Consent from interstate regulatory authorities*

56 Some of the conduct the subject of these proceedings occurred while the practitioner was living or working outside Western Australia; namely in South Australia or Victoria. That raises the question whether the conduct can be dealt with under the LP Act.

57 The answer lies in s 407 of the LP Act, which relevantly provides:

> (1) Subject to subsection (3), this Part applies to conduct of an Australian legal practitioner occurring in this jurisdiction.
>
> (2) This Part also applies to an Australian legal practitioner's conduct occurring outside this jurisdiction but only –
>
> (a) If it is part of a course of conduct that has occurred partly in this jurisdiction and partly in another jurisdiction and either –

[22] Exhibit 2.2.
[23] The LPCC alleged in its Further Amended Annexure A that the practitioner was employed at that firm from about 17 January 2015 to 19 May 2017. The error in her commencement date at the firm is of no present moment.

> (i) the corresponding authority of each other jurisdiction in which the conduct has occurred consents to its being dealt with under this Act; or
>
> (ii) the complainant and the practitioner consent to its being dealt with under this Act.
>
> …

58 In our view, the practitioner's conduct which is the subject of Grounds 1 – 3 can properly be regarded as forming part of a course of conduct, which had its origins in the breakdown of her relationship with the ex-husband, and which relevantly involved her attempting to obtain a violence restraining order against the ex-husband and to pursue various proceedings (applications and appeals) against him, in this State and interstate. We discuss these matters further below.

59 To the extent that it was necessary for the LPCC to have the consent of the regulatory authorities of Victoria and South Australia to bring these proceedings in respect of that conduct, pursuant to s 407(2) of the LP Act, we are satisfied, and we find, that that consent was given. By letters dated 14 April 2022[24] and 21 and 26 April 2022,[25] the South Australian Legal Profession Conduct Commissioner, and the Victorian Legal Services Board and Commissioner, respectively, consented to the practitioner's conduct, which was the subject of Grounds 2 and 3, being dealt with under the LP Act.

***(ii) whether the Tribunal continues to have jurisdiction in light of the repeal of the LP Act***

60 Shortly after we reserved our decision on the Application, the LP Act was repealed. We must therefore consider whether the Tribunal continues to have jurisdiction to determine the Application in light of that repeal.

61 By s 260(a) of the *Legal Profession Uniform Law Application Act 2022* (WA) (**Application Act**) the LP Act was repealed on 1 July 2022 (**commencement date**). From the same day, the *Legal Profession Uniform Law* (WA) (**Uniform Law**) applied as a law of Western Australia.[26]

62 The practitioner submitted that the effect of the Application Act was to completely repeal the LP Act. She submitted that 'only those

[24] Exhibit 2.6.
[25] Exhibit 2.9, Exhibit 3.1.
[26] Application Act, s 6(2).

complaints at the investigation or complaints stage are still under the [LP] Act if not already in the SAT'.[27] The practitioner also submitted that the *Interpretation Act 1984* (WA) did not apply and 'there is no provision in the [Application Act] for the powers of the SAT in relation to those proceedings commenced prior to 1 July 2022 other than those found by reading the other LP Uniform Laws in Victoria and NSW for direction'[28] (sic).

63 In so far as the practitioner contended that the LP Act no longer applies in relation to the Application, or that after the commencement date the Tribunal was unable to deal with the Application pursuant to the LP Act, we reject that contention, for the following reasons.

64 The Application Act contains various transitional provisions in relation to the continuation of investigations commenced under the LP Act, but not completed prior to the commencement date,[29] and in relation to the continuation, in the Tribunal, of applications for the review of certain decisions of the LPCC prior to the repeal of the LP Act.[30]

65 The Application Act also expressly deals with the investigation of alleged conduct which was engaged in by a person prior to the commencement date, but which was not the subject of a complaint or investigation under the LP Act (although it could have been). In that event, the alleged conduct may be the subject of a complaint or investigation under the Uniform Law.[31]

66 Schedule 4 to the Uniform Law contains a number of savings and transitional provisions, but not all of them apply in this State. By s 266(2) of the Application Act, only some of those transitional provisions in the Uniform Law apply as a law of Western Australia. Relevantly for present purposes, the transitional provisions in Div 7 of Sch 4 to the Uniform Law (namely clauses 26 and 27) do not apply as a law of Western Australia. Clause 26 in Schedule 4 provides that a complaint made (to the relevant tribunal) under the previous legislation but not disposed of before the commencement of the Uniform Law is to continue to be dealt with under the provisions of the previous legislation. Had that clause applied as a law of Western Australia, it would have permitted the Application to continue to be dealt with under the LP Act. However, clause 26 in Schedule 4 to the Uniform Law does not apply as a law of this State.

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[27] Practitioner's Further Amended Supplementary Submissions at [20].
[28] Practitioner's Further Amended Supplementary Submissions at [21].
[29] Application Act, s 313.
[30] See, for example, Application Act, s 316, s 317, s 318 and s 319.
[31] Application Act, s 315(2).

67 The consequence, then, is that neither the Application Act nor the Uniform Law expressly answers the question whether alleged conduct, which occurred prior to the commencement date (as is the case here), and which was referred to the Tribunal prior to the commencement date, is to be dealt under the LP Act or the Uniform Law.

68 The answer to that question lies in s 37 of the *Interpretation Act 1984* (WA) (**Interpretation Act**). Except where the contrary intention appears, Part 15 of the Application Act (which contains the repeal of the LP Act) and Part 16 of the Application Act (which contains the various transitional provisions to which we have referred) do not prejudice or affect the application of the Interpretation Act to and in relation to the repeal of the LP Act.[32]

69 Section 37(1) of the Interpretation Act relevantly provides that:

> Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears –
>
> …
>
> (b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;
>
> …
>
> (d) affect any duty, obligation, liability, or burden of proof imposed, created, or incurred prior to the repeal;
>
> …
>
> (f) affect any investigation, legal proceeding or remedy in respect of any such right, interest, title, power, privilege, status, capacity, duty, obligation, liability, burden of proof, penalty or forfeiture,
>
> and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, and any such penalty or forfeiture may be imposed and enforced as if the repealing written law had not been passed or made.

70 Having regard to the discussion above, we do not consider that Parts 15 or 16 of the Application Act manifest any intention which is contrary to the application of the Interpretation Act or s 37(1) of that Act in particular. For the sake of completeness, the transitional provisions in the Uniform Law do not manifest a contrary intention either.

[32] Application Act, s 261.

71 By virtue of s 37(1)(b) of the Interpretation Act, the referral of the Application to the Tribunal under s 428 of the LP Act is not affected by the repeal of the LP Act.

72 In our view, a practitioner who, prior to the repeal of the LP Act, engaged in conduct that might be found to constitute unsatisfactory professional conduct or professional misconduct under the LP Act, can be said to have incurred a potential or inchoate liability under the LP Act.[33] By virtue of s 37(1)(d) of the Interpretation Act, that liability was not affected by the repeal of the LP Act.

73 Furthermore, in our view, by virtue of s 37(1)(f) of the Interpretation Act, the repeal of the LP Act did not affect any legal proceeding or remedy in respect of that liability, including, relevantly, the legal proceedings commenced by the LPCC by the referral of the Application to the Tribunal, and the remedies available in the event that the Tribunal finds that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct.[34] The proceedings in the Tribunal therefore continue as if the LP Act had not been repealed.

74 Accordingly, the effect of s 37(1) of the Interpretation Act, as applied by s 261 of the Application Act, is that the Application can continue to be dealt with by the Tribunal, and the provisions of the LP Act in Division 10 of Part 13 continue to apply in respect of the Tribunal's determination of the Application.

75 We note that that conclusion is entirely consistent with the reasoning of the Tribunal in ***Legal Profession Complaints Committee and Goldsmith***[35] and is consistent with the conclusion reached by the Tribunal in ***Legal Profession Complaints Committee and Khosa***.[36] That conclusion is also consistent with recent *obiter dicta* of the Court of Appeal.[37]

76 The repeal of the LP Act had one further consequence relevant to the present case. The LPCC was established under the LP Act, and the repeal of the LP Act means that the LPCC no longer exists. However, the Legal Services and Complaints Committee was established under the

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[33] Cf ***Mijatovic v Legal Practitioners Complaints Committee*** [2008] WASCA 115.
[34] LP Act, Part 13, Division 10 and see esp s 438(2), (3) and (4), and s 439 – 442.
[35] ***Legal Profession Complaints Committee and Goldsmith*** [2022] WASAT 43 (S) (***Goldsmith (S)***) at [5] – [35].
[36] ***Legal Profession Complaints Committee and Khosa*** [2023] WASAT 90 at [135]; see also ***Legal Profession Complaints Committee and Bostock*** [2022] WASAT 100 at [6] – [7]; and ***Legal Services and Complaints Committee and Butler*** [2023] WASAT 124 (***Butler***) at [8] – [13].
[37] See ***Papamihail*** at [9].

Application Act,[38] and that Committee is the same entity as, and a continuation of, the LPCC.[39]

77 Consequently, we consider that the correct name of the applicant in these proceedings should now be the Legal Services and Complaints Committee. It is necessary and appropriate to make an order to amend the name of the applicant to be the Legal Services and Complaints Committee instead of the LPCC. Nevertheless, for the sake of convenience, in these reasons we will continue to refer to the applicant as the LPCC.

***(iii) whether the Tribunal has jurisdiction – the jurisdictional argument advanced by the practitioner***

78 Throughout these proceedings the practitioner has advanced a jurisdictional argument, namely that the Tribunal has no jurisdiction to determine the Application because it falls within federal jurisdiction.

79 In a case where a claim or defence is said to fall within federal jurisdiction, the Tribunal's enquiry as to its jurisdiction does not stop with its confirmation that the SAT Act, or other enabling legislation, has conferred original or review jurisdiction on it. While the SAT Act does not contain an express conferral of power on the Tribunal to take steps to comply with its duty to ensure that it has jurisdiction, the Tribunal has an implied power to take steps to secure its own compliance with its duty to ensure that proceedings before it are within its jurisdiction to hear and determine.[40]

80 The need for further enquiry, when a claim or defence is said to fall within federal jurisdiction, arises because the Tribunal is an administrative tribunal and not a court,[41] much less a court of the kind referred to in Chapter III of the *Constitution,* and it therefore has no jurisdiction to determine matters which are within federal jurisdiction.[42]

81 The outcome of the Tribunal's enquiry as to its jurisdiction is that the Tribunal must form an opinion – rather than a conclusion with legal effect – about the limits of its own jurisdiction, for the purpose of moulding its

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[38] Application Act, s 57.
[39] Application Act, s 269.
[40] Cf ***Citta*** at [21].
[41] ***Mustac v Medical Board of Western Australia*** [2007] WASCA 128 at [48] (Martin CJ, Wheeler JA and Buss JA agreeing).
[42] ***Burns v Corbett*** [2018] HCA 15; (2018) 265 CLR 304 esp at [43], [50] (Kiefel CJ, Bell and Keane JJ), at [68] – [69], at [119] – [120] (Gageler J), at [145] – [146] (Nettle J), at [150] – [151], [187] – [188], [192] – [193] (Gordon J), at [203] – [205], [252] – [257], [260] (Edelman J).

conduct to accord with the law.[43] If a party to a proceeding in the Tribunal raises a claim or defence which is said to fall within federal jurisdiction, the Tribunal must form an opinion as to whether the claim or defence is genuinely raised and whether the claim is not incapable on its face of legal argument.[44]

82 In the Interim Application, the practitioner's jurisdictional argument was that the proceedings fell within s 75(iv) of the *Constitution* and therefore could only be determined by a court of the kind referred to in Chapter III of the *Constitution*. The practitioner submitted that the proceedings should be characterised as proceedings between a resident of one State (on the basis that the persons whose complaints had led to the LPCC's investigation and pursuit of the proceedings were residents of a State other than Western Australia) and a resident of another State (namely the practitioner, who resides in Queensland), or alternatively as proceedings between a State (on the basis that the LPCC could be equated with the State of Western Australia) and a resident of another State (namely the practitioner).

83 For completeness, we note that in the Interim Application, the practitioner also contended that the Application should be dismissed on the basis that its continuation would constitute an abuse of process. The bases for the abuse of process argument were that:

(a) The gender composition of the Legal Practice Board meant that it lacked an understanding of the practitioner's circumstances;

(b) The issues the subject of the Application had been, or were being, dealt with by disciplinary tribunals in other jurisdictions;

(c) The pursuit of the Application is unfair given the delay in bringing the proceedings, that the proceedings were having an adverse effect on the practitioner, that she was being 'targeted' in the proceedings, and that other practitioners were not the subject of proceedings brought by the LPCC; and

(d) She was not acting as a legal practitioner in the various proceedings in which her conduct is alleged to constitute professional misconduct.

84 The President determined that the Tribunal did have jurisdiction to determine the Application and determined that the Application was not an

[43] ***Citta*** at [24], [25]; see also at [63], [65] (Edelman J).
[44] ***Citta*** at [35].

abuse of process on any of the bases relied upon by the practitioner.[45] It is not necessary to traverse the President's reasons here.

85 The practitioner continued to maintain the jurisdictional argument notwithstanding the President's decision to dismiss the Interim Application. The practitioner submitted that the President's decision was made on a factually incorrect basis, including that the Office of the Australian Information Commissioner had determined that the LPCC is a 'State government body or State government department'.[46] However, the practitioner did not file an appeal against the President's order dismissing the Interim Application.

86 The practitioner instead submitted that the Tribunal's determination that it had jurisdiction to deal with the proceedings should be set aside by a hearing before another Tribunal member, or preferably stayed. That submission must be rejected. No Member of the Tribunal has jurisdiction to set aside the President's decision to dismiss the Interim Application on the basis that that decision is said to be wrong, or to stay the proceedings on that basis.

87 Had the practitioner raised a new argument calling into question whether the Tribunal has jurisdiction, we would have been obliged to consider it so that we could continue to be satisfied that the Tribunal does have jurisdiction to determine the Application. However, the practitioner has not raised any new argument in support of her contention that the Tribunal does not have jurisdiction.

88 In any event, having regard to the arguments which the practitioner continues to maintain, and having regard to the reasons given by the President for rejecting the jurisdictional argument advanced in the Interim Application, we are of the view that that jurisdictional argument is incapable, on its face, of legal argument.[47] We are therefore of the opinion that the Tribunal does have jurisdiction to deal with the Application, and we proceed on that basis.

## (d) Professional misconduct under the LP Act

89 In respect of each Ground, the LPCC alleged that the practitioner, between various dates, engaged in professional misconduct within the meaning of s 403 and s 438 of the LP Act in that her conduct would, if established:

[45] ***McCardle*** at [35] and [52].
[46] Practitioner's Response at [1].
[47] ***Citta*** at [34] – [35].

(i) justify a finding that the practitioner is not a fit and proper person to engage in legal practice,

(ii) further or alternatively, would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence and

(iii) further or alternatively comprised a breach of rules 6(2)(b) and 6(2)(c) of the Conduct Rules and, in the case of Ground 3, comprised a breach of rules 6(2)(b) and 6(2)(c) and also of rules 34(1) and 34(2) of the Conduct Rules.

90 The term 'professional misconduct' is defined in the LP Act[48] as follows:

> (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'.

91 The term 'unsatisfactory professional conduct' is defined in the LP Act to include:

> … 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.

92 The definition of 'professional misconduct' in the LP Act is thus, expressly, an inclusive one. It is not an exhaustive definition.[49] That much is reinforced by s 404 of the LP Act, which, 'without limiting s 402 or s 403', sets out examples of conduct which is capable of constituting unsatisfactory professional conduct or professional misconduct.

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[48] LP Act, s 403(1).
[49] ***Legal Practitioners Complaints Committee and Segler*** [2009] WASAT 205 (***Segler***) at [97].

93 It is also well established that s 403 encompasses conduct which would be understood to constitute professional misconduct (known as unprofessional conduct) at common law.[50] In ***Kyle v Legal Practitioners' Complaints Committee***,[51] the Full Court explained that the common law concept of what was known as 'unprofessional conduct' had two limbs:

(i) Conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence (**first limb**); and

(ii) Conduct that, to a substantial degree fell short of the standard of professional conduct observed or approved by members of the profession of good repute and competence (**second limb**).

94 The second limb of ***Kyle*** is not dissimilar to the definition of professional misconduct in s 403(1)(a) of the LP Act. (In contrast, s 403(1)(b) does not mirror the first limb of ***Kyle***.)

95 In ***Legal Services and Complaints Committee and Lourey***[52] the Tribunal explained that in ***Fidock v Legal Professional Complaints Committee***[53] and in ***Legal Profession Complaints Committee v Lourey***[54] the Court of Appeal confirmed that the ***Kyle*** test remains a separate and distinct test for professional misconduct under the LP Act, in addition to the statutory definition provided in s 403(1) of the LP Act.

96 In summary, then, the statutory definition of 'professional misconduct' in s 403(1) of the LP Act includes not only the express statutory tests there set out, but also includes, as a separate and distinct test, the test set out in the first limb of ***Kyle*** namely 'conduct that would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and confidence', as well as the second limb of ***Kyle***, which bears some similarity to the definition in s 403(1)(a) of the LP Act.

97 The Committee submits that the alleged conduct the subject of this application satisfies both the test in s 403(1)(b) of the LP Act and the test in the first limb of ***Kyle***.

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[50] See the discussion in ***Legal Services Complaints Committee and Lourey [No 2]*** [2023] WASAT 77 (***Lourey [No. 2]***) at [219] – [234].
[51] ***Kyle v Legal Practitioners' Complaints Committee*** (1999) 21 WAR 56 (***Kyle***) at [61] (Parker J, Ipp J and Steytler J agreeing).
[52] ***Lourey [No 2]*** at [219] – [234].
[53] ***Fidock v Legal Profession Complaints Committee*** [2013] WASCA 108.
[54] ***Legal Profession Complaints Committee v Lourey*** [2022] WASCA 114 (***Lourey***).

98 In so far as the concept of a 'fit and proper person' in s 403(1)(b) is concerned, for the purpose of making such a finding, 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.[55]

99 Fitness to practise law requires that a practitioner must command the personal confidence of his or her clients, fellow practitioners and judges.[56]

100 Considerations of relevance to whether someone is a fit and proper person to be a solicitor may include the protection of the public against similar conduct, the character of the solicitor, and the effect which an order will have on the understanding (within the profession and amongst the public), of the standard of behaviour required of solicitors, the effect on relationships which must exist between solicitors and the circumstances surrounding the impugned conduct.[57]

101 The assessment of fitness and propriety in legal practitioners also involves a range of broad public interest considerations. The relevant interests include the interests of the public, the interests of the court and the maintenance of the high reputation and standards in the legal profession.[58]

### *Professional misconduct – alleged breach of the Conduct Rules*

102 In addition, the LPCC also alleged that the practitioner's conduct constituted professional misconduct for the purposes of s 403 of the LP Act in that it constituted a breach of particular Conduct Rules.

103 As the Tribunal observed in ***Legal Profession Complaints Committee and Butler***,[59] the Conduct Rules are an important aspect of regulation of the profession. Amongst other things, they serve as a standard of conduct in disciplinary proceedings and as a guide to practitioners as to action in a specific case, and for that reason, the Conduct Rules are a reliable and important indicator of the accepted opinion of members of the profession and accordingly are of assistance in determining matters of misconduct.

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[55] LP Act, s 403(2).
[56] ***In re Davis*** (1947) 75 CLR 409, 420 (Dixon J); ***Legal Practitioners Complaints Committee v Thorpe*** [2008] WASC 9 at [43]; ***Legal Profession Complaints Committee v Brennan*** [2010] WASC 198 at [11].
[57] ***Prothonotary of the Supreme Court of New South Wales v Da Rocha*** [2013] NSWCA 151 at [29].
[58] ***Dixon v Legal Practice Board of Western Australia*** [2012] WASC 79 at [27].
[59] ***Butler*** at [222] – [223] referring to GE Dal Pont, *Lawyers Professional Responsibility*, (7th ed, 2021) at [1.25].

104 At the time of the alleged conduct, rules 6(2)(b) and 6(2)(c) relevantly provided:

> (2) A practitioner must not engage in conduct, in the course of providing legal services or otherwise, which —
>
> …
>
> (b) may be prejudicial to, or diminish public confidence in, the administration of justice; or
>
> (c) may bring the profession into disrepute.

105 At the time of the alleged conduct, rules 34(1) and 34(2) relevantly provided:

> (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.

***Conduct outside legal practice may constitute professional misconduct under the LP Act***

106 It will be noted that none of the conduct alleged against the practitioner in Grounds 1, 2 and 3 involved the provision of legal services to a client. Rather, the LPCC's case is that the practitioner engaged in professional misconduct when acting on her own behalf in the various legal proceedings referred to in the Grounds.

107 As s 403(1)(b) of the LP Act expressly recognises, conduct occurring otherwise than in connection with the practice of the law may constitute professional misconduct, if it is conduct that would justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

108 It is well established (and indeed was expressly accepted in ***Kyle*** itself) that conduct occurring outside the provision of legal services may constitute professional misconduct on the basis that it satisfies the first limb of ***Kyle*** if it 'would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence'.[60] And there have been cases where legal practitioners have been found to have

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[60] See, eg, ***Kyle*** at [61]; ***Legal Profession Complaints Committee and Tang*** [2021] WASAT 117 at [8] – [9]; see also ***Ziems v Prothonotary of the Supreme Court of New South Wales*** [1957] HCA 46; (1957) 97 CLR 279; ***Chamberlain v Law Society of the Australian Capital Territory*** [1993] FCA 527; (1993) 43 FCR 148 at [163] (Lockhart J).

engaged in professional misconduct when acting on their own behalf in legal proceedings.[61]

### (e) The onus and standard of proof

109 The LPCC bears the onus of proving its allegations of professional misconduct against the practitioner. As to the standard of proof, we adopt the following observations of the Tribunal in ***Chang***:[62]

> The Committee bears the onus of proof in relation to the allegations of professional misconduct it makes against the practitioner. The civil standard of proof ('on a balance of probabilities') applies together with the *Briginshaw* approach, which requires clear and cogent evidence to be adduced by the Committee and for the Tribunal to feel an actual persuasion of the occurrence or existence of relevant facts before it can find the practitioner guilty of professional misconduct (or unsatisfactory professional conduct). The *Briginshaw* approach applies in disciplinary proceedings, because of the nature and seriousness, and potential consequences, of allegations of wrongdoing (or incompetence) made in such proceedings. As Dixon J said in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361 – 362:
>
> > Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

110 In these reasons, when we express ourselves to be satisfied, and make a finding, we do so on the balance of probabilities and on the basis of evidence which we regard as clear and cogent, having regard to what was said in ***Briginshaw***.[63]

### (f) The nature of the LPCC's case

111 The LPCC did not adduce in evidence a complete set of the documents relating to the various proceedings which were referred to in the Application. In relation to many of its factual allegations, the LPCC relied, by way of evidence, on the reasons given by various courts, either

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[61] See, for example, ***Legal Profession Complaints Committee and Amsden*** [2014] WASAT 57 (***Amsden***); ***Legal Profession Complaints Committee and A Legal Practitioner*** [2013] WASAT 37.

[62] ***Legal Profession Complaints Committee and Chang*** [2019] WASAT 67 at [8].

[63] ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336 (***Briginshaw***) at [361] – [362].

at first instance, or on appeal, or on transcript of hearings before various courts.

112 The Tribunal is not bound by the rules of evidence,[64] and in any event, the evidentiary material upon which the LPCC relied was, in our view, cogent evidence sufficient to establish the facts alleged.

113 At a number of points in these reasons, we have drawn inferences adverse to the practitioner from the contents of the documentary evidence. In drawing those inferences, we have had regard to the well known principles for drawing inferences of serious misconduct from circumstantial evidence, which require us to:[65]

1. consider the weight to be given to the united force of all of the circumstances taken together;

2. apply the standard of proof at the final stage in the reasoning process;

3. weigh the inference to be drawn from the proved facts against realistic possibilities as distinct from possibilities that might be regarded as fanciful; and

4. find the allegation is not proved where there are competing possibilities of equal likelihood or where the choice between them can only be resolved by conjecture.

114 In ***Westgyp Pty Ltd v Northline Ceilings Pty Ltd***,[66] Vaughan J (as his Honour then was) explained that 'it suffices if the circumstances raise 'a more probable inference' in favour of what is alleged, ie the evidence gives rise to a reasonable and definite inference rather than conflicting inferences of equal degrees of probability'.

115 We have applied these principles in determining whether to draw inferences adverse to the practitioner.

## (g) Some concepts relevant to the LPCC's allegations

116 It is convenient, at this point, to say a little more about the basis for some of the LPCC's allegations.

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[64] SAT Act, s 32(2).

[65] ***Palmer v Dolman*** [2005] NSWCA 361 at [41], applied in ***Legal Profession Complaints Committee and Goldsmith*** [2022] WASAT 43 at [31], and ***Lourey [No 2]*** at [213].

[66] ***Westgyp Pty Ltd v Northline Ceilings Pty Ltd*** [2018] WASC 244 at [57].

***The LPCC's allegation that the practitioner's conduct in commencing or maintaining various proceedings constituted an 'abuse of process'***

117 The term 'abuse of process' has a well-established meaning in the context of litigation.

118 Abuse of process is capable of application in any circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute.[67] However, abuse of process is not limited to cases where the proceedings have been brought for an improper purpose or where there is no possibility of the court affording the affected party a fair hearing.[68] Abuse of process extends to proceedings which are 'seriously and unfairly burdensome, prejudicial or damaging' or 'productive of serious and unjustified trouble and harassment'.[69]

119 The circumstances in which an abuse of process may arise are extremely varied and the courts have refrained from attempting any exhaustive categorisation of those circumstances.[70] However, although the circumstances in which an abuse of process may arise are incapable of being described exhaustively, it has also been said that at least one of three characteristics will be apparent in many cases of abuse of process, namely:[71]

(i) A court's processes being invoked for an illegitimate or collateral purpose;

(ii) The use of a court's procedures being unjustifiably oppressive to a party;

(iii) The use of a court's procedures bringing the administration of justice into disrepute.

120 Recognised categories of abuse of process include:

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[67] ***Tomlinson v Ramsey Food Processing Pty Limited*** [2015] HCA 28 (***Tomlinson***) at [25]; ***PNJ v The Queen*** [2009] HCA 6, (2009) 83 ALJR 384 at [385] – [386].

[68] ***Walton v Gardiner*** [1993] HCA 77; (1993) 177 CLR 378, page 395 (***Walton***); ***Rogers v The Queen*** [1994] HCA 42; (1994) 181 CLR 251 at [255] (Mason CJ), at [286] (McHugh J).

[69] ***QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd and Ors*** [2012] WASCA 186 at [115]; ***Jeffery and Katauskas Pty Ltd v SST Consulting Pty Ltd*** [2009] HCA 43; (2009) 239 CLR 75 at [28].

[70] ***Tomlinson*** at [25]; ***Batistatos v Roads and Traffic Authority (NSW)*** [2006] HCA 27; (2006) 226 CLR 256 at [7]; ***Michael Wilson & Partners Ltd v Nicholls*** [2011] HCA 48; (2011) 244 CLR 427 (***Michael Wilson***) at [89] (Gummow A/CJ, Hayne, Crennan and Bell JJ); ***Ridgeway v The Queen*** [1995] HCA 66; (1995) 184 CLR 19 at [74] – [75] (Gaudron J); ***Western Australia v Cunningham (No 2)*** [2017] WASCA 197 at [49] (Murphy JA and Mitchell JA); ***Sheraz Pty Ltd v Vegas Enterprises Pty Ltd*** [2015] WASCA 4; (2015) 48 WAR 93 (***Sheraz***)at [5] (Buss JA), at [119] (Murphy JA and Chaney J agreeing).

[71] ***Michael Wilson*** at [89]; ***Western Australia v Cunningham (No 2)*** [2017] WASCA 197 at [49]; ***Citta*** at [69].

(i) commencing successive proceedings which cause oppression, or are likely to be oppressive, to a party because they constitute an attempt by a litigant to run the same case again.[72]

(ii) bringing two extant civil actions where one will lie, if the issues overlap or significantly overlap or there is a similarity of subject matters of the proceedings.[73] That will be so irrespective of whether the two proceedings are in separate courts or one,[74] and even if the parties, or the relief sought, are not identical.[75]

(iii) It will also be an abuse of process for a party to make a claim in later proceedings which is based wholly or substantially on the facts of a claim made by the same party in earlier proceedings, such as by pursuing the same claim against a different defendant.[76] An abuse of process may even arise where there is no identity of parties.[77]

(iv) Further, not only will it be an abuse of process to attempt to re-litigate an issue which has, in substance, been determined in earlier proceedings, but it will also be an abuse if a party attempts to litigate an issue which *should* have been raised and determined in earlier proceedings.[78] However, estoppel will arise in that case only if there is a relevant connection or sufficient identification between the two litigants.[79]

121 Whether a subsequent action constitutes an abuse of process must be assessed by reference to guiding considerations of 'oppression and unfairness to the other party to the litigation and concern for the integrity

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[72] ***Walton*** at [393] (Mason CJ, Deane and Dawson JJ); ***Rogers v The Queen*** [1994] HCA 42; (1994) 181 CLR 251 at [286] – [287] (McHugh J); ***Sheraz*** at [8] (Buss JA), at [118] – [119] (Murphy JA and Chaney J agreeing).

[73] ***Mineralogy v Sino Iron Pty Ltd*** [2015] WASC 454 at [17] (***Mineralogy***) (Chaney J, citing ***Kermani v Westpac Banking Corporation*** [2012] VSCA 42; (2012) 36 VR 130 (***Kermani***) at [97] (Robson AJA, Neave and Harper JJA agreeing)); ***Moore v Inglis*** (1976) 9 ALR 509 (***Moore***) at [514] – [515] (Mason J); ***Thirteenth Corporation Pty Ltd v State*** [2006] FCA 979; (2006) 232 ALR 491 at [32] (Jessup J).

[74] ***Mineralogy*** at [17] (Chaney J, citing ***Kermani*** at [97] (Robson AJA, Neave and Harper JJA agreeing)); ***Branir Pty Ltd v Wallco Pastoral Co Pty Ltd*** [2006] NTSC 70; (2006) 18 NTLR 127 at [20].

[75] ***Mineralogy*** at [17] (Chaney J, citing ***Kermani*** at [97] (Robson AJA, Neave and Harper JJA agreeing)); ***Moore*** at [514] – [515].

[76] See, eg, ***Reichel v Magrath*** (1889) 14 App Cas 665 and ***Rippon v Chilcotin Pty Ltd*** [2001] NSWCA 142; (2001) 53 NSWLR 198 at [27] – [28].

[77] ***Sheraz*** at [120] (Murphy JA); see also ***MCC Proceeds Inc v Lehman Bros International (Europe)*** [1998] 4 All ER 675 esp 695 (Mummery LJ and Pill LJ agreeing).

[78] ***Sheraz*** at [11] (Buss JA) and the cases there cited. This category of abuse of process has been described as an extension of ***Anshun*** estoppel: ***Michael Wilson*** at [94]; ***Sheraz*** at [125] – [126] (Murphy JA and Chaney J agreeing).

[79] ***Legal Profession Complaints Committee v Rayney*** [2017] WASCA 78, (2017) 51 WAR 142 (***Rayney***) at [148] – [151].

of the system of administration of justice'.[80] Sometimes the assessment is described as a 'broad merits-based decision'.[81] All matters which are logically or rationally relevant to the determination must be taken into account.[82]

122 Among the matters which may be relevant to that issue will be:[83]

(i) The importance of the issue in and to the earlier proceedings, including whether it is an evidentiary or an ultimate issue;

(ii) The opportunity available and taken to fully litigate the issue;

(iii) The terms and finality of the finding as to the issue;

(iv) The identity between the relevant issues in the two proceedings;

(v) Any plea of fresh evidence, including the nature and significance of the evidence and the reason why it was not part of the earlier proceeding;

(vi) The extent of the oppression and unfairness to the other party if the issue was re-litigated and the impact of the re-litigation upon the principle of finality of judicial determination and public confidence in the administration of justice; and

(vii) An overall balancing of justice to the alleged abuser against the matters supportive of abuse of process.

123 The court should also consider whether there was reasonable justification for the second proceeding based on legitimate considerations of convenience, cost or the like.[84]

124 Arguments about abuse of process in the context of subsequent actions will often overlap with the concepts of *res judicata* and the

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[80] ***Sheraz*** at [134] ; see also, the discussion in ***Mineralogy*** at [159] – [179]***; Westpac Banking Corp v Anderson*** [2017] WASC 106 at [61]; ***State Bank of New South Wales Ltd v Alexander Stenhouse Ltd*** (1997) Aust Torts Reports 81–423, 64,089 (Giles CJ Comm Div); ***Kermani*** at [97] (Robson AJA, Neave and Harper JJA agreeing); ***Sheraz*** at [134] (Murphy JA and Chaney J agreeing).

[81] ***Rayney*** at [230].

[82] ***Rayney*** at [230].

[83] ***State Bank of New South Wales Ltd v Alexander Stenhouse Ltd*** (1997) Aust Torts Reports 81–423, 64,089 (Giles CJ Comm Div); ***Kermani*** at [97] (Robson AJA, Neave and Harper JJA agreeing); ***QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd and Ors*** [2012] WASCA 186 at [115]; ***Sheraz*** at [134] (Murphy JA and Chaney J agreeing).

[84] ***Kermani*** at [97] (Robson AJA, Neave and Harper JJA agreeing); ***Sheraz*** at [134] (Murphy JA and Chaney J agreeing).

various forms of estoppel (cause of action estoppel,[85] issue estoppel[86] and ***Anshun*** estoppel[87]. The three forms of estoppel have the potential to preclude assertion of a right or obligation, or the raising of an issue of fact or law, between parties to a proceeding or their privies.[88]

125 When a party asserts rights or obligations, or raises issues, in successive proceedings, there may be, simultaneously, a *res judicata* or estoppel which has resulted from the final judgment in the earlier proceeding and conduct which constitutes an abuse of process in the subsequent proceeding.[89]

126 However, abuse of process is broader and more flexible than estoppel.[90]

127 In these reasons, when we make a determination as to whether the LPCC has proved its allegations that proceedings commenced and/or maintained by the practitioner were an abuse of process, we have applied the principles discussed above.

***The LPCC's allegations that the practitioner acted with reckless indifference as to whether her conduct had the potential to mislead***

128 The LPCC alleges, on a number of occasions in the Grounds, that the practitioner acted with reckless indifference to whether her statements to the court were liable to be misleading, or knew that an affidavit she had made was false and/or misleading in a material respect, or was recklessly indifferent to whether the affidavit was false or misleading in a material respect.

129 Those allegations raise the question as to the knowledge which must be proved in order to establish that a practitioner intended to mislead, or was recklessly indifferent to whether a statement was false or misleading. That issue was considered by the Court of Appeal in ***Giudice v Legal Profession Complaints Committee,***[91] which was recently discussed by the Tribunal in ***Legal Services and Complaints Committee and Robertson.***[92]

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[85] ***Tomlinson*** at [22].
[86] ***Tomlinson*** at [22]; ***Blair v Curran*** (1939) 62 CLR 464, 510, 531-533; ***Jackson v Goldsmith*** (1950) 81 CLR 446 at [466] – [467].
[87] ***Port of Melbourne Authority v Anshun Pty Ltd*** (1981) 147 CLR 589 (***Anshun***) at [598], [602] – [603].
[88] ***Tomlinson*** at [23].
[89] ***Tomlinson*** at [24].
[90] ***Tomlinson*** at [24].
[91] ***Giudice v Legal Profession Complaints Committee*** [2014] WASCA 115 (***Giudice***).
[92] ***Legal Services and Complaints Committee and Robertson*** [2023] WASAT 127 (***Robertson***).

130 In ***Giudice*** the Tribunal had found that a solicitor who caused a client's affidavit to be sworn, filed and served in court proceedings, when that affidavit contained a false statement, had committed an act of unsatisfactory professional conduct because he had prepared the affidavit with reckless disregard for the truth or falsity of the statement. On appeal the Court of Appeal held that in disciplinary proceedings, a reckless disregard for whether a statement is false or misleading involves a subjective assessment as to the practitioner's state of mind. The Court of Appeal found that the Tribunal had erred because its reasoning suggested that it had assessed the practitioner's statement of mind on an objective basis – that is, what he should have known – rather than on the basis of his actual state of mind.

131 As the members of the Court of Appeal in ***Giudice*** acknowledged,[93] the term 'reckless' is capable of bearing different meanings, and its meaning in any given case will be determined by the context in which the term is used.[94]

132 Martin CJ explained the different categories of professional misconduct or unsatisfactory professional conduct which may be involved when a practitioner provides information or makes a statement which is false or misleading:[95]

> … when a practitioner provides information or makes a statement … which is false or misleading, there are (at least) three categories of case in which that conduct will constitute either professional misconduct or unsatisfactory professional conduct. First, the practitioner might know that the statement or information is false or misleading. Second, the practitioner might have a reckless disregard to the question of whether the statement of information is false or misleading, and third, the practitioner might be negligent or careless. Because the first two categories will only apply if, assessed subjectively, the practitioner is either aware that the statement or information is false or misleading, or wilfully indifferent to its truth, in the absence of special circumstances one would ordinarily expect a finding of either category of conduct to be characterised as a substantial departure from the standard of conduct reasonably expected of a practitioner such as to constitute professional misconduct, within the taxonomy of the [LP] Act. In cases falling within the third category – that of negligence or carelessness – whether or not the practitioner's conduct is either unsatisfactory professional conduct or professional misconduct will depend upon the nature and degree of negligence or carelessness involved.' (footnotes omitted)

[93] ***Giudice*** at [42] (Martin CJ); [81] (Buss JA), at [130] (Edelman J).
[94] ***Giudice*** at [42] – [44] (Martin CJ), at [81] – [82] (Buss JA), at [130] (Edelman J).
[95] ***Giudice*** at [8].

133 Martin CJ explained that in disciplinary proceedings of the kind with which we are presently dealing, an allegation of reckless disregard of the truth by a legal practitioner will only be made out if it is established that the practitioner's actual state of mind was that of indifference to the truth of the relevant statement,[96] or 'not caring in the [person's] own heart and conscience whether it was true or false'.[97]

134 Edelman J agreed with Martin CJ that the allegation of recklessness was an allegation of subjective recklessness 'in the sense of [Mr Giudice] being indifferent to the truth of the statement or 'not caring in [his] own heart and conscience whether it was true or false'.[98]

135 Buss JA agreed that the assessment required was a subjective one. He concluded that 'a reckless disregard or indifference involves, at least, a subjective element of actual and conscious disregard of or indifference to the risks created by the conduct'.[99] In the context of the allegation that the practitioner had recklessly disregarded whether the statement in his client's affidavit was true or false, Buss JA considered that that allegation comprised two subject elements:[100]

> The appellant will have recklessly disregarded whether the statement was true or false if:
>
> (a) the appellant was aware, when he settled the statement … that there was a risk that the statement was untrue or false; and
>
> (b) the appellant consciously disregarded the risk.
>
> Those elements are subjective in that they are concerned with the appellant's actual state of mind.
>
> The notion of 'conscious disregard' by the appellant of the risk, being the second element, connotes that the appellant wilfully or deliberately shut his eyes to, or excluded from contemplation, the risk that the statement was untrue or false.

136 For the reasons we explain below, in each case where the LPCC alleges that the practitioner was recklessly indifferent to whether her statements to the court were liable to be misleading, or was recklessly indifferent to whether the 5 July 2013 Affidavit was false and/or misleading, we are satisfied that the practitioner was aware that there was

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[96] ***Giudice*** at [44] (Martin CJ), referring to ***Fidock v Legal Profession Complaints Committee*** [2013] WASCA 108.
[97] ***Giudice*** at [44] (Martin CJ), quoting ***Le Lievre v Gould*** [1893] 1 QB 491.
[98] ***Giudice*** at [130] (Edelman J).
[99] ***Giudice*** at [87] (Buss JA).
[100] ***Giudice*** at [94] – [97] (Buss JA).

a risk that her statements to the court, or that affidavit, were liable to be misleading, or were false or misleading, and that she consciously disregarded that risk, in that she did not care whether the statements were liable to mislead, or were false or misleading, when she made the statements to the court, or made the affidavit.

***The LPCC's allegations that the practitioner made written and oral statements which were scandalous***

137 At this point it is also convenient to address what we understand is alleged by the LPCC in Ground 2, in so far as the LPCC alleges that the practitioner made comments, whether in a hearing or in written communications, or filed material, which was 'scandalous'.

138 In each instance, the alleged scandalous comments were made in the context of the practitioner's participation in litigation. In the context of the conduct of litigation, the meaning of the term 'scandalous' is well established.

139 Material which is properly described as 'scandalous' consists in the allegation of anything which is unbecoming to the dignity of a court to hear, or which is contrary to good manners, or which is indecent or offensive, or which alleges that a person has committed a crime or makes an adverse allegation about the moral character of a person, when such allegation is not necessary to be shown for the purposes of the litigation, and thus is irrelevant to the litigation, or which is made only for the purpose of abusing or injuring the opposing party.[101]

140 By way of example, in ***Kowalski v Mitsubishi Motors Australia Ltd***,[102] an allegation that a judge of a court 'perverted the course of justice' was struck out from a notice of motion and a notice of appeal because there was no foundation for the allegations and they were therefore scandalous.[103] Further, in ***Manolakis v Carter***,[104] the court dismissed an application which made general unsupported allegations of criminal conduct against the respondents, which allegations were not particularised

[101] ***Hongkong Xinhe International Investment Co Ltd v Bullseye Mining Ltd [No. 3]*** [2021] WASC 260 at [61]; ***Sarto v Sarto*** [2021] VSC 295 [42] (Derham AsJ); ***Chandrasekaran v Commonwealth (No. 3)*** [2020] FCA 1629 [101] – [106] (Wigney J); ***Powell v In de Braekt*** [2007] WASC 4 at [83]; ***Cavill Business Solutions Pty Ltd v Jackson*** [2005] WASC 138 [25]; ***Legal Practice Board v Said*** (unreported, 1994, Lib No. 940003); ***Millington v Loring*** (1880) 6 QBD 190; ***Coyle v Cumin*** (1879) 40 LT 455; ***Cashin v Craddock*** (1876) 3 Ch D 376; ***Blake v Albion Life Assurance Society*** (1876) 45 LJQB 663; ***Christie v Christie*** (1873) LR 78 Ch App 499; Edward Bray *The Principles and Practice of Discovery* (1885) at 105.
[102] ***Kowalski v Mitsubishi Motors Australia*** [2009] FCA 1289 (***Kowalski***).
[103] ***Kowalski***.
[104] ***Manolakis v Carter*** [2008] FCAFC 183.

or supported by assertions of material facts which were comprehensible, and from which any of the respondents could understand what conduct they were alleged to have engaged in. And in ***Wu v Avin Operations Pty Ltd (No. 2)***,[105] a party filed an affidavit alleging serious improprieties against the other party and her solicitors, which were not reflected in the pleadings, and were therefore irrelevant. The court ordered that those parts of the affidavit be struck out or taken off the court file.

141 In considering whether the LPCC has made out those allegations in which it alleges that the practitioner made scandalous comments, either orally or in written material, in connection with litigation in which she was involved, we have understood that the term 'scandalous' imports the meaning set out above.

### (h) Arguments advanced by the practitioner in opposition to the Application generally

142 This is a convenient time to address various arguments advanced by the practitioner in her Statement of Contentions, Response and in various submissions, by way of opposition to the Application. We have set out below the practitioner's arguments, and our response thereto.

143 **First**, the practitioner made various complaints about the conduct of the LPCC – including that its officers had misled the Tribunal, or had commenced separate own motion investigations into the practitioner's conduct (which were not part of these proceedings). The practitioner's complaints about the conduct of the LPCC in relation to other investigations of her conduct are irrelevant to the determination of the Application.

144 **Secondly**, the practitioner contended that the LPCC had delayed in its investigation, and final orders by the Tribunal would now amount to an abuse of process as a result. She asserted that the delays by the LPCC had caused her 'prejudice, extreme unfairness and distress to her.'[106] Even if there was delay in relation to the LPCC's investigation, there was no evidence as to the consequence of that delay which would impede the practitioner's defence of the Application. Given the documentary nature of the LPCC's case, we do not see any basis for such an argument. The practitioner did not at any time make an application for the proceedings to be stayed, on the basis that any delay had resulted in prejudice to her defence of the Application, or otherwise. However, in the

[105] ***Wu v Avin Operations Pty Ltd (No 2)*** [2006] FCA 792.
[106] Practitioner's Further Amended Supplementary Submissions at [3].

Interim Application, the practitioner applied for an order that the proceedings be dismissed on the basis that the Tribunal had no jurisdiction to deal with the Application, or that the Application was an abuse of process. In support of her argument as to abuse of process, the practitioner advanced arguments including that the Application had been brought many years after the conduct complained of. The Interim Application was dismissed by the President. We note that at that stage, as now, there was no evidence of any prejudice to the practitioner which might provide a basis for concluding that the continuation of the proceeding would constitute an abuse of process.[107]

145 **Thirdly**, the practitioner made various complaints about the conduct of professional regulatory bodies in other States in relation to their investigation or pursuit of complaints against her. This argument is of no merit in the present context. The practitioner's complaints about the conduct of legal regulatory bodies in other States are irrelevant to the determination of the Application.

146 **Fourthly**, the practitioner contended that these proceedings are an abuse of process, because they are discriminatory, vexatious and/or malicious, and that by the continuation of this matter, the regulatory bodies in South Australia and in Western Australia had 'engaged in misfeasance of public office with the intent to vexatiously injure me'.[108] There is no evidence to support the conclusion that the Application itself is an abuse of process, or is vexatious, or is being pursued with some malicious intent, so as to call into question whether the proceeding should be permitted to continue.

147 **Fifthly**, the practitioner made various allegations and complaints about the conduct of the ex-husband, about the outcome of the proceedings against him in other courts, and about his alleged failure to comply with orders made by other courts. The practitioner's complaints are irrelevant to the determination of the Application.

148 **Sixthly**, the practitioner contended that many of the decisions of courts referred to as the basis for the complaints against her were seriously flawed or wrong, and that 'there were criticisms in judgments there were mistakes or erroneous at best'.[109] She also contended that the various decisions of courts on which the LPCC relied were 'all actually

[107] ***McCardle*** at [46].
[108] Practitioner's submissions as at 29 April 2022 at [10(h)].
[109] Practitioner's Amended Submissions as at 4 May 2022 [J].

hearsay or opinion and are inadmissible'.[110] The decisions of courts relied upon by the LPCC as the basis for the Grounds stand, unless and until they are set aside on appeal. The *Evidence Act 1906* (WA) does not apply to the Tribunal, and the Tribunal is not bound by the rules of evidence,[111] and may inform itself in any manner it sees fit.[112] In the absence of any proper basis being shown for why the Tribunal should not give weight to the findings and observations made by the judges who delivered those decisions, it is entitled to do so.

149 **Seventhly**, the practitioner relied on proceedings she commenced in the Victorian Civil and Administrative Tribunal (**VCAT**) against the Legal Services Board of Victoria, and contended that 'there is now presumably an estoppel'[113] and that that warranted the proceedings being stayed or discontinued. The practitioner contended that she commenced those proceedings in the VCAT after the Legal Services Board refused to issue her with a practising certificate in Victoria, and that she included within that proceeding references to the complaints made in Western Australia and in South Australia 'to effectively deal with all matters in one place, one tribunal, at one time and in a fair environment'.[114] The practitioner initially acknowledged that proceedings in the VCAT were stayed, and contended that 'if they had not been stayed but determined an issue estoppel would apply'.[115] She subsequently claimed that the proceedings had been revived and contended that it was 'far better and fairer that VCAT proceed not SAT because it was first and is closer for [the practitioner] as well as there being no conflicts'.[116] She also claimed that the VCAT proceedings had been 'settled' in 2021[117] and further claimed that the VCAT proceedings had been resolved by agreement, whereby she 'would be in effect suspended, with an option to reapply at a later date' and that her 'understanding is that VCAT dealt with the matters which are the subject of complaints, this being in late 2021'.[118]

150 These arguments were raised by the practitioner in the Interim Application, as one of the bases for her contention that the continuation of the Application would constitute an abuse of process. In dismissing the Interim Application,[119] the President rejected that argument, having regard

[110] Practitioner's email to the LPCC and the Tribunal dated 23 May 2022.
[111] SAT Act, s 32(2).
[112] SAT Act, s 32(4).
[113] Email from the practitioner to the LPCC and the Tribunal dated 19 February 2022.
[114] Practitioner's Response at [6].
[115] Practitioner's Contentions, page 3.
[116] Practitioner's Response at [12].
[117] Email from the practitioner to the LPCC and the Tribunal dated 19 February 2022.
[118] Practitioner's submissions as at 29 April 2023 at [10(e)].
[119] ***McCardle*** at [40] – [44].

to the affidavit of Stephen Robert Merrick dated 4 March 2020, which was read by the LPCC on the Interim Application. As the President discussed in her reasons, Mr Merrick deposed to enquiries he had made in relation to the proceedings in the VCAT, and in relation to proceedings brought against the practitioner in the South Australian Legal Practitioners Disciplinary Tribunal (which concerned the practitioner's failure to comply with a notice to provide information), and which the LPCC contended demonstrated that the allegations the subject of the Application had not been determined elsewhere.

151 The practitioner's submission–that her understanding was that the VCAT dealt with the matters which are the subject of complaints–was not supported by any evidence (much less any evidence which was inconsistent with that relied upon by the President in the Interim Application), and the practitioner herself acknowledged, in her submission, that she had not reviewed the documents relating to the VCAT proceeding, and was relying on her recollection as to what was agreed.[120] On the face of it, there is no basis to conclude that the practitioner's commencement of proceedings in VCAT, for the review a decision by the Legal Services Board to refuse to issue the practitioner with a Victorian practising certificate, could give rise, or has given rise, to any issue estoppel or to any basis for an abuse of process argument, in relation to the allegations the subject of the Application.

152 **Eighthly**, the practitioner contended that the Australian Law Reform Commission suggested that the irregularities in her case 'should be investigated by a federal ICAC as soon as one is established'.[121] This contention is irrelevant to the determination of the Application;

153 **Ninthly**, the practitioner denied any abuse of process on her part, and denied that her conduct was oppressive to the ex-husband, and instead contended that she had been 'the victim of miscarriages of justice, denials of procedural fairness and misleading of courts' by the ex-husband's legal representatives, or by the conduct of judicial officers, which amounted to scandalous allegations of serious misconduct (the particulars of which will not be set out here).[122] In assessing the evidence on which the LPCC relies in support of the factual allegations, and in assessing its contentions, in relation to each of the Grounds, we have borne in mind that the

[120] Practitioner's submission as at 29 April 2022 at [10(e)].
[121] Practitioner's Response at [2].
[122] Practitioner's Response at [3]; Practitioner's submissions as at 29 April 2022 at [10(h)] and [7] (sic [11]); see also Practitioner's Amended Submissions as at 4 May 2022 at [J], [K]; and see also Practitioner's Further Amended Supplementary Submissions at [25(r) – (v) and (z)].

practitioner denies any abuse of process on her part. We have approached the matter on the basis that, in the absence of any admissions, the LPCC must prove each and every one of its allegations. In so far as the practitioner contends that she had been the victim of miscarriages of justice, denials of procedural fairness and other misconduct by others, those allegations are irrelevant to the determination of the Application.

154 **Tenthly**, the practitioner contended that the complaints referred to the LPCC in 2016 were the same complaints by the same complainants who had also lodged the complaints in South Australia, and those complaints were made after the practitioner had made complaints against those persons. She contends that by pursuing proceedings in different States, the complainants were 'forum shopping with an underlying deliberate intent to harass [her] as much as possible'.[123] This argument has no merit. The practitioner appeared to be operating on the understanding that in the present proceedings, the LPCC represents the interest of persons who have made complaints about her conduct. As the President explained in her reasons for decision on the Interim Application,[124] that is not the case.

155 **Eleventhly**, the practitioner contended that despite complaints being made against her in South Australia and in Western Australia, neither legal regulatory body would allow the other to handle the matter on its own, which indicated that they were vexatious. We reject this contention. As discussed, the LPCC has provided the Tribunal with evidence that the regulatory bodies of other jurisdictions consent to the pursuit of the proceedings in Western Australia.

156 **Twelfthly**, the practitioner claimed that she had been targeted 'in various ways by numerous others' and that this was 'a direct result of her university research into corruption within South Australia and beyond by police and other public officials'.[125] There was no evidence of this allegation and it is irrelevant to the determination of the Application.

157 **Thirteenthly**, the practitioner claimed that 'the violence, abuse, corruptions, deliberate miscarriages of justice and harassment all affected the [practitioner's] health in a seriously detrimental manner'.[126] The practitioner contended that 'there was illness (or disability…) affecting [her] on a couple of occasions, which do not amount to any

[123] Practitioner's Response at [9].
[124] ***McCardle*** at [8].
[125] Practitioner's Brief Final Submissions dated 30 November 2022 at [2(e)].
[126] Practitioner's Response at [13].

justification for the allegations contained within the [LPCC's] application in SAT'.[127] She contended that if the Tribunal did not stay or set aside the proceedings, they would have to be adjourned due to her ill-health. However, the practitioner did not provide any evidence of her ill health or injuries. She did not explain how any health issues she may suffer were relevant to whether she engaged in the conduct alleged in the Further Amended Annexure A, or as to the proper characterisation of that conduct. Nor did the practitioner seek an adjournment of the proceedings on the basis that due to ill-health she was unable to prepare her defence.

158 For completeness, we note that in the Interim Application, and in support of her argument that the continuation of the Application would be an abuse of process, the practitioner also advanced an argument that the proceedings were having an adverse impact on her, and that the proceedings were therefore an abuse of process. As we have already noted, the Interim Application was dismissed by the President. On that occasion, as now, there was no evidence of any prejudice to the practitioner which might provide a basis for concluding that the continuation of the proceeding would constitute an abuse of process.[128]

159 **Fourteenthly**, the practitioner said that she had pursued freedom of information requests which have been refused, or not completed and they must be resolved before procedural fairness and discovery are completed irrespective of which tribunal in which State hears and determines the complaints. This argument does not assist the practitioner. The orders made by the Tribunal required the LPCC to provide the practitioner with copies of all documents on which it wished to rely in the proceedings. The practitioner did not make any application to the Tribunal for orders that the LPCC provide other documents said to be relevant to the determination of the Application.

160 **Fifteenthly**, the practitioner said that she had been unable to obtain legal representation. However, the practitioner did not apply for an adjournment of the final hearing to permit her to secure representation. In any event, the fact that the practitioner had no legal representation is not, in and of itself, any bar to the Tribunal's determination of the Application, especially in circumstances where the practitioner is herself a legal practitioner.

161 **Sixteenthly**, the practitioner contended that the LPCC's use of documents in its book of documents constituted a breach of their

[127] Practitioner's Response at [24].
[128] ***McCardle*** at [46].

obligation known as the ***Harman***[129] undertaking in that she alleged that neither the parties who had provided documents to the LPCC, nor the LPCC itself, had applied to the relevant courts for the purpose of obtaining leave to use documents obtained in those proceedings for the purposes of the Application. There was no evidence to support this allegation. A number of the reasons for decision on which the LPCC relied are publicly available. And there was no evidence as to how the LPCC came to be in possession of the remaining documents on which it relied in these proceedings. Absent any such evidence, there is no basis on we could conclude that the use of the documents was improper.

## Ground 1 – allegations, evidence and findings

### *The allegations in Ground 1*

162 The LPCC alleged that between July 2012 and January 2017, the practitioner caused to be commenced and maintained, and/or commenced and maintained various legal proceedings against the ex-husband, namely:

(i) an application to the Busselton Magistrates Court for final orders (**final VRO**) in relation to an interim violence restraining order (**Interim VRO**) made on 11 July 2012 which application was heard and dismissed on 20 March 2013 (**Magistrates Court March 2013 Decision**);

(ii) an application to the District Court of Western Australia filed on around 10 April 2013 to appeal the Magistrates Court March 2013 Decision which was heard on 24 October 2013 and dismissed on 27 November 2013 (**District Court 2013 Decision**);

(iii) an application to the Court of Appeal of the Supreme Court of Western Australia on around 7 January 2014 for leave to appeal the District Court 2013 Decision which was heard and dismissed on 20 June 2014 (**Court of Appeal Decision**);

(iv) an application to the High Court of Australia in around August 2014 for special leave to appeal the Court of Appeal Decision which was heard and dismissed on 10 December 2014 (**special leave application**);

(v) an application to the Busselton Magistrates Court on around 28 August 2015 (**August 2015 Application**) to set aside the March

[129] ***Harman v Secretary of State for the Home Department*** [1983] 1 AC 280.

2013 Decision which was heard and dismissed on 24 September 2015 (**Magistrates Court September 2015 Decision**); and

(vi) an application to the District Court of Western Australia on around 5 November 2015 to appeal the Magistrates Court September 2015 Decision, which was heard on 6 January 2017 and dismissed on 3 March 2017 (**District Court 2017 Decision**).

163 The LPCC alleged[130] that the commencement and/or maintenance of those proceedings constituted professional misconduct because each of those applications:

(i) had no, or no proper, basis;

(ii) constituted an abuse of process;

(iii) was conducted in a manner which was oppressive to the ex-husband;

(iv) had the potential to diminish public confidence in the administration of justice; and/or

(v) had the potential to bring the profession into disrepute.

164 Before turning to the specific allegations of the facts said to support Ground 1, it is convenient to give a brief factual overview of Ground 1.

165 In summary, the starting point for the allegations in Ground 1 is that the practitioner obtained an Interim VRO in the Magistrates Court at Busselton. The ex-husband objected to the Interim VRO being made into a final VRO. Before those proceedings were resolved, the practitioner commenced a proceeding in the Federal Magistrates Court against the ex-husband (**FMC proceedings**). In the course of the FMC proceedings, the practitioner also sought orders restraining the ex-husband from telephoning her, abusing her or denigrating her in any manner whatsoever (**FMC restraining order application**). The LPCC alleged that the FMC restraining order application was based on the same allegations on which the practitioner relied in seeking the Interim VRO, and a final VRO in the Busselton Magistrates Court. A magistrate in the Federal Magistrates Court (**Federal Magistrate**) dismissed the FMC restraining order application before the practitioner's application for a final VRO was determined. The LPCC's case is that despite the dismissal of the FMC restraining order application, and despite the fact that the ex-husband's

[130] Applicant's Further Amended Annexure A Ground 1.

solicitors put the practitioner on notice that in those circumstances it would be an abuse of process for the practitioner to continue to pursue the application for a final VRO, the practitioner nevertheless maintained the application for a final VRO.

166 The LPCC's case is that in the Magistrates Court March 2013 Decision, the Magistrate granted an application by the ex-husband for a permanent stay of the practitioner's application for a VRO in the Magistrates Court. The LPCC alleges that the practitioner then commenced a number of proceedings to appeal that decision (in the District Court, the Court of Appeal and the High Court) or to set it aside (in the Magistrates Court, which was followed by a further appeal to the District Court).

167 The LPCC did not contend that the practitioner engaged in any misconduct in applying for the Interim VRO. The LPCC's allegation was that it constituted professional misconduct for the practitioner to maintain her application for a final VRO once the FMC restraining order application had been dismissed.[131] Further, the LPCC alleged that the practitioner's commencement and maintenance of the various appeals, or her applications to set aside the Magistrates Court March 2013 Decision, also constituted professional misconduct in the circumstances.

## The practitioner's response to Ground 1

168 In considering the LPCC's case in respect of Ground 1, we have borne in mind the practitioner's response to that Ground.

169 The practitioner's response to Ground 1 was set out in the Practitioner's Contentions and in the various submissions she filed. In her submissions, the practitioner acknowledged that she obtained two restraining orders. The first was a two year interim order, obtained in 2010 in South Australia, and the second was an interim order obtained in Western Australia in 2012.[132] That is consistent with the evidence which we discuss below.

170 Otherwise, the practitioner's response was to deny the allegation of professional misconduct in Ground 1, and to deny that her conduct in maintaining the application for a final VRO constituted professional misconduct.

[131] ts 13, 5 May 2022.
[132] Practitioner's submission as at 29 April 2022 at [2].

171 We note, however, that the practitioner also advanced five other arguments which we understood to be responsive to Ground 1. It is convenient to deal with them at this point.

172 **First**, the practitioner contended that neither the LPCC nor the Tribunal is in a position to determine the factual basis for a VRO. This argument does not assist the practitioner. The question for the Tribunal is not whether there was sufficient evidence to support the making of a VRO. The question for the Tribunal is whether the practitioner's application for a final VRO was an abuse of process. The Tribunal is in a position to make a finding as to that issue, having regard to the evidence.

173 **Secondly**, the practitioner contended that the LPCC's case was subjective and was not supported by evidence and, in fact, there was a long history of evidence which supported the making of the final VRO. Whether there was enough evidence before the Magistrates Court to support the making of a final VRO is not to the point. The question is whether it was an abuse of process for the practitioner to maintain her application for a final VRO in the circumstances. As to that, the LPCC's case was advanced on the basis of the evidence tendered at the hearing, and the Tribunal's finding (explained below) is based on that evidence.

174 **Thirdly**, the practitioner contended that the LPCC's case was frivolous and vexatious. We reject that contention, having regard to the evidence and our findings below.

175 **Fourthly**, the practitioner contended that in so far as she applied for the final VRO she was not acting as a practitioner but as a party. As we have already explained, a person who is a legal practitioner may engage in conduct outside their practice of the law, which conduct constitutes professional misconduct under the LP Act.

176 **Finally**, the practitioner contended that she had not been the subject of any disciplinary action or criminal convictions during her 15 years in practice, and so the present proceedings could not be justified on the basis of a need to protect the public. That argument also does not assist the practitioner. Assuming, for present purposes, that the practitioner has not previously been the subject of disciplinary findings and has no criminal convictions (as to which there was no evidence) we are nevertheless satisfied, as explained below, that the evidence before the Tribunal supports the findings we make in relation to Ground 1.

177 We turn, now, to the specific factual allegations made by the LPCC in support of Ground 1.

### *Background facts*

178 As noted, the conduct the subject of these proceedings stems from the breakdown of the practitioner's relationship with the ex-husband.

179 The LPCC alleged[133] that the practitioner was separated from her ex-husband. In evidence were some orders from the Federal Magistrates Court (**FMC Orders**).[134] It is implicit in the FMC Orders, and on that basis, we are satisfied, and we find, that the practitioner and her ex-husband were separated and divorced.

180 The LPCC alleged[135] that in March 2010 the practitioner sought and obtained an interim domestic violence order for the term of two years against the ex-husband in the Victor Harbour Magistrates Court in Adelaide, South Australia.

181 In evidence was a Certificate of Record from the Magistrates Court of South Australia at Victor Harbor[136] which indicates that on 1 March 2010, the Magistrates Court heard an application for a domestic violence restraining order against the ex-husband and granted an interim restraining order for a period of two years from 1 March 2010, for the protection of the practitioner. Having regard to that evidence we are satisfied, and we find, that on 1 March 2010, the Magistrates Court of South Australia granted an interim domestic violence order against the practitioner's ex-husband, which order was to last for a period of two years.

182 The LPCC alleged,[137] and on the basis of the FMC Orders[138] to which we have already referred, we are satisfied and we find, [redacted].[139]

183 The LPCC alleged[140] that in around February 2012 the practitioner relocated from South Australia to live and work in Busselton, Western Australia. The LPCC relied on evidence that in the course of proceedings in the Magistrates Court in Busselton (to which we refer in more detail below) the practitioner filed a response in those proceedings which indicated that she 'was relocating to WA in mid-February 2012'.[141] That is also consistent with the evidence to which we have already referred,

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[133] Applicant's Further Amended Annexure A at [2].
[134] Exhibit 1.1.
[135] Applicant's Further Amended Annexure A at [3].
[136] Exhibit 1.2.
[137] Applicant's Further Amended Annexure A at [4].
[138] Exhibit 1.1.
[139] [Redacted].
[140] Applicant's Further Amended Annexure A at [5].
[141] Exhibit 1.4.

namely that the practitioner was employed as a solicitor at a legal practice in Busselton from 16 February 2012. Having regard to all of that evidence, we are satisfied, and we find, that the practitioner relocated from South Australia, where she had previously been living, to Busselton in Western Australia, in mid-February 2012.

***The specific allegations and evidence – Magistrates Court March 2013 Decision***

184 The LPCC alleged[142] that on 11 July 2012 the practitioner made an ex parte application for the Interim VRO pursuant to the *Restraining Orders Act 1997* (WA) in the Busselton Magistrates Court, and that the Court made the Interim VRO.

185 Evidence of the fact that the Magistrates Court granted the Interim VRO was before the Tribunal. In reasons subsequently given by the Court of Appeal (**Court of Appeal Reasons**) Murphy JA and Edelman J (as his Honour then was) noted that the practitioner 'applied for and obtained an ex parte interim violence restraining order in the Magistrates Court in Busselton against the [ex-husband] on 11 July 2012'.[143] We are satisfied, and we find, that on 11 July 2012 the practitioner sought and obtained, from the Busselton Magistrates Court, the Interim VRO against the ex-husband.

186 The LPCC alleged[144] that the Interim VRO was obtained on the basis that the practitioner alleged she had received unwanted telephone calls on 'at least 33 occasions' from the ex-husband in the middle of 2012.

187 The Court of Appeal Reasons contained evidence of the basis for the Interim VRO. Murphy JA and Edelman J noted that:[145]

> The July 2012 [Interim VRO] was obtained on the basis that [the practitioner] had allegedly received unwanted telephone calls on "at least 33 occasions", and that those calls came from the [ex-husband] in mid-2012 … . The [practitioner] reiterated these matters in her affidavit of 11 March 2014, where she described the telephone calls as calls received to her mobile number from a "blocked number caller". She said she answered one of these calls and the [ex-husband] started swearing at her and abusing her with foul language … .

188 Having regard to that evidence we are satisfied, and we find, that the Interim VRO was obtained on the basis that the practitioner alleged she

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142 Applicant's Further Amended Annexure A at [6].
143 Exhibit 1.12 at [7].
144 Applicant's Further Amended Annexure A at [6].
145 Exhibit 1.12 at [8].

had received unwanted telephone calls on at least 33 occasions from the ex-husband in the middle of 2012.

189 The LPCC alleged[146] that the Interim VRO restrained the ex-husband from behaving in any intimidatory, offensive or emotionally abusive manner towards the practitioner and, with limited exceptions, from communicating with the practitioner.

190 Having regard to the evidence, we are satisfied, and we find, that that allegation is proved. The basis for that finding lies in the reasons given by Gething DCJ for the District Court 2017 Decision. His Honour noted that amongst other things, the Interim VRO 'restrained the respondent from behaving in an intimidatory, offensive or emotionally abusive manner towards the [practitioner] and, with limited exceptions, from communicating, or attempting to communicate, with the appellant by any means whatsoever'.[147]

191 The LPCC alleged[148] that the ex-husband objected to the Interim VRO becoming final, and the Magistrates Court therefore listed a final order hearing which was ultimately held on 20 March 2013 (**Magistrates Court March 2013 hearing**).

192 We are satisfied, and we find, that those allegations are proved. The transcript of the Magistrates Court March 2013 hearing was in evidence, and indicates that that hearing dealt with the ex-husband's objection to the Interim VRO.[149]

193 The LPCC alleged[150] that on 24 August 2012, and prior to the Magistrates Court March 2013 hearing, the practitioner commenced the FMC proceedings. The LPCC alleged that in addition to the substantive application made in the FMC proceedings (**substantive application**), the practitioner also made the FMC restraining order application, in which she sought orders, including an order 'that the husband be forthwith restrained and an injunction granted restraining him from telephoning the [practitioner], abusing the [practitioner] or denigrating the [practitioner] in any manner whatsoever'.

194 Having regard to the evidence before the Tribunal we are satisfied, and we find, that these allegations are proved. In the course of his reasons

[146] Applicant's Further Amended Annexure A at [6].
[147] Exhibit 1.21 at [7].
[148] Applicant's Further Amended Annexure A at [6].
[149] Exhibit 1.4 (ts 30). See also Exhibit 1.21 at [7]; and see also Exhibit 1.12 at [10].
[150] Applicant's Further Amended Annexure A at [7].

for the District Court 2017 Decision, Gething DCJ noted[151] that in addition to the substantive application, the practitioner 'sought what was described as an 'Interim Procedural Order' against the [ex-husband] in the following terms:

> That the [ex-]husband be forthwith restrained and an injunction granted restraining him from telephoning the wife, abusing the wife or denigrating the wife in any manner whatsoever.'

195 The LPCC alleged[152] that the FMC restraining order application was:

(i) based on the same allegations as the practitioner's application for the Interim VRO which had not yet been determined; and

(ii) supported by an affidavit sworn by the practitioner relying on the same factual situation cited in the application for the Interim VRO and in which she deposed that 'Such unknown calls received on at least 33 occasions, and on the only occasion I answered the call it was [the ex-husband] abusing and swearing at me. He called me a fucking whore. I seek he be restrained. I have also obtained a violence restraining order against [the ex-husband] due to this one abusive phone call.'

196 Having regard to the evidence before the Tribunal, we are satisfied, and we find, that these allegations are proved. The evidence on which we rely is the reasons given by Magistrate Fisher for the Magistrates Court March 2013 Decision, and the reasons given by Gething DCJ for the District Court 2017 Decision. In his reasons,[153] Magistrate Fisher discussed the FMC restraining order application and, according to the transcript of the Magistrates Court March 2013 hearing, his Honour said:[154]

> I have before me today an application [in a] Form 23, brought by the respondent [ex-husband] to an application for a restraining order … .
>
> It is, of course, of great significant to this application that the grounds which were relied upon by the applicant [for] the restraining order [that is, the practitioner] were principally the existence of a restraining order made in March 2010 in South Australia and the expiry, on her evidence, of that order, with the afflux (sic) of two years, and that on and with that expiry the endeavours by [the ex-husband] to again communicate by telephone

[151] Exhibit 1.21 at [12].
[152] Applicant's Further Amended Annexure A at [7.1] and [7.2].
[153] Exhibit 1.4.
[154] Exhibit 1.4 (ts 30 – 31).

with her, and in the course of one of those phone calls descending into abusive behaviour with his comments made towards [the practitioner].

It was essentially on that basis that her Honour Magistrate Hamilton gave and turned her mind to the grounds to support the making of the interim violence restraining order, and upon being so satisfied, made that order. The application form 23 makes a number of prayers for relief. But the one that has been prosecuted today is that which essentially falls under the heading of abuse of process, in which they seek a permanent stay of these proceedings, on the basis of *res judicata*, issue estoppel, or as an alternative again, the abuse of the court's process.

That relief comes essentially from proceedings initiated by [the practitioner] in the … Federal Magistrates Court … exercising federal jurisdiction … by an application brought by her relevantly on 24 August 2012. That application was necessarily supported by an affidavit filed by [the practitioner], which in paragraph 2 … she sets down the grounds for the seeking of interim injunctive relief against [the ex-husband].

The injunctive relief sought by her is that the [ex-husband] be forthwith restrained, an injunction granted restraining him from telephoning the [practitioner], abusing the [practitioner] or denigrating the [practitioner] in any manner whatsoever. In support of that prayer for relief, as I say in paragraph 2 of the affidavit … she says that since the proceedings began in 2012 for enforcement … [the ex-husband] has regularly telephoned the [practitioner] on an unknown number of her mobile phone. Such unknown calls received on at least 33 occasions, and:

> On the only occasion I answered the call it was the [ex-husband] abusing and swearing at me. He called me a 'fucking whore'. I seek he be restrained. I have also obtained a violence restraining order against [the ex-husband] due to this one abusive phone call. …
>
> A notice of the family violence has previously been filed in this honourable court in relation to the past acts of intense violence, including physical, emotional, psychological and financial deprivation. I had a domestic violence restraining order in 2010 which expired in February of this year. I have obtained a further VRO in July this year, both being against [the ex-husband].

That application was, on 30 October, dealt with by [the Federal Magistrate], who amongst other orders dealt with the [substantive application] … and thereafter indicated all outstanding applications are dismissed as finalised. It is on that basis principally that the applicant here to this form 23, [the ex-husband], asserts that the applicant for a restraining order [that is, the practitioner] is subject to principles of *res judicata* and/or issue estoppel.

To that extent, it is difficult to argue otherwise on the face of the documents.'

197 Furthermore, in his reasons for the District Court 2017 Decision, Gething DCJ referred to the factual basis for the Interim Procedural Order (that is, the FMC restraining order application) which was sought by the practitioner in addition to the substantive application in the FMC proceedings. His Honour said that the basis for the FMC restraining order application:

> … as set out in the affidavit filed by the [practitioner] dated 24 August 2012, was the same as for the Interim VRO: 33 calls received on her mobile phone from an unknown number, and that she received a call from [the ex-husband] in which he is alleged to have used abusive language towards the [practitioner].[155]

198 The LPCC alleged[156] that because the FMC restraining order application was based on the same allegations as the practitioner's application for the Interim VRO, which had not yet been determined, and was supported by an affidavit by the practitioner citing the same factual situation cited in the application for the Interim VRO, the FMC restraining order application was not able to be made as a result of an estoppel arising from the principle of *res judicata* and/or was an abuse of process.

199 As we discuss below, when the Federal Magistrate dismissed the FMC restraining order application, nothing in her reasons suggested that she did so expressly on the basis that she had concluded that it was an abuse of process for the practitioner to pursue the FMC restraining order application in light of the Interim VRO application. In any event, there may also be an issue as to whether it would have been an abuse of process for the practitioner to pursue the FMC restraining order application in light of the Interim VRO application only, given the nature of the Interim VRO, including the fact that it was not a final order.

200 However, it is unnecessary for us to determine this issue because Ground 1 (as set out in the Further Amended Annexure A) does not allege that the practitioner's commencement or maintenance of the FMC restraining order application was itself an abuse of process. That being the case, we decline to make a finding in respect of this issue.

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[155] Exhibit 1.21 at [13].
[156] Applicant's Further Amended Annexure A at [7].

201 The LPCC alleged[157] that the substantive application and, relevantly, the FMC restraining order application, were considered at a hearing before the Federal Magistrate in the Federal Magistrates Court on 30 October 2012. The LPCC alleged that the Federal Magistrate dismissed the substantive application in the FMC proceedings and further dismissed 'all other proceedings as finalised', which included the FMC restraining order application (**30 October 2012 decision**).

202 We are satisfied, and we find, that that allegation is proved. The transcript of the hearing before the Federal Magistrate was in evidence.[158] The transcript indicates that on 30 October 2012, there was a hearing in the Federal Magistrates Court, at which the practitioner appeared in person, and a senior counsel appeared for the ex-husband (**Senior Counsel**). Her Honour indicated that the purpose of the hearing was to deliver her reasons in relation to the substantive application, and to deal with 'some other minor issues as well'.[159] Having delivered her oral reasons for decision on the substantive application, the Federal Magistrate made an order that she dismissed the substantive application and an order to 'dismiss all other proceedings as finalised'.[160] Her Honour later confirmed that she had 'dismissed the [substantive] application [and] I've dismissed all enforcement applications'[161] so that the only issue that remained was the question of costs. Senior Counsel for the ex-husband then confirmed that the Federal Magistrate was also dismissing 'the initiating application and the application in a case'.[162] (The latter appears to be a reference to the FMC restraining order application.) The Federal Magistrate again repeated that she was 'dismissing all applications … at this point in time. … Aside from the issue of cost[s] that is now enlivened as a result of the finalisation of these proceedings.'[163]

203 As we noted (in paragraph [199] above) nothing in the transcript of the hearing before the Federal Magistrate indicates that her Honour dismissed the FMC restraining order application on the basis that that application was itself an abuse of process. Rather, what was said by her Honour indicates that she dismissed that application because she regarded all of the issues ventilated in relation to the substantive application, and

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[157] Applicant's Further Amended Annexure A at [8].
[158] Exhibit 1.3.
[159] Exhibit 1.3 (ts 2).
[160] Exhibit 1.3 (ts 10).
[161] Exhibit 1,3 (ts 17).
[162] Exhibit 1.3 (ts 12).
[163] Exhibit 1.3 (ts 17).

the other applications made in conjunction with it, as having been 'finalised'.[164]

204 That was also the understanding of Magistrate Fisher, who referred to the FMC proceedings in the course of his reasons for decision for the Magistrates Court March 2013 Decision (in the passage quoted above at [196]). At that hearing, the counsel who appeared for the practitioner submitted to Magistrate Fisher that the decision of the Federal Magistrate did not demonstrate that her Honour had turned her mind, or considered specifically, the facts underlying the FMC restraining order application. In response to that submission, Magistrate Fisher observed:[165]

> Of course the [practitioner] offers nothing in either her sworn material or otherwise to suggest or support that submission, and I accept the submission of counsel for the [ex-husband] that it is not now for this court, without more, to look behind the order of a court and of a judicial officer in which it is clear[ly] … expressed that the application is dismissed, and particularly with the inclusion, albeit perhaps strangely, of the words "as finalised".

205 The LPCC alleged[166] that the practitioner filed an appeal against the 30 October 2012 decision (**federal appeal**) but that the federal appeal was deemed abandoned by the Court in February 2013 when the practitioner failed to comply with programming requirements for the appeal.[167] The LPCC also alleged[168] that the practitioner filed an application in the Registry of the Court seeking that the federal appeal, which was deemed abandoned in February 2013, be reinstated (**reinstatement application**) and that application was listed for hearing on 8 May 2013.

206 We are satisfied, and we find, that these allegations are proved, on the evidence before us. Turning, first, to the practitioner's appeal against the 30 October 2012 decision, the fact that the practitioner filed the federal appeal and the reason it was deemed abandoned, was discussed by the Full Court [redacted].[169] Amongst other things, that decision pertained to the practitioner's appeal against the decision of the presiding judge in the federal appeal (**Presiding Judge**) in which his Honour refused to recuse himself (a matter to which we will return later in these reasons). In the course of its reasons, the Full Court recounted the history of the proceedings in the federal appeal, until that point in time (that is,

[164] Exhibit 1.3 (ts 10).
[165] Exhibit 1.4 (ts 32).
[166] Applicant's Further Amended Annexure A at [9] – [10].
[167] Applicant's Further Amended Annexure A at [9] – [10].
[168] Applicant's Further Amended Annexure A at [15].
[169] [Redacted].

1 September 2014). Amongst other things, the Full Court noted that the practitioner had filed the federal appeal against the decision of the Federal Magistrates Court to dismiss the substantive application in the FMC proceedings. (The Court did not specifically indicate that the federal appeal pertained also to the order made by the Federal Magistrate by which her Honour dismissed the FMC restraining order application. However, we infer, most favourably to the practitioner, that the federal appeal also included an appeal against the decision of the Federal Magistrate to dismiss all other applications, including the FMC restraining order application.) The Full Court noted that procedural orders for the preparation of the appeal book required the practitioner to file the book by 28 February 2013. The practitioner filed the book late, and the Full Court noted that:[170]

> … [t]hat being the case, by reason of the rules the document was regarded as having been filed … out of time. The appeal was taken to have been abandoned. The [practitioner] was thus obliged to file an application for an order that the appeal be reinstated. On 25 March 2013 the [practitioner] filed an application for reinstatement of the appeal … . This relatively simple matter is yet to be heard by reason of the course taken by the [practitioner].

207 On the basis of what the Full Court there said, we are satisfied, and we find, that although the practitioner filed the federal appeal against the 30 October 2012 decision, the federal appeal was deemed abandoned by the Court in February 2013.

208 We are also satisfied, and we find, that the practitioner filed the reinstatement application on 25 March 2013. The reinstatement application was initially listed for hearing on 8 May 2013. In *ex tempore* reasons delivered on that day, the Presiding Judge indicated that he would have to adjourn the reinstatement application in light of the practitioner's application that the ex-husband's Senior Counsel had a conflict of interest and should be restrained from acting for him.[171] The orders made by his Honour adjourned the reinstatement application to 31 July 2013. We discuss the reinstatement application further below, but it suffices to note, for the moment, that it was not, in fact, heard until 27 March 2015. For completeness, we note that in his reasons for decision on the reinstatement application, the Presiding Judge held that none of the practitioner's grounds in the federal appeal demonstrated any appellable

[170] Exhibit 1.13 at [5] – [6].
[171] Exhibit 1.6 at [6].

error or had any prospect of success and that the federal appeal was so devoid of merit that it would be futile to reinstate it.[172]

209 The position, therefore, was that as at the date of the Magistrates Court March 2013 Decision, the FMC restraining order application had been dismissed. In so far as it might be argued that the practitioner had filed an appeal against that decision by the Federal Magistrate, the position was that at the date of the Magistrates Court March 2013 Decision, the federal appeal had been deemed abandoned, and had not been reinstated, and in any event, the reinstatement application which was ultimately made, had no merit.

210 The LPCC alleged[173] that prior to the Magistrates Court March 2013 hearing, the ex-husband's solicitors had notified the practitioner that, as a result of the FMC restraining order application and the 30 October 2012 decision, the ex-husband would oppose the orders sought by the practitioner for a final VRO on the basis that such an order would be *res judicata* and that issue estoppel applied, and that for her to maintain the application was, relevantly, an abuse of process.

211 We are satisfied, and we find, that this allegation is proved. Following the delivery of the *ex tempore* reasons of Magistrate Fisher in the Magistrates Court March 2013 Decision, counsel for the ex-husband made an application for costs. In the course of that application, she told the learned Magistrate that the ex-husband's solicitor had raised with the practitioner's then solicitor that the practitioner's pursuit of a final VRO would be an abuse of process, in light of the decision of the Federal Magistrate in relation to the FMC restraining order application and invited reconsideration of the practitioner's application for the final VRO. Counsel told Magistrate Fisher that 'it was put to [the practitioner] through her solicitor that Senior Counsel had advised that there was an estoppel and an abuse of process issues (sic) and, notwithstanding that correspondence, [the practitioner] has chosen to proceed'.[174] Counsel for the practitioner, who was present when that submission was made, did not dispute what was said.[175] That being the case, we consider the LPCC's allegation to be proved.

212 The LPCC alleged[176] that at the Magistrates Court March 2013 hearing and despite the fact that the 30 October 2012 decision dealt with

[172] Exhibit 1.19 at [39], [48], [60].
[173] Applicant's Further Amended Annexure A at [11].
[174] Exhibit 1.4 (ts 33).
[175] Exhibit 1.4 (ts 34).
[176] Applicant's Further Amended Annexure A at [12].

the same factual allegations and despite the practitioner's failure to prosecute the federal appeal against that decision, and despite the ex-husband's solicitors having put her on notice of the estoppel and abuse of process issue in relation to the pursuit of the final VRO, the practitioner maintained her application for a final VRO (**final VRO application**).

213 Having regard to the findings we have made above, and to the transcript of the Magistrates Court March 2013 hearing, which was in evidence,[177] we are satisfied, and we find, that this allegation is proved.

214 The LPCC alleged,[178] and having regard to the transcript of the hearing before the Magistrates Court March 2013 hearing, which was in evidence,[179] we are satisfied, and we find, that Magistrate Fisher heard:

(a) the practitioner's final VRO application; and

(b) an application by the ex-husband (**ex-husband's application**) for an order that, in light of the 30 October 2012 decision, the practitioner's application be struck out pursuant to s 17(2) of the *Magistrates Court (Civil Proceedings) Act 2004* (WA) (MCCPA) on the grounds that its subject matter gave rise to *res judicata* and/or issue estoppel, that it was an abuse of process, alternatively, that it was vexatious or improper.

215 The LPCC alleged[180] that in the Magistrates Court March 2013 Decision, Magistrate Fisher:

(a) ordered that the practitioner's application for a final VRO be stayed permanently on the grounds that *res judicata* and/or issue estoppel applied, alternatively that the practitioner's application for a final VRO was 'itself an abuse of process'; and

(b) determined that:

> … consideration must be made as to whether the proceedings were frivolous and vexatious at their conclusion when costs became a live issue. Clearly the issue here is that this applicant for a restraining order continued to prosecute the application self-evidently, despite communications with counsel for the respondent as to the application for *res judicata* and abuse of process being brought. In those circumstances it has been found that the application is certainly frivolous and clearly vexatious.

[177] Exhibit 1.4.
[178] Applicant's Further Amended Annexure A at [12].
[179] Exhibit 1.4.
[180] Applicant's Further Amended Annexure A at [13].

216 We are satisfied, and we find, that this allegation is proved, on the basis of what was said by Magistrate Fisher in his reasons for the Magistrates Court March 2013 Decision. His Honour said:[181]

> [O]n 30 October … [the Federal Magistrate] … indicated that all outstanding applications are dismissed as finalised. It is on that basis principally that the applicant here to this Form 23 [the ex-husband] asserts that the [application] by [the practitioner] for a restraining order is subject to principles of *res judicata* and/or issue estoppel.
>
> To that extent, it is difficult to argue otherwise on the face of the documents. What is today sought and suggested by [the practitioner], through her counsel, is that the decision of her Honour [the Federal Magistrate] delivered on 30 October does not of itself demonstrate that she has turned her mind or in fact considered specifically the facts underlying the application for the injunctive relief.
>
> Of course [the practitioner] offers nothing in either her sworn material or otherwise to suggest or support that submission, and I accept the submission of counsel for the [ex-husband] that it is not now for this court, without more, to look behind the order of a court and of a judicial officer in which it is clear[ly]… expressed that the application is dismissed, and particular with the inclusion, albeit perhaps strangely, of the words 'as finalised'.
>
> It would seem to me … that there is, in a court, no discretion with the presence of *res judicata* that the court is obliged in those circumstances to stay permanently the application.
>
> If, however, I be wrong in that respect … the same principle would of course apply in respect of issue estoppel.
>
> But as I have indicated, if I be wrong in respect of each of those primary submissions of [the ex-husband's] counsel, then it would seem to me in any event that … the matter is tending towards harassment, and in the circumstances, the use of the processes of the court as the instrument to deal with her concerns in an oppressive way towards [the ex-husband].
>
> I would be of the view that it is important for the court to preserve its integrity in the fairness of proceedings between parties, to say that, in my respectful view, this application is itself an abuse of process, and I am not, I would not have thought, limited to this court alone. It is a process in the use of court or courts as an instrument of oppression that gives rise to the abuse. The application is subject to a permanent stay.

217 Further, as we have already noted, the ex-husband's counsel made an application for costs. Counsel for the practitioner sought to resist that

[181] Exhibit 1.4 (ts 32 – 33).

application on the basis that, by virtue of s 69(2) of the *Restraining Orders Act 1997* (WA) a court was not to order an applicant for a restraining order to pay the costs of a respondent unless the court considered the application was frivolous and vexatious. Counsel for the practitioner submitted that the application for a VRO could not have been an abuse of process when it was first made by the practitioner.[182]

218 In dealing with the application for costs, Magistrate Fisher referred to s 69(2) of the *Restraining Orders Act 1997* (WA) and said:

> [S 69(2)] can only be considered in the understanding that an application for a restraining order has been unsuccessful.
>
> I mention that because it is the suggestion of the [practitioner] that the relevant consideration is the making of the application, and in terms of the time lines here, it is accepted that this application, that is the application for the restraining order, predated the applications that are currently the subject of appeal in the [appeal Court].
>
> Self-evidently that is not the consideration, and the consideration must be made as to whether the proceedings were frivolous and vexatious at their conclusion when costs become a live issue. Clearly the issue here is that this applicant for a restraining order continued to prosecute the application self-evidently, despite the communications with counsel for the respondent as to the application for *res judicata* and abuse of process being brought.
>
> In those circumstances it has been found that the application is certainly frivolous and clearly vexatious. In those circumstances it is to be ordered by the court that the applicant [for] the restraining order is to pay the [ex-husband's] costs, which costs are to be taxed if not agreed.

219 The LPCC alleged[183] that the practitioner maintained the application for a final VRO in circumstances where:

(a) the application for a final VRO was based on the same factual allegations as the restraining order application which was dismissed in the Federal Magistrates Court in the 30 October 2012 decision;

(b) prior to the filing of the ex-husband's application for a stay, the solicitors for the ex-husband informed the practitioner that her application for a final VRO would be opposed on the grounds of *res judicata* and issue estoppel;

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[182] Exhibit 1.4 (ts 34).
[183] Applicant's Further Amended Annexure A at [14].

(c) the application for a final VRO was an abuse of process in light of the FMC restraining order application and the resulting 30 October 2012 decision;

(d) the application for a final VRO was oppressive towards the husband;

(e) there was no impediment to the practitioner seeking a fresh VRO in the Magistrates Court if further matters gave rise to concerns as regards the conduct of the ex-husband; and

(f) the practitioner's conduct in maintaining the application for a final VRO in those circumstances had the potential to diminish public confidence in the administration of justice and/or had the potential to bring the profession into disrepute.

220 We are satisfied, and we find, that the facts underpinning the allegations in paragraphs (a) – (d) are proved, having regard to our findings as to the reasons given by Magistrate Fisher for the Magistrates Court March 2013 Decision. As to the allegation in paragraph (e), which is properly characterised as a contention, we accept the LPCC's contention. If further matters, outside those relied upon in the FMC restraining order application, arose, in relation to the conduct of the ex-husband, it was clearly open to the practitioner to make a further, fresh application for a VRO on the basis of those new matters. Indeed, the learned Magistrate noted as much, when, at the conclusion of his reasons for the Magistrates Court March 2013 Decision, he observed that the grant of a permanent stay of the practitioner's application for a final VRO:

> … does not preclude, I would not have thought, a further application if there be further matters that give rise to concerns of [the practitioner] or in fact [the ex-husband] as regards their conduct.

221 Finally, as to paragraph (f) above, which is also properly characterised as a contention on the part of the LPCC, we accept it. We are satisfied, and we find, that by pursuing the final VRO application, in the circumstances we have found, the practitioner's conduct had the potential to diminish public confidence in the administration of justice and had the potential to bring the profession into disrepute. We have no doubt that for a practitioner to maintain an application for a final VRO which, in effect, constituted an attempt to re-litigate allegations previously dismissed by another court, and thereby to unnecessarily use the resources of the court hearing the final VRO application, and to cause inconvenience and cost to the other party to the application, would give

rise to an apprehension that standards of professional conduct were not being maintained by members of the profession and would thereby bring the profession into disrepute. We consider that conduct of that kind would, in turn, undermine public confidence in the proper administration of justice.

222 The practitioner denied that her application for a VRO in the Busselton Magistrates Court was made without a proper basis, or that it was an abuse of process, or that it was oppressive to her ex-husband, or that it had the potential to diminish public confidence in the administration of justice or to bring the profession into disrepute. For the reasons we have given, we are satisfied that the evidence supports a contrary finding.

223 Furthermore, the practitioner claimed it was the ex-husband's application which in fact had no proper basis, was an abuse of process and was oppressive and unfair to her, and that the Magistrates Court was misled into thinking that the allegations on which she relied in her application for the VRO were *res judicata*.[184] There is no evidence to support those claims. Despite the numerous appeals pursued by the practitioner (as discussed below) she did not establish any error sufficient to warrant setting aside the Magistrates Court March 2013 decision.

***The specific allegations and evidence – District Court 2013 Decision***

224 The LPCC alleged[185] that on or about 10 April 2013, and prior to the hearing of the reinstatement application, the practitioner filed an appeal against the Magistrates Court March 2013 Decision in the District Court of Western Australia (**District Court Appeal**), so that the practitioner once again sought to maintain proceedings in different jurisdictions in respect to the same factual allegations.

225 We are satisfied, and we find, that this allegation is proved. In the District Court 2017 Decision, Gething DCJ noted the history of the practitioner's appeal against the Magistrates Court March 2013 Decision. His Honour noted that the practitioner appealed that decision on or about 10 April 2013.[186]

226 The LPCC alleged[187] that on 24 October 2013 the District Court 2013 Decision was delivered, by which the practitioner's District Court

[184] Practitioner's Further Amended Supplementary Submissions at [6].
[185] Applicant's Further Amended Annexure A at [16].
[186] Exhibit 1.21 at [20].
[187] Applicant's Further Amended Annexure A at [24].

Appeal from the Magistrates Court March 2013 Decision was dismissed by Fenbury DCJ, pursuant to s 43(3) of the MCCPA on the basis that the costs of the District Court Appeal, were the appeal to proceed further, would be disproportionate to the nature of the case the subject of the appeal.

227 Having regard to his Honour's reasons for decision,[188] which were in evidence before us, we are satisfied and we find, that that allegation is proved, save only for the fact that the decision was not delivered on 24 October 2013. We find, instead, that that decision was delivered on 27 November 2013. (The difference in the date of the decision is not material.) On that date, his Honour made an order that 'pursuant to s 43(3) of the MCCPA this appeal [i.e. the District Court Appeal] be struck out'.[189]

228 The LPCC alleged[190] that the practitioner commenced and maintained the District Court Appeal from the Magistrates Court March 2013 Decision without any, or any proper, basis and in circumstances where:

(a) 15 months had passed since the alleged abusive telephone call from the ex-husband;

(b) The practitioner knew or ought to have known that the District Court Appeal could not advance the Interim VRO as, even if successful, the matter could only be remitted back to the Magistrates Court and, given the 30 October 2012 decision which was based on the same allegations as her application for a final VRO, the same issues of *res judicata*, issue estoppel and abuse of process would arise;

(c) the District Court Appeal was an abuse of process;

(d) the District Court Appeal was oppressive towards the husband;

(e) there was no impediment to the practitioner seeking a fresh VRO in the Magistrates Court if further matters gave rise to concerns as regards the conduct of the ex-husband; and

[188] Exhibit 1.11.
[189] Exhibit 1.11.
[190] Applicant's Further Amended Annexure A at [30].

(f) the District Court Appeal had the potential to diminish public confidence in the administration of justice and/or had the potential to bring the profession into disrepute.

229 We are satisfied, and we find, that the factual allegation in paragraph (a) is proved. In the course of his reasons in the District Court 2013 Decision, Fenbury DCJ observed that the VRO sought by the practitioner was based on events that allegedly occurred in about July 2012, more than 15 months before the appeal.[191]

230 Paragraph (b) above is properly characterised as a contention. We do not accept it. We consider it to be based on an erroneous premise. The practitioner's grounds of appeal in the District Court Appeal included grounds which alleged errors of law in the Magistrates Court March 2013 decision, and orders that the practitioner's application for a final VRO should be permanently stayed as an abuse of process.[192] Had the practitioner's appeal against the Magistrates Court March 2013 Decision been successful, the best outcome for the practitioner would have been for the order made by Magistrate Fisher to be set aside and for the matter to be remitted to the Magistrates Court for determination as to whether a final VRO should be made. In those circumstances, it is difficult to see that the same *res judicata* and abuse of process arguments as succeeded before the learned Magistrate at first instance could have been ventilated again because, presumably, the success of the appeal would have proceeded on the basis that the learned Magistrate erred in reaching those conclusions.

231 For the reasons already given, we accept the contention in paragraph (e) above. It clearly was open to the practitioner to pursue another application for a VRO if further conduct occurred sufficient to justify such an application.

232 As for the LPCC's contentions that the District Court Appeal was an abuse of process, or oppressive to the ex-husband, we accept that to be the case, having regard to the following:

(a) His Honour, Judge Fenbury, found that the District Court Appeal had no reasonable prospect of success;[193]

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[191] Exhibit 1.11 at [8].

[192] The grounds of appeal in the District Court Appeal were set out by the Court of Appeal in the Court of Appeal Decision: Exhibit 1.12 at [11].

[193] Exhibit 1.11 at [24].

(b) His Honour found 'compelling' the ex-husband's submission, in the course of the District Court Appeal, that the grounds for seeking a VRO were 'stale';[194]

(c) His Honour concluded that there was no impediment to the practitioner making a fresh VRO application should there have been any basis to do so arising since July 2012 (that is, any basis different from that already relied upon in her Interim VRO application);[195]

(d) His Honour found compelling the ex-husband's submissions that the issues the practitioner sought to raise on the appeal were unusual, technical and far more legally complex than would ordinarily arise on an application for a VRO, with the result that the appeal would involve a considerable amount of further work and costs for the parties,[196] in circumstances where the costs incurred by the ex-husband on the appeal had already exceeded the costs incurred by him in the Magistrates Court, and where there was no doubt that if the merits of the appeal were to be determined, the ex-husband would incur further costs on a similar or greater scale;[197]

(e) His Honour found compelling the submission by the ex-husband that the ex-husband may be unable to recover his actual costs from the practitioner if the appeal was unsuccessful;[198]

(f) His Honour concluded that the likely costs of the appeal, if it were to proceed, would be disproportionate to the nature of the case the subject of the appeal.[199]

233 Finally, as to paragraph [228(f)], which is properly characterised as a contention on the part of the LPCC, we accept it. We are satisfied, and we find, that pursuing the District Court Appeal, in circumstances described by Fenbury DCJ, was an abuse of process and was unjustifiably oppressive to the ex-husband. That being the case, the practitioner's conduct would unnecessarily and pointlessly use the resources of the District Court, and would cause inconvenience and considerable cost to the other party to the District Court Appeal, in circumstances where there

[194] Exhibit 1.11 at [18] and [24].
[195] Exhibit 1.11 at [17].
[196] Exhibit 1.11 at [20] and [24].
[197] Exhibit 1.11 at [21], [22], [24].
[198] Exhibit 1.11 at [23], [24].
[199] Exhibit 1.11 at [24].

was no guarantee that he could recover those costs. Those consequences would in our view give rise to an apprehension that the proper standards of professional conduct were not being maintained by members of the profession and would thereby bring the profession into disrepute. In turn, we consider that conduct of that kind would undermine public confidence in the proper administration of justice.

***The specific allegations and evidence – Court of Appeal Decision***

234 The LPCC alleged[200] and on the basis of the Court of Appeal Decision, which was in evidence,[201] we are satisfied, and we find, that the practitioner proceeded, on 7 January 2014, to file, out of time, an appeal in the Court of Appeal against the District Court 2013 Decision.

235 The LPCC also alleged,[202] and on the basis of the Court of Appeal Decision, we are satisfied, and we find, that at a hearing on 20 June 2014 the Court of Appeal delivered the Court of Appeal Decision in which it refused the practitioner's application to extend the time within which to appeal against the District Court 2013 Decision[203] and dismissed the appeal.

236 The LPCC alleged[204] that the practitioner commenced and maintained the appeal to the Court of Appeal without any, or any proper, basis and in circumstances where:

(a) the documents filed by the practitioner did not clearly convey the substance of the appeal and did not comply with the *Supreme Court (Court of Appeal) Rules 2005* (WA);

(b) the appeal was misconceived in that the relief sought was not relief which the Court of Appeal could grant;

(c) the appeal was an abuse of process for the reasons set out in paragraph [30.2] of the Further Amended Annexure A (and which are set out in paragraph [228(b)] above;

(d) the practitioner's reasons for not filing an appeal notice in the Court of Appeal on time were 'unsatisfactory for a legal practitioner';

200 Applicant's Further Amended Annexure A at [31].
201 Exhibit 1.12.
202 Applicant's Further Amended Annexure A at [32.7].
203 Exhibit 1.12 at [42].
204 Applicant's Further Amended Annexure A at [32].

(e) there was no impediment to the practitioner seeking a fresh VRO in the Magistrates Court if further matters gave rise to concerns as regards the conduct of the ex-husband;

(f) the appeal had the potential to diminish public confidence in the administration of justice and/or had the potential to bring the profession into disrepute.

237 Having regard to the Court of Appeal Decision,[205] we are satisfied, and we find, that the Court of Appeal held:

(a) the submissions the practitioner filed in the Court of Appeal did not clearly and succinctly convey the substance of the grounds of appeal, as required by the *Supreme Court (Court of Appeal) Rules 2005* (WA) and the appellant's case, filed by the practitioner, did not comply with the Rules either;'[206]

(b) the relief sought by the practitioner on the appeal was not relief which the Court of Appeal could grant,[207] and the appeal was therefore misconceived;

(c) the practitioner's stated reasons for not filing an appeal notice on time were unsatisfactory for a legal practitioner;[208]

(d) there was no impediment to the practitioner seeking a fresh VRO in Western Australia, or the equivalent in South Australia, particularly in relation to any events since July 2012, about which the practitioner had made a number of allegations in her affidavit evidence in the Court of Appeal and in the District Court.[209]

238 For the reasons set out at paragraph [237] above, we do not accept the LPCC's contention in paragraph [236 (c)] that the appeal to the Court of Appeal was an abuse of process for the reasons there contended. However, there is no doubt that the practitioner's conduct in pursuing an appeal to the Court of Appeal without any, or any proper, basis, constituted an abuse of process.

239 As for the LPCC's contention in paragraph [236(f)], we are well satisfied that by pursuing the appeal to the Court of Appeal, in the circumstances described in paragraphs [237(c) – (d)] and [238] above, the

[205] Exhibit 1.12.
[206] Exhibit 1.12 at [32].
[207] Exhibit 1.12 at [35].
[208] Exhibit 1.12 at [37].
[209] Exhibit 1.12 at [41].

practitioner's conduct would unnecessarily and pointlessly use the resources of the Court of Appeal, and would cause inconvenience and considerable cost to the other party to the appeal, and would thereby raise doubts as to whether proper standards of professional conduct were being maintained by members of the profession. In our view, such conduct would bring the profession into disrepute, and in turn would undermine public confidence in the proper administration of justice.

***The specific allegations and evidence – special leave application***

240 The LPCC alleged,[210] and having regard to the copy of the reasons for decision and the orders made by the High Court which were in evidence, we are satisfied and we find, that the practitioner applied for leave to appeal the Court of Appeal Decision to the High Court of Australia, and that that application was heard on 10 December 2014 and dismissed by Bell and Gageler JJ, who observed that the 'prolix materials filed in support of the application do not identify any question suitable for the grant of special leave nor are the interests [of] … the administration of justice engaged by the application.'

241 The LPCC contended[211] that the practitioner commenced and maintained the special leave application without any, or any proper, basis, and further alleged that:

(a) the appeal was an abuse of process;

(b) there was no impediment to the practitioner seeking a fresh VRO in the Magistrates Court if further matters gave rise to concerns as regards the conduct of the ex-husband;

(c) the special leave application had the potential to diminish public confidence in the administration of justice and/or had the potential to bring the profession into disrepute.

242 In circumstances where the High Court held that the special leave application did not identify any question suitable for the grant of special leave, nor were the interests of the administration of justice engaged by the application, we are satisfied that the practitioner commenced and maintained the special leave application without any, or any proper, basis. The pursuit, by the practitioner, of the application for special leave when it had no proper basis was clearly an abuse of process, and that was all the more so in circumstances, where, as we have found, there was no

[210] Applicant's Further Amended Annexure A at [34].
[211] Applicant's Further Amended Annexure A at [35].

impediment to the practitioner pursuing an application for a VRO based on conduct which was different from that relied upon for the purposes of the Interim VRO.

243 We are well satisfied that the practitioner's conduct – in pursuing the special leave application in those circumstances – had the potential to diminish public confidence in the administration of justice and had the potential to bring the profession into disrepute, for the reasons already discussed at paragraph [239] above.

***The specific allegations and evidence – Magistrates Court September 2015 Decision***

244 The LPCC alleged[212] that in the August 2015 Application the practitioner applied to the Magistrates Court at Busselton to set aside or permanently stay the enforcement of the Magistrates Court March 2013 Decision.

245 The LPCC alleged[213] that on 24 August 2015 the practitioner swore and filed an affidavit in the Magistrates Court in support of the August 2015 Application in which she deposed that she sought an order setting aside the Magistrates Court March 2013 Decision 'on the basis of a denial of procedural fairness or natural justice, and a fraud on the Court due to misleading facts presented' by the ex-husband to the Magistrates Court at Busselton.

246 The LPCC alleged that on 24 September 2015, Magistrate Hamilton made the Magistrates Court September 2015 Decision, in which the August 2015 Application was dismissed.

247 Having regard to the transcript of the Magistrates Court 2015 Decision, which was in evidence, and to the District Court 2015 Decision, which was also in evidence, we are satisfied that these allegations are proved, and we so find. That evidence discloses that in August 2015, the practitioner filed two applications in the Magistrates Court in relation to the orders made by the Magistrates Court and which were explained in the Magistrates Court March 2013 Decision. The first was an application for an order suspending the enforcement of the order for costs made as part of the Magistrates Court March 2013 Decision (**costs suspension application**).[214] The costs suspension application was determined by

[212] Applicant's Further Amended Annexure A at [39].
[213] Applicant's Further Amended Annexure A at [40].
[214] Exhibit 1.21 at [28].

Magistrate Hamilton on 24 September 2015. Her Honour refused that application,[215] (which decision was not appealed).

248 The second was an application filed on 28 August 2015 which sought orders including that the Magistrates Court March 2013 Decision 'be set aside forthwith' and that any order awarding costs to the ex-husband be stayed (**set aside costs application**).[216] In support of the set aside costs application, the practitioner filed an affidavit in which she stated that the basis for the set aside costs application was a 'denial of procedural fairness or natural justice, and a fraud on the Court due to misleading facts presented to [the Court] by or on behalf of the [ex-]husband'.[217] The practitioner contended that the Magistrates Court March 2013 Decision 'was made on the basis that the issue of a restraining order had been heard on the merits and finally determined by the FMC, when in fact this had not occurred, in particular because the FMC did not have jurisdiction to hear such an application'.[218]

249 The set aside costs application was rejected for filing by the Magistrates Court. The practitioner then filed an application for leave to lodge a document pursuant to s 17(3) of the MCCPA.[219] Magistrate Hamilton granted leave to accept the set aside costs application for filing, on the basis that the Magistrates Court March 2013 Decision was made pursuant to s 17(2) and s 17(3) of the MCCPA permitted the Court to set aside an application under s 17(2) of the MCCPA.[220]

250 The ex-husband submitted that the set aside costs application was an abuse of process. Magistrate Hamilton noted that the Magistrates Court March 2013 Decision had 'been litigated through every relevant superior court in this country without success'.[221] She then considered various authorities in relation to what constituted an abuse of process and concluded that the set aside costs application constituted an abuse of process. She therefore dismissed the set aside costs application.[222]

251 The LPCC alleged that the practitioner commenced and maintained the August 2015 Application without any, or any proper, basis and in circumstances where the August 2015 Application:

[215] Exhibit 1.21 at [34].
[216] Exhibit 1.21 at [29].
[217] Exhibit 1.21 at [30].
[218] Exhibit 1.21 at [30].
[219] Exhibit 1.21 at [33].
[220] Exhibit 1.21 at [37].
[221] Exhibit 1.21 at [39]; Exhibit 1.20 (ts 8).
[222] Exhibit 1.21 at [42].

(a) was filed in the Magistrates Court out of time and without compliance with the rules of the Magistrates Court as to service;

(b) was an attempt to set aside the Magistrates Court March 2013 Decision notwithstanding that the subject matter of that decision had been litigated through every relevant superior court in the country without success;

(c) was thereby an abuse of process;

(d) was oppressive towards the ex-husband; and

(e) had the potential to diminish public confidence in the administration of justice and/or had the potential to bring the profession into disrepute.

252 As to the factual allegation in paragraph [251(a)], we are not satisfied that the practitioner failed to comply with the applicable Magistrates Court rules in relation to service. In relation to the set aside costs application, no question of service appears to have arisen, perhaps because of the initial rejection of the application by the Registrar of the Court, and the process then followed to obtain the grant of leave to pursue that application. In relation to the costs suspension application, however, a question was raised as to whether that application had been served.[223] The ex-husband and his counsel were aware of both applications,[224] and they were dealt with as we have described.

253 As for paragraph [251(b)], we are satisfied, and we find, that that allegation is proved, having regard to the transcript of the Magistrates Court September 2015 hearing. The transcript discloses that the learned Magistrate concluded that the set aside costs application amounted to an application to set aside, pursuant to s 17(3) of the MCCPA, the decision of Magistrate Fisher 'notwithstanding the subject matter of that decision has been litigated through every relevant superior court in this country without success'.[225]

254 As for the matters raised in paragraph [251(c) and (d)] above, they are properly characterised as contentions. We accept those contentions and find that the August 2015 Application was an abuse of process and unjustifiably oppressive to the ex-husband. Magistrate Hamilton held that

[223] Exhibit 1.20 (ts 2).
[224] Exhibit 1.20 (ts 2, ts 4 – 6).
[225] Exhibit 1.20 (ts 8).

the set aside costs application constituted an abuse of process,[226] having regard to the authorities in relation to what constitutes an abuse of process, most particularly the decision of Buss JA in ***Sheraz***.[227]

255 In reaching the conclusion that the August 2015 Application and the proceedings in the Magistrates Court which resulted in the Magistrates Court September 2015 Decision constituted an abuse of process and was oppressive to the ex-husband, we rely, also, on the decision of Gething DCJ in the District Court 2017 Decision, which we discuss in detail below.

256 As for the contention in paragraph [251(e)], we are satisfied that in the circumstances, the practitioner's conduct in filing and maintaining the August 2015 Application would unnecessarily and pointlessly use the resources of the Magistrates Court and would cause inconvenience and further cost to the other party to the application, and that that would raise doubts as to whether proper standards of professional conduct were being maintained by members of the profession. In our view, such conduct would bring the profession into disrepute, and in turn would undermine public confidence in the proper administration of justice.

***The specific allegations and evidence –District Court 2017 Decision***

257 The LPCC alleged and, having regard to the District Court 2017 Decision, we are satisfied, and we find, that on 5 November 2015 the practitioner filed an appeal against the Magistrates Court September 2015 Decision in the District Court of Western Australia (**Second District Court Appeal**) which was heard by Gething DCJ on 6 January 2017 and dismissed on 3 March 2017.

*Overview of the Second District Court Appeal*

258 It is convenient, at this point, to give an overview of the Second District Court Appeal.

259 The grounds of appeal[228] included that the learned Magistrate had denied the practitioner procedural fairness and that she failed to give the practitioner the opportunity to make oral submissions, in relation to the abuse of process argument advanced by the ex-husband (as the basis on which he submitted the set aside application should be dismissed). The appeal grounds also included that the learned Magistrate failed to

[226] Exhibit 1.20 (ts 10).
[227] ***Sheraz*** at [8] – [11] (Buss JA).
[228] Exhibit 1.21 at [44].

consider the continued ongoing lack of evidence identified by the ex-husband, or to consider the new evidence provided by the practitioner, on the question whether the Federal Magistrate had in fact considered the merits of the FMC restraining order application.

260 Gething DCJ held that the learned Magistrate had not given the practitioner the opportunity to make submissions as to why the set aside costs application should not be dismissed, effectively summarily, on the basis that it constituted an abuse of process. His Honour held that because Magistrate Hamilton did not hear from the practitioner, and simply relied upon the documents filed by the parties, which she had read, in advance of the hearing, the learned Magistrate effectively determined the abuse of process argument on the papers.[229]

261 However, as his Honour observed, not every denial of procedural fairness will result in the grant of relief. Accordingly, he went on to consider whether any further information that the practitioner had intended to put before the Magistrates Court would have made any difference to the outcome of the set aside costs application.[230] His Honour noted that the affidavit filed by the practitioner in support of the set aside costs application raised two matters which his Honour considered the practitioner would have drawn to the attention of Magistrate Hamilton, and would also rely upon if a new hearing was ordered, namely a jurisdictional argument advanced by the practitioner, which was that the FMC was precluded from hearing a restraining order application that was already on foot in a State court, and the additional evidence the practitioner said confirmed that the Federal Magistrate did not consider the merits of the FMC restraining order application.[231]

262 As to the jurisdictional argument, Gething DCJ held that it was not clear that the FMC would be precluded from determining the FMC restraining order application even though she had previously commenced an application for an Interim VRO. However, his Honour held he did not have to determine the issue in order to determine the appeal, but rather could proceed on the basis most favourable to the practitioner; namely to assume the FMC was precluded from granting the FMC restraining order application.[232]

[229] Exhibit 1.21 at [77].
[230] Exhibit 1.21 at [78] – [79].
[231] Exhibit 1.21 at [86].
[232] Exhibit 1.21 at [91].

263 As for the argument that the Federal Magistrate did not consider the merits of the FMC restraining order application, Gething DCJ noted that the reasons given by the Federal Magistrate did not specifically address the issue of whether the practitioner was entitled to the relief sought, but that he was prepared to assume, most favourably to the practitioner, that there was no hearing at which evidence was called specifically on the issue whether an injunction should be granted against the ex-husband in the terms sought by the practitioner, and that there was no specific determination of the issue.[233] However, Gething DCJ also noted that in the Magistrates Court March 2013 Decision, Magistrate Fisher was aware of the scenario that the FMC had not 'properly and completely considered' whether an injunction should be granted against the ex-husband in the terms sought by the practitioner. His Honour accepted that, in this scenario, that the doctrines of *res judicata* and issue estoppel would not apply. Accordingly, his Honour proceeded to consider a second basis on which the practitioner's application under the Restraining Orders Act could be stayed, being abuse of process.[234]

264 Based on those assumptions, the question his Honour considered was whether giving the practitioner the opportunity to make submissions before the Magistrates Court on 24 September 2015, or in a new hearing, to permit her to develop those two arguments, would have made a difference to the outcome of that hearing, or of a new hearing.[235] As his Honour noted, the issue for determination was not whether the Magistrates Court March 2013 Decision should be set aside, but whether it would be an abuse of the processes of the Court to allow the practitioner to proceed with the August 2015 Application.[236]

265 Gething DCJ held that it would have made no difference to the outcome of either the hearing on 24 September 2015, or to a new hearing, if the practitioner had the opportunity to make oral submissions on the two arguments, because those two arguments were squarely raised in the August 2015 Application, which annexed a copy of the reasons for decision of the Federal Magistrate, and in circumstances where Magistrate Hamilton made it clear that she had read all the material that had been filed.[237] In any event, his Honour held that the two arguments the practitioner sought to advance did not undermine the conclusion reached by the learned Magistrate that the August 2015 Application constituted an

[233] Exhibit 1.21 at [95] – [97].
[234] Exhibit 1.21 at [98].
[235] Exhibit 1.21 at [99].
[236] Exhibit 1.21 at [100].
[237] Exhibit 1.21 at [101].

abuse of process having regard to the test identified by Buss JA in ***Sheraz***. That was because the August 2015 Application was an attempt to re litigate an issue (that is, a challenge to the Magistrates Court March 2013 Decision) when that issue had already been litigated and determined in earlier proceedings, namely the First District Court Appeal. His Honour held that in the August 2015 Application, the practitioner was again trying to challenge the Magistrates Court March 2013 Decision, but by a different route; namely to apply to set that decision aside under the MCCPA.[238]

266 Moreover, Gething DCJ held that the two arguments the practitioner sought to advance did not undermine the conclusion that to permit the August 2015 Application to proceed would be oppressive to the ex-husband, having regard to the futility and lack of proportionality in the practitioner's actions.[239] His Honour noted that the practitioner had been unable to identify any practical utility in setting aside the Magistrates Court March 2013 Decision, and that the futility and lack of proportionality which led Fenbury DCJ to strike out the appeal pursuant to s 43(3) of the MCCPA in the District Court 2013 Decision were even more stark when it came to the August 2015 Application.[240] As Gething DCJ noted, it had been drawn to the practitioner's attention by Magistrate Fisher in March 2013, by Fenbury DCJ in November 2013, and by the Court of Appeal in July 2014, that it was open to her to have made a fresh application for a violence or misconduct restraining order in Western Australia, or interstate, if further conduct by the ex-husband had occurred, as she had alleged, yet she persisted in focusing on the Magistrates Court March 2013 Decision.[241]

267 Gething DCJ held that the practitioner had not demonstrated that there was any basis for setting aside the Magistrates Court September 2015 Decision.[242] He held that there was ample justification for Magistrate Hamilton to have come to the conclusion that to allow the August 2015 Application to proceed would be to countenance an abuse of the processes of the Court.[243]

268 Consequently, in the District Court 2015 Decision, Gething DCJ dismissed the appeal.

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[238] Exhibit 1.21 at [102].
[239] Exhibit 1.21 at [103].
[240] Exhibit 1.21 at [103].
[241] Exhibit 1.21 at [104].
[242] Exhibit 1.21 at [108], [115], [125].
[243] Exhibit 1.21 at [115].

269 Gething DCJ also had to consider an application for an order against the practitioner under the *Vexatious Proceedings Restriction Act 2002* (WA) (**VPRA**), to restrict her from taking further proceedings to collaterally challenge either the Magistrates Court March 2013 Decision or the Magistrates Court September 2015 Decision.[244] His Honour concluded that such an order was justified in the circumstances.[245]

*The LPCC's submissions in relation to the Second District Court Appeal*

270 The LPCC alleged that the practitioner commenced and maintained the Second District Court Appeal without any, or any proper, basis and in circumstances where:

(a) the Second District Court Appeal was filed out of time;

(b) the Second District Court Appeal was a clear attempt to re-litigate the issue which had, in substance, been litigated and determined in earlier proceedings, namely the District Court Decision;

(c) the practitioner had been advised by a number of judicial officers that there was no proper basis for the Second District Court Appeal and that there was a quicker and less costly option available to the practitioner to commence an application for a fresh VRO, in the event that the husband's conduct warranted it;

(d) the Second District Court Appeal was thereby an abuse of process;

(e) the Second District Court Appeal was oppressive towards the husband;

(f) the Second District Court Appeal had the potential to diminish public confidence in the administration of justice and/or had the potential to bring the profession into disrepute; and

(g) Gething DCJ granted an application by the ex-husband under section 4(2)(c)(i) of the VPRA for an order prohibiting the practitioner from instituting further proceedings in relation to the Magistrates Court March 2013 Decision or the Magistrates Court September 2015 Decision without the leave of the District Court.

[244] Gething DCJ referred to the 'August 2015 Decision' but it is apparent that that is an error, given his Honour otherwise referred to 'the September 2015 Decision' when he was referring to the decision of Magistrate Hamilton on 24 September 2015.
[245] Exhibit 1.21 at [157].

271 Having regard to the reasons given by Gething DCJ for the District Court 2017 Decision, summarised above, we are satisfied, and we find, that the factual allegations in paragraph [270(a), (c) and (g)] are proved. As for the factual allegation in paragraph [270(a)], the practitioner's appeal was filed 20 days' late.[246] However, we immediately note that Gething DCJ granted the practitioner leave to commence the appeal out of time,[247] as we have discussed above. As for the factual allegation in paragraph [270(c)], we find that that allegation is proved, for the reasons outlined in paragraph [266] above. And as for the factual allegation in paragraph [270(g)], we are satisfied, and we find, that that allegation is proved, for the reasons outlined in paragraph [269] above.

272 The matters referred to in paragraphs [270(b), (d), (e) and (f)] and the umbrella allegation in paragraph [270] (that the Second District Court Appeal had no, or no proper basis) are properly characterised as contentions.

273 We do not accept the LPCC's contention that the Second District Court Appeal was commenced and maintained without any, or any proper, basis. That is because Gething DCJ found one of the grounds of appeal (namely that Magistrate Hamilton had denied the practitioner procedural fairness) was made out, so that the 'appeal had a modest amount of merit'[248] and for that reason, granted the practitioner leave to commence the appeal out of time,[249] although his Honour ultimately dismissed the appeal.

274 However, we accept the balance of the contentions advanced by the LPCC in paragraph [270], for the following reasons. In circumstances where:

(a) the set aside costs application had been dismissed on the basis that it was an abuse of process, having regard to the principles identified by Magistrate Hamilton;

(b) it remained the case that the practitioner, through the Second District Court Appeal, simply sought to re-litigate an issue that had been fully litigated and dismissed in other proceedings;

[246] Exhibit 1.21 at [43].
[247] Exhibit 1.21 at [129].
[248] Exhibit 1.21 at [129].
[249] Exhibit 1.21 at [129].

(c) the practitioner's attempt to re-litigate that issue would be oppressive to the ex-husband (for the reasons identified by Gething DCJ);

(d) it had remained the case, and had been drawn to the practitioner's attention, that it was open to her to pursue a fresh application for a VRO in respect of other conduct by the ex-husband which supported such an application; and

(e) where Gething DCJ considered that an order should be made under the VPRA to restrict the practitioner from further attempts to re-litigate the same issue;

we consider that the practitioner's conduct in pursuing the Second District Court Appeal is properly characterised as an abuse of process as alleged in paragraph [270(d)]. Further, in our view, the practitioner's conduct in pursuing the Second District Court Appeal in those circumstances unnecessarily and pointlessly used the resources of the District Court and would no doubt have caused inconvenience and further cost to the other party to the Appeal, and that that would raise doubts as to whether proper standards of professional conduct were being maintained by members of the profession. In our view, such conduct would bring the profession into disrepute, and in turn would undermine public confidence in the proper administration of justice.

***The LPCC's contentions in relation to Ground 1***

275 The LPCC contended that the practitioner's conduct in causing to be commenced and/or maintained or commencing and/or maintaining, on the bases alleged:

- the application for a final VRO;
- the District Court Appeal from the Magistrates Court March 2013 Decision;
- the appeal from the District Court 2013 Decision to the Court of Appeal;
- the special leave application;
- the August 2015 Application; and
- the Second District Court Appeal from the Magistrates Court September 2015 Decision;

would, if established:

(a) justify a finding that the practitioner is not a fit and proper person to engage in legal practice;

(b) further or alternatively, would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence; and

(c) is professional misconduct within the meanings of s 403 and s 438 of the LP Act.

276 The LPCC also contended that a reasonably competent practitioner would not issue proceedings without any proper basis or foundation and would not occupy a Court's time and that of the ex-husband with proceedings of no substance. The LPCC contended that the practitioner's conduct in causing to be commenced and/or maintained or in commencing and/or maintaining the proceedings the subject of Ground 1 had the potential to diminish public confidence in the administration of justice and/or to bring the profession into disrepute, and was therefore in breach of rules 6(2)(b) and 6(2)(c) of the Conduct Rules, in that:

(a) it could be inferred that the practitioner was not competent to practise as a legal practitioner;

(b) the practitioner caused the ex-husband to waste time and resources in responding to the many proceedings, for which he could not be properly compensated by way of a costs order, which was oppressive and unfair;

(c) the practitioner caused the various courts to waste time and resources in dealing with her various matters, including where she had actions simultaneously before different courts in respect to the same subject matter in order to achieve the outcome she sought, which had the potential to undermine public confidence in the administration of justice;

(d) the commencement and/or maintenance by the practitioner of the proceedings, none of which would be considered reasonably arguable by a reasonably competent Australian legal practitioner, and which lacked any, or any proper basis or foundation, was likely to undermine public confidence in the legal profession by giving rise to an apprehension that members of the legal profession are willing to engage the legal process in circumstances

where it is not justified, and where in the practitioner's case, she did so on many occasions when on notice of issues of *res judicata*, estoppel and abuse of process.

*Disposition*

277 In ***Amsden***[250] the Tribunal held that the practitioner's conduct–which included commencing and prosecuting a proceeding in the Magistrates Court, in circumstances where the practitioner had no cause of action, and where the proceeding lacked any legal foundation and was therefore an abuse of the court's process–would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence, within the first limb of ***Kyle***. The Tribunal held that the practitioner's conduct involved the breach of duties of fairness to the other parties to the proceeding not to bring legal proceedings against them when she had no founding cause of action, and the breach of a duty of propriety to the Court not to commence and prosecute proceedings which involved an abuse of process.[251]

278 In ***Amsden,***[252] the Tribunal said that a practitioner has:

> … a duty of propriety to the court not to commence and prosecute a legal proceeding which involves an abuse of process. [That] fundamental [duty is] binding upon a legal practitioner, whether acting for a client or representing himself or herself in a private dispute or private litigation.

279 Professor Dal Pont has explained why the institution of civil proceedings which do not have a legal foundation constitutes an abuse of process:

> … for a lawyer to institute civil proceedings lacking a legal foundation is an abuse of court processes because it squanders valuable court time and resources and causes unnecessary discomfort, cost and inconvenience to the opposing party.[253]

280 Having regard to the circumstances in which we have found that the practitioner:

1. Maintained her application for a final VRO;

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[250] ***Amsden*** at [49].
[251] ***Amsden*** at [49].
[252] ***Amsden*** at [64].
[253] G.E. Dal Pont, *Lawyers' Professional Responsibility*, 7th ed, 2021, [17.260], referring to ***C.T. Bowring and Co (Insurance) Ltd v Corsi Partners Ltd*** [1994] 2 Lloyd's Rep 567 at [580] (Millett LJ).

2. Commenced and maintained the District Court Appeal from the Magistrates Court March 2013 Decision;

3. Commenced and maintained the appeal from the District Court 2013 Decision to the Court of Appeal;

4. Commenced and maintained the special leave application;

5. Commenced and maintained the August 2015 Application; and

6. Commenced and maintained the Second District Court Appeal from the Magistrates Court September 2015 Decision,

we have no doubt that the practitioner's conduct in maintaining the final VRO application, and in commencing and maintaining each of the other proceedings, was conduct which would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence, within the first limb of ***Kyle.*** We regard each of those instances of conduct, individually and collectively, as demonstrative of a failure to appreciate and observe the most fundamental standards expected of practitioners, namely their duties to the courts not to pursue baseless proceedings, and thereby to waste the time and resources of the courts, and their duties of fairness to other parties not to pursue baseless proceedings and thereby, unnecessarily, to cause inconvenience and costs to those other parties.

281 As we have already explained, conduct of that kind by a legal practitioner, even when the practitioner is acting on their own behalf in litigation, gives rise to an apprehension that legal practitioners are willing to issue court proceedings in circumstances where that cannot be justified, and thereby to cause inconvenience and cost to other parties, and to waste judicial time and resources, in their own self-interest. And that a practitioner is willing to engage in such conduct diminishes public confidence in the administration of justice and may have the effect of bringing the profession into disrepute.

282 Accordingly, we are satisfied, and we find, that the practitioner's conduct met the first limb of ***Kyle*** and on that basis constituted professional misconduct for the purposes of s 403 of the LP Act.

283 A practitioner who is willing to engage in multiple instances of such conduct is a person who could not command the personal confidence of his or her clients, fellow practitioners and judges. Accordingly, we are also satisfied, and we find, that the practitioner's conduct, as described

above, and when viewed as a whole, was conduct which justifies a finding that the practitioner is not a fit and proper person to engage in legal practice, and on that basis constituted professional misconduct for the purposes of s 403(1)(b) of the LP Act.

284 We turn, next, to the allegation that the practitioner's conduct constituted a breach of rules 6(2)(b) and 6(2)(c) of the Conduct Rules.

285 In ***Amsden***, the Tribunal held that the practitioner's conduct constituted a breach of rules 6(2)(b) and 6(2)(c) of the Conduct Rules in that it was prejudicial to, or would diminish public confidence in, the administration of justice and had the effect of bringing the profession into disrepute because, amongst other things, it gave rise to an apprehension that legal practitioners are willing to issue court proceedings in circumstances where that could not be justified, where the conduct caused discomfort and inconvenience to the other parties, and wasted the time and resources of the court in dealing with the practitioner's claim, which involved an abuse of process.[254]

286 As the Tribunal pointed out in ***Amsden***, while a practitioner is acting in a personal capacity in the litigation, they are, in effect, their own 'client' for the purposes of the Conduct Rules.[255] The Tribunal held that it would be contrary to the intent of the Conduct Rules for a lawyer to be subject to the stated ethical requirements when acting for another person, but not when acting for themselves.[256]

287 Furthermore, the Tribunal in ***Amsden*** observed that 'for a lawyer to commence a legal proceeding, to advance his or her own interest, which involves an abuse of court process constitutes a very serious breach of rule 6(2) of the Conduct Rules. It reflects most adversely on the propriety of the legal profession as a whole'.[257]

288 For the reasons set out at [280] and [281] above, we are satisfied, and we find, that the practitioner's conduct in the circumstances described in [280] above, individually and collectively, was conduct which would diminish public confidence in the administration of justice and which may bring the profession into disrepute. We therefore find that the practitioner's conduct constituted a breach of rules 6(2)(b) and 6(2)(c) of the Conduct Rules, and on that basis was also professional misconduct for the purposes of s 403 of the LP Act.

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[254] ***Amsden*** at [54].
[255] ***Amsden*** at [58].
[256] ***Amsden*** at [58].
[257] ***Amsden*** at [55].

### (j) Ground 2 – allegations, evidence and findings

*The allegation in Ground 2*

289 The LPCC alleged that between May 2013 and March 2015, in the course of acting in the reinstatement application, which she commenced on 25 March 2013 to reinstate the federal appeal against orders made by the Federal Magistrates Court on 30 October 2012, the practitioner:

(a) at a hearing on 8 May 2013, made oral submissions in support of an oral application to restrain the ex-husband's Senior Counsel from acting for the husband in the federal appeal, without any, or any proper, basis (**May 2013 oral submissions**);

(b) (deleted by amendment of the Further Amended Annexure A);

(c) prepared, filed and maintained an application dated 5 July 2013 (**5 July 2013 application**) which had no, or no proper, basis in that it sought orders that:

(i) the Presiding Judge be disqualified from hearing the federal appeal on the grounds of alleged bias (**disqualification application**);

(ii) the ex-husband's solicitor (**Solicitor**) and Senior Counsel be restrained from acting for the husband in the federal appeal on the grounds of an alleged conflict of interest (**counsel conflict of interest application**);

(d) at a hearing on 31 July 2013 (**31 July 2013 hearing**):

(i) did not accurately read to the appeal Court from the transcripts of previous hearings, which conduct had the potential to mislead the appeal Court, and the practitioner was recklessly indifferent as to whether her doing so had the potential to mislead the appeal Court and as to whether the appeal Court would be misled;

(ii) made comments that were discourteous, intemperate and/or scandalous, made without any, or any reasonable, basis, and had the potential to diminish public confidence in the administration of justice and/or to bring the profession into disrepute;

(e) prepared, filed and maintained an appeal against the Presiding Judge's decision on 31 July 2013 to dismiss the disqualification application (**disqualification appeal**) which appeal had no, or no proper, basis and in which the practitioner filed a document which included irrelevant, insulting and scandalous comments;

(f) on 28 August 2013 prepared and sent two emails to a Registrar of the appeal Court (**August 2013 emails**) which contained comments that were discourteous, intemperate and/or scandalous, made without any, or any reasonable, basis, and had the potential to diminish public confidence in the administration of justice and/or had the potential to bring the profession into disrepute;

(g) at a hearing on 12 February 2015 (**February 2015 hearing**), made oral submissions which were:

(i) inconsistent with her May 2013 oral submissions;

(ii) discourteous, intemperate and/or scandalous, made without any, or any reasonable basis, and which had the potential to bring the profession into disrepute; and

(h) at a hearing on 27 March 2015 (**March 2015 hearing**) made discourteous, intemperate and/or scandalous comments.

**The practitioner's response to the allegation in Ground 2**

290 The practitioner's response to Ground 2 was set out in her Statement of Contentions, and in the submissions she filed.

291 For the sake of completeness, we note that the practitioner made an admission in relation to an allegation which had originally been included in Annexure A, but which was no longer pursued in the Further Amended Annexure, upon which the LPCC relied at the final hearing, namely that the practitioner severed the telephone connection in a hearing in 2013, when she was appearing by telephone from Western Australia at a hearing being conducted interstate.[258] A similar allegation, in relation to a hearing in 2015, had also initially been included in Annexure A,[259] but was deleted from the Further Amended Annexure A. As the allegations were not pursued by the LPCC in the Further Amended Annexure A, it is not necessary to say anything further about them.

[258] Annexure A Ground 2(b) and [19.2] (later deleted in Further Amended Annexure A).
[259] Annexure A at [37.2] (later deleted in Further Amended Annexure A).

292 The practitioner's response, relevant to the allegations now maintained in Ground 2, was to deny the allegations. We deal with particular arguments raised by the practitioner in relation to the allegations in Ground 2 later in these reasons.

293 We turn to consider the specific factual allegations on which the LPCC relies in support of Ground 2.

***The specific allegations and evidence – May 2013 oral submissions***

294 The LPCC alleged[260] that on 25 March 2013 the practitioner filed the reinstatement application in respect of the federal appeal, and that that application was listed for hearing on 8 May 2013.

295 As explained above at [206] – [208], we have found that these allegations are proved.

296 The LPCC alleged[261] that on 8 May 2013, at the hearing in the appeal Court of the reinstatement application in relation to the federal appeal (**8 May 2013 hearing**), which was heard by the Presiding Judge, the practitioner (who attended by telephone) made an oral application to restrain the ex-husband's Senior Counsel from representing the ex-husband in the proceedings on the basis of an alleged conflict of interest (**conflict of interest allegation**). In light of that oral application, the Presiding Judge ordered that the practitioner file an application in relation to the conflict of interest allegation, together with an affidavit in support, by 5 July 2013, and that the reinstatement application be adjourned to 31 July 2013.

297 Having regard to the transcript of the 8 May 2013 hearing,[262] to the *ex tempore* reasons and orders made by the Presiding Judge on that day,[263] and to *ex tempore* reasons given by the Presiding Judge on 31 July 2013,[264] we are satisfied, and we find, that these allegations are proved.

298 In the course of his *ex tempore* reasons, the Presiding Judge explained that an amended application that the practitioner had attempted to file in the week prior to the 8 May 2013 hearing was not accepted for filing. One of the orders sought in that application was that the ex-husband's Senior Counsel be restrained from accepting a brief on

[260] Further Amended Annexure A at [15].
[261] Further Amended Annexure A at [17].
[262] Exhibit 1.5.
[263] Exhibit 1.6, Orders 1 and 2.
[264] Exhibit 1.9.

behalf of the ex-husband.[265] That issue was, nevertheless, raised at the commencement of the hearing on 8 May 2013,[266] because as his Honour explained, if the practitioner wished to pursue the conflict of interest allegation, it would need to be dealt with before the hearing could proceed.[267] The practitioner confirmed that she wished to pursue the conflict of interest allegation.[268] The practitioner thus pursued an oral application to restrain the ex-husband's Senior Counsel from acting for him in the proceedings.[269] However, as we explain below, the practitioner said that she did not have to hand, during the hearing on 8 May 2013, the evidence she claimed to possess to support the conflict of interest allegation. The Presiding Judge therefore made orders that the practitioner's application to restrain the Senior Counsel from acting be adjourned to 31 July 2013 for further consideration, and that the practitioner file and serve a (written) conflict of interest application setting out the orders she sought, together with a supporting affidavit, by 5 July 2013.[270]

299 The LPCC alleged[271] that at the 8 May 2013 hearing the practitioner made oral submissions to the appeal Court in support of the conflict of interest allegation, namely that the conflict of interest arose from the practitioner having disclosed confidential information to the Senior Counsel on a previous occasion. The LPCC alleged that there was no, or no reasonable, basis for that allegation and that it was made in circumstances where the practitioner:

(a) knew that the Senior Counsel had acted for the ex-husband since September 2012 and the practitioner had not previously raised any allegation of a conflict of interest against the Senior Counsel;

(b) failed to accurately identify the date of an alleged telephone conversation with the Senior Counsel (or her clerk) during which conversation the practitioner claimed she disclosed confidential information to the Senior Counsel (or her clerk) which the practitioner submitted warranted the Senior Counsel being injuncted from further acting for the ex-husband in the proceedings;

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[265] Exhibit 1.6 at [5].
[266] Exhibit 1.5 (ts 2 – 4).
[267] Exhibit 1.6 at [6].
[268] Exhibit 1.5 (ts 5).
[269] Exhibit 1.9 at [6].
[270] Exhibit 1.6, Orders 1 and 2.
[271] Further Amended Annexure A at [18].

(c) failed to identify accurately, or at all, the nature of the confidential information purportedly disclosed to the Senior Counsel which the practitioner submitted warranted the Senior Counsel being injuncted from further acting for the ex-husband in the proceedings;

(d) failed to provide any cogent evidence in support of the conflict of interest allegation, including any evidence of a file note which the practitioner claimed was in her possession, and which she submitted supported the conflict of interest allegation; and

(e) subsequently indicated to the Presiding Judge that she had spoken with the Senior Counsel, or her clerk, during the period between 3 and 14 January 2011, which was contradicted by records held by the Senior Counsel that she and her clerk were not in chambers during that period.

300 We are satisfied that some, but not all, of the factual allegations particularised in the paragraphs [299(a) – (e)] are proved. We make our findings, and explain our reasons, below.

301 **First**, we are satisfied, and we find, having regard to the transcript of the 8 May 2013 hearing, that at that hearing the practitioner made oral submissions to the appeal Court in support of the conflict of interest allegation. The practitioner confirmed, at the outset of the hearing, that she wished to contend that the Senior Counsel was subject to a conflict of interest.[272] The practitioner claimed that that conflict of interest arose from the practitioner having disclosed confidential information to the Senior Counsel, or to her clerk, in January 2011.[273]

302 **Secondly**, having regard to the *ex tempore* reasons for decision given by the Presiding Judge on 8 May 2013, we are satisfied, and we find, that the first occasion on which the practitioner sought to raise any conflict of interest allegation against the Senior Counsel was in May 2013 in connection with the reinstatement application. In the course of that hearing, the Senior Counsel informed the Presiding Judge that she had been acting as counsel for the ex-husband since September 2012,[274] and had conducted the hearing before the Federal Magistrate in October 2012, from whose orders the practitioner sought to appeal in the federal appeal. The Presiding Judge noted that the Senior Counsel had appeared in all

[272] Exhibit 1.5 (ts 5).
[273] Exhibit 1.5 (ts 7).
[274] Exhibit 1.5 (ts 3).

applications that had been made by the practitioner since that time.[275] The Presiding Judge noted that the Senior Counsel had asserted, and the practitioner had not disputed, that 'at no stage prior to effectively just before the hearing today, did the [practitioner] raise any issue of conflict of interest in relation to [the Senior Counsel]'.[276] We find that the practitioner clearly knew that the Senior Counsel had been acting for the ex-husband since at least the time of the hearing before the Federal Magistrate in October 2012.

303 **Thirdly**, the transcript of the hearing on 8 May 2013 reveals that during the course of the hearing before the Presiding Judge on that date, the practitioner was asked to identify the date on which she claimed to have had the conversation with the Senior Counsel or her clerk, and in which she claimed to have disclosed confidential information. The practitioner was unable to do so. Initially she said she said that she had seen a file note which caused her to recall that she 'had rung [the Senior Counsel] in very early January 2011'[277] to take over the matter from the practitioner's previous counsel. However, the practitioner was unable to provide further details of that conversation as she said she did not have the file note with her during the hearing, having left it at home.[278] When the practitioner was asked to indicate when the telephone conversation occurred she said 'it would be between the … probably around the 3rd [of January] or I would have to look at the diary, but it would be early 2011 up to the 14th [of January] because I was discussing barristers … at the time'.[279] When the Senior Counsel advised the Presiding Judge that she and her clerk had been on leave for the whole of January, the practitioner acknowledged that she had 'a difficulty with pinpointing the date'.[280] The practitioner also suggested that the conversation may have been in late December 2010[281] but 'was fairly certain that [she] recall[ed] that it was in January'.[282] We are satisfied, and we find, that in the course of the hearing on 8 May 2013, the practitioner failed to accurately identify the date of the alleged telephone conversation which was the basis for her conflict of interest allegation.

304 **Fourthly**, having regard to the transcript of the hearing on 8 May 2013, we are satisfied, and we find, that the practitioner failed to identify

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[275] Exhibit 1.6 at [16].
[276] Exhibit 1.6 at [16].
[277] Exhibit 1.5 (ts 7).
[278] Exhibit 1.5 (ts 8).
[279] Exhibit 1.5 (ts 11 – 12); see also Exhibit 1.6 at [8].
[280] Exhibit 1.5 (ts 13).
[281] Exhibit 1.5 (ts 14).
[282] Exhibit 1.5 (ts 14).

accurately, or at all, the nature of the confidential information which the practitioner claimed she had disclosed to the Senior Counsel and which the practitioner submitted warranted the Senior Counsel being restrained from further acting for the ex-husband. As we have already observed, initially the practitioner said that she had seen a file note which caused her to recall that she 'had rung [the Senior Counsel] in very early January 2011', but told the Court that she did not have the file note with her. The practitioner claimed that the conflict of interest arose from a conversation she alleged she had had with the Senior Counsel, or with her clerk, as to whether the Senior Counsel would be able to act for her in [redacted] against the ex-husband. The practitioner claimed to recall what the file note said, but was unable to recall whether she spoke to the Senior Counsel or to her clerk.[283]

305 The practitioner claimed that in that conversation, she had disclosed confidential information about [redacted].[284] When asked by the Presiding Judge to identify the confidential information she claimed had been disclosed in the conversation, the practitioner confirmed that the conversation involved 'a usual discussion … about payment of fees which would entail asking … about [the practitioner's] financial position and also … a usual discussion about availability, and there was a possibility of a clash in terms of that issue'.[285] However, when pressed, the practitioner said that she was unable to recall the precise words of the conversation she had, other than the effect of the words spoken was that [redacted].[286] The practitioner went on to claim that she had discussed [redacted].[287]

306 The Presiding Judge observed that nothing in what the practitioner had described as confidential information appeared to be information that he would describe as confidential information that would require the Senior Counsel to withdraw from the case.[288] When the Presiding Judge pointed out to the practitioner that it was necessary that she 'be absolutely clear about … the application you're making and the facts on which you base that application'[289] the practitioner indicated that she wished to withdraw the conflict of interest allegation.[290] The practitioner indicated that 'based on the information that I have heard that there was – and also that I did not exchange any documents per se with [the Senior Counsel's]

[283] Exhibit 1.5 (ts 8).
[284] Exhibit 1.5 (ts 8 – 10).
[285] [Redacted].
[286] [Redacted].
[287] [Redacted].
[288] Exhibit 1.5 (ts 10).
[289] Exhibit 1.5 (ts 15).
[290] Exhibit 1.5 (ts 15).

chambers, I will not proceed with the conflict of interest order that I am seeking'.[291] However, when faced with an application that she pay the ex-husband's costs of the hearing, the practitioner then indicated that she would proceed with the conflict of interest allegation.[292] She was then granted an adjournment to permit her to file documentation in support of that application. The Presiding Judge observed that the practitioner had failed 'to provide any detailed evidence in support of what is now an oral application, and in particular complete details of the conversation that occurred and also the timing of the conversation'[293] and that that had necessitated the adjournment of the proceedings. His Honour made an order that the counsel conflict of interest application be adjourned to a further hearing on 31 July 2013.[294] The orders made by the Presiding Judge on 8 May 2013 also required the practitioner to file and serve the counsel conflict of interest application in respect of the Senior Counsel, together with a supporting affidavit, on or before the close of business on Friday 5 July 2013.[295]

307 **Fifthly**, having regard to all of the latter evidence, we are satisfied, and we find, that at the hearing on 8 May 2013, the practitioner failed to provide any cogent evidence in support of the conflict of interest allegation.

308 In so far as the LPCC alleged that the practitioner 'subsequently indicated to the Presiding Judge that she had spoken with [the Senior Counsel] or her clerk during the period between 3 and 14 January 2011, which was contradicted by records held by [the Senior Counsel] that she and her clerk were not in their chambers during that period', we do not make a finding in relation to that allegation. There is no doubt, as we have found, that the practitioner told the Presiding Judge that she had spoken with the Senior Counsel or her clerk during the period between 3 and 14 January 2011. And there is also no doubt, and we find, that the Senior Counsel told the Presiding Judge that she had evidence which could be provided to the Court, to show that neither she nor her clerk were in chambers during that period. But the latter evidence was not put before the Court at the hearing on 8 May 2013. Consequently, there is no basis for a finding that the practitioner's claim was in fact contradicted by records held by the Senior Counsel. It may be that such records were in

[291] Exhibit 1.5 (ts 16).
[292] Exhibit 1.5 (ts 17); see also Exhibit 1.6 at [8] – [10].
[293] Exhibit 1.6 at [18].
[294] Exhibit 1.6, Order (1).
[295] Exhibit 1.6, Order (2).

fact held by the Senior Counsel but they were not tendered in evidence, or otherwise produced to the Court, during the hearing on 8 May 2013.

309 Having regard to our findings, we are satisfied, and we find, that the practitioner's submissions to the Court on 8 May 2013 did not disclose any, or any reasonable, basis for the conflict of interest allegation. A serious allegation of that kind must be supported by evidence. The practitioner's inability to provide any detail of her claim that the Senior Counsel had a conflict of interest which warranted her being restrained from acting for the ex-husband supports the inference that the practitioner did not have any, or any reasonable, basis for that claim.

***The specific allegations and evidence – application to issue subpoenas***

310 The LPCC alleged[296] that on around 26 June 2013 the practitioner filed an application in the federal appeal seeking an order for the issue of various subpoenas in support of the conflict of interest allegation (**subpoenas application**), and that the subpoenas application was listed for hearing before the Presiding Judge on 28 June 2013 (**28 June 2013 hearing**). We are satisfied, and we find, that those allegations are proved, having regard to the transcript of the 28 June 2013 hearing, which was in evidence.[297]

311 A copy of the subpoenas application was not in evidence. In the course of the 28 June 2013 hearing, the practitioner told the Court that she filed an application in an appeal for the issue of the subpoenas on 19 or 20 June 2013.[298] However, in the course of the 28 June 2013 hearing, the ex-husband's counsel advised the Court that her instructor was not aware of the subpoenas application until the morning of 26 June 2013.[299] We are satisfied, and we find, that the subpoenas application was filed in the appeal Court some time between around 19 June 2013 and 26 June 2013.

312 The LPCC also alleged[300] that during the 28 June 2013 hearing, the Presiding Judge stated that he was not satisfied there was any basis to issue the subpoenas sought by the practitioner until she filed the written counsel conflict of interest application, and an affidavit in support, as ordered at the 8 May 2013 hearing. Having regard to the transcript of the 28 June 2013 hearing, we are satisfied, and we find, that that allegation is proved. The Presiding Judge made clear to the practitioner that the

[296] Further Amended Annexure A at [19].
[297] Exhibit 1.7.
[298] Exhibit 1.7 (ts 7).
[299] Exhibit 1.7 (ts 3).
[300] Further Amended Annexure A at [19].

application she had attempted to file shortly before the 8 May 2013 hearing had not been accepted by the Court's Registry, and she had made the counsel conflict of interest application orally only.[301] His Honour's point was that until a written application, and an affidavit in support, were filed, the documents sought in the subpoenas could not be understood as documents potentially relevant to any application which was actually before the Court.[302] His Honour held that he was not satisfied that there was any basis to issue the subpoenas until the practitioner had filed her counsel conflict of interest application together with a supporting affidavit.[303]

**The 5 July 2013 application**

313 Much of the next part of the LPCC's application deals with an application made by the practitioner on 5 July 2013 (**5 July 2013 application**). A copy of that application was not in evidence. The 5 July 2013 application was supported by an affidavit made by the practitioner on the same date (**5 July 2013 Affidavit**). A copy of the 5 July 2013 Affidavit was in evidence.

314 To assist in understanding the discussion below, we have set out an overview, in summary form, of the matters encompassed by the 5 July 2013 application, and how they were dealt with, and when. The overview draws on the *ex tempore* reasons for decision given by the Presiding Judge on 31 July 2013 (**31 July 2013 reasons**)[304] and the reasons for decision delivered by the Presiding Judge on 13 March 2015[305] (**13 March 2015 reasons**), in both of which his Honour discussed the disposition of the 5 July 2013 application.

315 The 5 July 2013 application comprised a number of separate applications in the reinstatement application. Those various applications were referred to by the Presiding Judge in the 13 March 2015 reasons. It is convenient to refer, at this point, to what his Honour there said about the disposition of the 5 July 2013 Application. We are satisfied, and we find, that the following matters are proved:

(a) The 5 July 2013 application was made in the course of the reinstatement application in respect of the federal appeal. (The practitioner's Notice of Appeal in the federal appeal was

[301] Exhibit 1.7 (ts 4 – 6, 9).
[302] Exhibit 1.7 (ts 4 – 5, 10).
[303] Exhibit 1.7 (ts 12).
[304] Exhibit 1.9.
[305] Exhibit 1.16.

deemed abandoned because the practitioner failed to file her draft appeal index in the time required under the Court Rules.[306])

(b) The 5 July 2013 application was made in circumstances where the practitioner had previously made, orally, the conflict of interest allegation in respect of the ex-husband's Senior Counsel, as a result of which the Presiding Judge made orders requiring the practitioner to file a formal application in an appeal and a supporting affidavit;[307]

(c) The 5 July 2013 application was also made in circumstances where the practitioner had, on 24 June 2013, made an application for orders for leave to issue a number of subpoenas, including for the purpose of demonstrating that the Senior Counsel had a conflict of interest.[308] The subpoenas application was dismissed by the Presiding Judge on 19 July 2013 because it had been overtaken by the 5 July 2013 Application.[309]

(d) In summary, the 5 July 2013 Application dealt with:[310]

(i) The disqualification application - for the Presiding Judge to disqualify himself on the grounds of apprehended bias;

(ii) The counsel conflict of interest application - to restrain the ex-husband's Senior Counsel and his Solicitor from continuing to act for him in the proceedings; and

(iii) An application for leave to issue certain subpoenas.

(e) The Presiding Judge heard the disqualification application in July 2013, and dismissed that application.[311] The practitioner appealed that decision in the disqualification appeal, which was dismissed by the Full Court in September 2014.[312]

(f) The remainder of the 5 July 2013 Application was next heard on 12 August 2013, together with some costs applications.[313]

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[306] Exhibit 1.16 at [7].
[307] Exhibit 1.16 at [9].
[308] Exhibit 1.16 at [11].
[309] Exhibit 1.16 at [12].
[310] Exhibit 1.16 at [12].
[311] Exhibit 1.9.
[312] Exhibit 1.13.
[313] Exhibit 1.16 at [15] – [16].

(g) On 12 August 2013, the Presiding Judge finished hearing that part of the 5 July 2013 Application which was concerned with the practitioner's application for leave to issue subpoenas, subject to the practitioner filing a further affidavit. As the practitioner had failed to file a further affidavit, his Honour proceeded to deliver his reasons for judgment in relation to the subpoena applications on 9 September 2013.[314] His Honour gave the practitioner leave to issue certain subpoenas to telecommunication providers in order to permit her to obtain a list of outgoing phone calls from the place where the practitioner claimed she was when she telephoned the Senior Counsel's chambers, but otherwise refused leave to issue the remaining subpoenas.[315]

(h) As for the practitioner's counsel conflict of interest application, the Presiding Judge noted that on 12 August 2013 the application was listed for hearing on 3 October 2013, but that that hearing had to be vacated as a result of the disqualification appeal.[316]

(i) As we have said, the disqualification appeal was dismissed in September 2014.[317] After that, the remaining applications in the 5 July 2013 Application, namely the application to restrain the Senior Counsel and the Solicitor from continuing to act for the ex-husband, and the costs applications, together with an application in an appeal filed on 14 August 2013, which was an application for suppression of the proceedings (**suppression application**),[318] were listed for a mention on 21 October 2014, then adjourned to 23 October 2014, and were then adjourned again to 20 January 2015, at which point the outstanding applications were listed for hearing on 12 February 2015.[319]

(j) On 12 February 2015, the Presiding Judge heard that part of the 5 July 2013 Application by which the practitioner sought to restrain the Senior Counsel and the Solicitor from continuing to act for the ex-husband. His Honour dismissed those applications.[320] His Honour heard the suppression application and

[314] Exhibit 1.10.
[315] Exhibit 1.10 [59] – [82]; Exhibit 1.16 [20].
[316] Exhibit 1.16 [21].
[317] Exhibit 1.13.
[318] Exhibit 1.16 at [4].
[319] Exhibit 1.16 at [22] – [23].
[320] Exhibit 1.16 at [1] – [3].

dismissed it.[321] His Honour also heard and determined various applications for costs made by the ex-husband.[322]

316 With that overview in mind, we return to deal with the LPCC's specific allegations arising from the 5 July 2013 Application.

***The specific allegations and evidence – the 5 July 2013 application***

317 The LPCC alleged[323] that on 5 July 2013, despite the fact that the practitioner had no, or no proper, basis on which to make the conflict of interest allegation, the practitioner filed the 5 July 2013 Application in the federal appeal, in which she sought:

(a) an injunction restraining both the Senior Counsel and the Solicitor from further acting in the federal appeal; and

(b) an order that the Presiding Judge 'be disqualified from hearing the proceedings due to an appearance of bias'.

318 In the 31 July 2013 reasons, the Presiding Judge explained that the 5 July 2013 Application was filed by the practitioner on that date.[324] His Honour further explained that the first order sought in the 5 July 2013 Application was an order that he be disqualified from hearing the proceedings due to an appearance of bias.[325] The Presiding Judge also noted that the 5 July 2013 application sought that the ex-husband's Senior Counsel and Solicitor be restrained from acting for him.[326] Having regard to that evidence, we are satisfied, and we find, that in the 5 July 2013 Application, the practitioner sought (amongst other things) an order to restrain the ex-husband's Senior Counsel, and his Solicitor, from further acting in the federal appeal, and an order that the Presiding Judge be disqualified from hearing the proceedings due to an appearance of bias.

319 The LPCC alleged[327] that the 5 July 2013 application, in so far as it encompassed the counsel conflict of interest application (to restrain the Senior Counsel and the Solicitor from continuing to act for the ex-husband), and the disqualification application, had no, or no proper, basis for the reasons to which we refer below. We deal with those aspects of the LPCC's allegations where they arise below.

[321] Exhibit 1.16 at [4] – [5].
[322] Exhibit 1.16 at [6].
[323] Further Amended Annexure A at [20].
[324] Exhibit 1.9 at [1].
[325] Exhibit 1.9 at [2].
[326] Exhibit 1.9 at [42].
[327] Further Amended Annexure A at [20].

320 The LPCC also alleged[328] that on 5 July 2013 the practitioner filed the 5 July 2013 Affidavit in which she deposed, amongst other things, that (at paragraph 2) [redacted]. (We will refer to the critical comment, which we have underlined in that quote, as the **Comment**.)

321 A copy of the 5 July 2013 Affidavit was in evidence.[329] Having regard to its contents, we are satisfied, and we find, that in that Affidavit, the practitioner deposed to the matters set out in [320] above.

322 In the 5 July 2013 Affidavit, the practitioner did not specify the hearing at which she claimed that the Presiding Judge made the Comment. However, the fact of the matter was that prior to 5 July 2013, the practitioner had appeared before the Presiding Judge in only two hearings: on 8 May 2013 and on 28 June 2013. The only reasonable inference which is open from the practitioner's evidence in the 5 July 2013 Affidavit is that when she claimed that the Presiding Judge made the Comment, she was referring to him having made the Comment on one of those occasions. At the hearing on 31 July 2013, the Presiding Judge clarified with the practitioner the evidence on which she relied in support of the 5 July 2013 Application and she confirmed that, apart from the 5 July 2013 Affidavit, she relied on the transcripts of the hearings conducted by the Presiding Judge on 8 May 2013 and 28 June 2013 and on his Honour's *ex tempore* reasons for judgment given on those dates.[330] Having regard to that evidence, we are satisfied, and we find, that the practitioner's claim that the Presiding Judge made the Comment was a claim that he made the Comment in the course of one of the two hearings in which she had appeared before him, namely on 8 May 2013 or on 28 June 2013. (For completeness, and having regard to the evidence below, we observe that it is more likely than not that the practitioner in fact had in mind the hearing on 8 May 2013, but it is not necessary for us to make a finding as to that effect, because either way the 5 July 2013 Affidavit was false.)

323 The LPCC alleged[331] that the 5 July 2013 Affidavit was false and/or misleading in a material respect in that:

(a) at paragraph 2 of the 5 July 2013 Affidavit (as set out in paragraph [320] above) the practitioner deposed that the Presiding Judge

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[328] Further Amended Annexure A at [21.1].
[329] Exhibit 1.8 at [2].
[330] Exhibit 1.9 at [3].
[331] Further Amended Annexure A at [22].

made the Comment in response to the practitioner's submissions [redacted];

(b) the true position was that the Presiding Judge did not make the Comment at either the 8 May 2013 hearing or the 28 June 2013 hearing.

324 In his *ex tempore* reasons for decision given on 31 July 2013, following the hearing on that day, the Presiding Judge dealt with the practitioner's allegation, in the 5 July 2013 Affidavit, that he made the Comment in response to her submissions [redacted]. The Presiding Judge said:[332]

> One other comment is warranted about paragraph 2 of the [practitioner's] affidavit. There the [practitioner] deposed that I said to her [redacted]. However, the [practitioner] was unable to take the court to where those words appeared in the transcript, and neither I nor [the Senior Counsel] have been able to find them. It is concerning that the [practitioner] who is a legal practitioner, has been prepared to swear in an affidavit that I used these words when the transcript does not support that. It adds to my concern about her preparedness to inaccurately repeat part of the transcripts when reading those transcripts out during the hearing.

325 Those observations were made in a context where his Honour had been discussing the practitioner's reference to the transcript of the hearing on 8 May 2013.[333] His Honour's reference to the transcript must be understood as the transcript from that occasion, and we so find.

326 That was clearly how the evidence was understood by the Full Court, which had before it the transcript of the hearing before the Presiding Judge on 8 May 2013.[334]

327 In any event, the transcript of the hearing on 8 May 2013 and of the hearing on 28 June 2013 were in evidence before us. We have been unable to locate the Comment in either of the transcripts.

328 We note that in her Amended Submissions as at 4 May 2022, the practitioner claimed that the words referred to in the 5 July 2013 Affidavit were 'what were heard by [her] in a hearing [and] the question is whether or not the LPCC have obtained the correct transcript and/or whether their transcript is accurate'.[335] The practitioner did not give evidence in the

[332] Exhibit 1.9 at [30].
[333] Exhibit 1.9 at [28], [30].
[334] Exhibit 1.13 at [90] – [92].
[335] Practitioner's Amended Submissions as at 4 May 2022 [F].

Tribunal in relation to the circumstances in which she prepared the 5 July 2013 Affidavit. There was no evidence before the Tribunal which gave rise to any doubt as to the accuracy or authenticity of the transcripts of the 8 May 2013 hearing or the 28 June 2013 hearing, which were in evidence.

329 Having regard to those transcripts, and to what was said by the Presiding Judge in the passage quoted above, we are satisfied, and we find, that in the 5 July 2013 Affidavit, the practitioner deposed that the Presiding Judge made the comment in response to the practitioner's submissions, and we find that the Presiding Judge did not make the Comment at the hearing on either 8 May 2013 or on 28 June 2013. We note, also, that in the 5 July 2013 Affidavit the practitioner put the Comment in quotation marks, and thus purported to quote directly what the Presiding Judge said. In those circumstances, we consider that the 5 July 2013 Affidavit is properly regarded as false, rather than merely misleading. Accordingly, we are satisfied, and we find, that the 5 July 2013 Affidavit was false in the manner alleged by the LPCC at [323].

330 The LPCC alleged[336] that the practitioner:

(a) knew the 5 July 2013 Affidavit was false and/or misleading (for the reason that the Presiding Judge did not make the Comment at either the 8 May 2013 hearing or the 28 June 2013 hearing) and intended the appeal Court rely on and be misled by the 5 July 2013 Affidavit;

(b) alternatively, was recklessly indifferent as to whether the 5 July 2013 Affidavit was false and/or misleading and as to whether the appeal Court would be misled by the 5 July 2013 Affidavit.

331 We are not satisfied that the only reasonable inference which is open, on the evidence before the Tribunal, is that the practitioner knew that the 5 July 2013 Affidavit was false and/or misleading, on the basis that she knew that the Presiding Judge did not make the Comment at either the 8 May 2013 hearing or the 28 June 2013 hearing, and that she intended that the appeal Court rely on and be misled by the 5 July 2013 Affidavit. That is because there was evidence before us that the practitioner did not receive the transcript (or at least the 8 May 2013 transcript) until 30 July 2013, well after she made the 5 July 2013 Affidavit. That was what the practitioner told the Presiding Judge at the hearing on 31 July 2013.[337] As a result, and adopting the conclusion most favourable to the

[336] Further Amended Annexure A at [23].
[337] Exhibit 1.13 at [91].

practitioner, when she made the 5 July 2013 Affidavit, the practitioner did not have the transcript to confirm that her recollection of what the Presiding Judge said was accurate. That being the case, we cannot dismiss the alternative inference that the practitioner was mistaken in her recollection of what was said by the Presiding Judge.

332 However, we are satisfied that the practitioner was recklessly indifferent as to whether the 5 July 2013 Affidavit was false and as to whether the Court would be misled by it, for the following reasons.

333 **First**, the practitioner's claim that the Presiding Judge made the Comment is in clear and unambiguous terms in so far as the content of the Comment is concerned. In the 5 July 2013 Affidavit, the practitioner referred to the Comment in quotation marks, purporting to quote his Honour directly. This is not a case where the practitioner's evidence can be understood as evidence that his Honour said words to a particular effect (so that there could be room for argument as to whether the tenor of other remarks could convey that meaning). In circumstances where the practitioner clearly could not have verified that his Honour actually made the Comment, and where the practitioner was necessarily relying on her memory, we consider that the only reasonable inference is that the practitioner was aware, at the time she made the Affidavit, that there was a risk that her evidence in the 5 July 2013 Affidavit was false. Nevertheless, the practitioner included her evidence as to the Comment in the 5 July 2013 Affidavit, and conveyed, by the use of quotation marks, that she was quoting precisely what his Honour had said. In our view, to present her evidence that way, rather than to put it in terms of what, to the best of her recollection the Presiding Judge had said, or words to the effect of what his Honour said, is consistent only with the practitioner consciously disregarding the risk that her evidence was false.

334 **Secondly**, while there was evidence that the practitioner did not have the transcript of 8 May 2013 when she made the 5 July 2013 Affidavit, there is no doubt that the practitioner had the transcript of that hearing by the time of the hearing on 31 July 2013 (**31 July 2013 hearing**), and that she had read it, as she referred extensively to the transcript during the hearing.[338] Once she obtained the transcripts it was incumbent upon her to alert the Court to the fact that there was an error in the 5 July 2013 Affidavit, in so far as she had deposed that the Presiding Judge had made the Comment. The fact that the practitioner did not do so supports the inference that when she made the 5 July 2013 Affidavit, she had

[338] Exhibit 1.9 at [10].

consciously disregarded the risk that her evidence in the Affidavit was false, and the risk that the Court would be misled by it, and that she continued that conscious disregard even after she had received the transcripts.

335 **Thirdly**, at the 31 July 2013 hearing, the Presiding Judge specifically asked the practitioner where the Comment appeared in the transcript of the previous hearings. As the quote from his Honour's reasons (set out above at [324]) makes clear, the practitioner was unable to take the Court to where the Comment appeared in the transcript. The transcript of that hearing before the Presiding Judge was before the Full Court, which quoted from it in the Full Court's reasons for decision on the disqualification appeal. The practitioner's response to the Presiding Judge, and to the Full Court itself, when pressed in relation to where the Comment appeared in the transcript, is illuminating of her attitude to the correctness of the 5 July 2013 Affidavit. The Full Court said:

> [Redacted].

336 When pressed by the Presiding Judge to identify where the Comment appeared in the transcript, the practitioner tried to deflect the question. That supports the inference that she was, at the least, aware that she could not confirm that the Comment appeared in the transcript, and thus must have been aware that there was a risk – a very real risk – that the evidence she had set out in the Affidavit was false. When pressed by the Presiding Judge, the practitioner did not apologise lest she had misled the Court, nor did she acknowledge the possibility that perhaps she had been mistaken in her recollection. On the contrary, she was defensive and sought to attack his Honour for being pedantic. Her belligerence in responding to the Presiding Judge, and to the Full Court in response to its inquiry, is, to our minds, consistent only with the maintenance of the same conscious disregard that she manifested on 5 July 2013 as to whether the evidence in the 5 July 2013 Affidavit was false, and to whether the Court might be misled by it.

337 It is difficult to envisage a clearer case of a practitioner demonstrating that they did not care, in their heart or conscious, whether the 5 July 2013 Affidavit was true or false.

*The specific allegations and evidence – 31 July 2013 hearing*

338 The LPCC alleged[339] that at the 31 July 2013 hearing, the Presiding Judge heard the disqualification application and dismissed that aspect of the 5 July 2013 application (**disqualification decision**); and adjourned the balance of the 5 July 2013 application to 12 August 2013 (although that application was ultimately adjourned to 12 February 2015). Having regard to the *ex tempore* reasons given by the Presiding Judge on 31 July 2013,[340] we are satisfied, and we find, that these allegations are proved.

339 The LPCC alleged[341] that during the course of the 31 July 2013 hearing the practitioner:

(a) ignored, on repeated occasions, the rulings and directions of the Presiding Judge;

(b) in her submissions, did not accurately read from the transcripts of the 8 May 2013 hearing and the 28 June 2013 hearing, which conduct had the potential to mislead the appeal Court and the practitioner was recklessly indifferent as to whether her doing so had the potential to mislead the appeal Court and as to whether the appeal Court would be misled;

(c) failed, when asked by the Presiding Judge, to identify where in the transcript of the 8 May 2013 hearing it showed that he made the Comment;

(d) further, and after she acknowledged that she first received a copy of the transcript of the 8 May 2013 hearing on 30 July 2013, stated to the Presiding Judge that:

> [Redacted].

which comments were discourteous, intemperate and/or scandalous, made without any, or any reasonable, basis, maintained the false and/or misleading statement in her 5 July 2013 Affidavit, and had the potential to diminish public confidence in the administration of justice and/or to bring the profession into disrepute;

(e) misapprehended the test to be applied in determining whether there is apprehended bias by a judicial officer; and

[339] Further Amended Annexure A at [24].
[340] Exhibit 1.9.
[341] Further Amended Annexure A at [25].

(f) made oral submissions in which she alleged that the manner and behaviour of the Presiding Judge in the proceedings was evidence of his judicial bias and favouritism towards the ex-husband's Senior Counsel when there was no, or no reasonable, basis for those serious allegations to be made.

340 In so far as the LPCC's allegations in the previous paragraph may be regarded as allegations as to facts, having regard to the *ex tempore* reasons given by the Presiding Judge on 31 July 2013, we are satisfied, and we find, that these allegations are proved, for the reasons set out below.

341 **First**, as to the allegation in [339(a)], the Presiding Judge found, by reference to numerous examples,[342] and on that basis we are satisfied, and we find, that that the practitioner:

> [Redacted].[343]

342 **Secondly**, as to the allegation in [339(b)] we are satisfied, and we find, that in her oral submissions, the practitioner did not accurately read from the transcripts of the 8 May 2013 hearing and the 28 June 2013 hearing. In making that finding, we rely on the following comments by the Presiding Judge:

> [Redacted].[344]

343 The LPCC also contended that the practitioner's conduct in this respect had the potential to mislead the appeal Court. Having regard to what was said by the Presiding Judge there can be no doubt that that was the case, and we so find. But for the fact that the Presiding Judge was, evidently, carefully reading the transcript during the practitioner's submissions, and so was able to identify the fact that she was not accurately reading from the transcript, or accurately representing what was there set out, the Court may well have been misled. As his Honour noted, a person reading the transcript of the 31 July 2013 hearing or, for that matter, someone listening to the practitioner's submissions, without the benefit of the transcripts from 8 May 2013 and 28 June 2013, was likely to assume that the practitioner was accurately reading from those transcripts when in fact that was not the case, and might well be misled as a result.

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[342] See, eg, Exhibit 1.9 at [8], [10] – [11], [14], [21]. See also Exhibit 1.10 at [26].
[343] [Redacted].
[344] [Redacted].

344 As for the LPCC's allegation that the practitioner was recklessly indifferent as to whether her conduct had the potential to mislead the appeal Court, and as to whether the Court would be misled, we consider that to be the only reasonable inference, and on that basis, we find the allegation to be proved, having regard to the following considerations:

(a) the conduct was not isolated. We note that, according to the Presiding Judge,[345] there were 'many examples' where the practitioner misrepresented what the transcript said, and clearly there was more than one occasion on which she did not accurately read from the transcript;

(b) the practitioner engaged in this conduct despite the Presiding Judge specifically raising with her his concern that the conduct may be misleading, yet there is no suggestion in his Honour's reasons that the practitioner accepted his Honour's point, or undertook to correct her conduct.

345 **Thirdly**, as to the allegation in [339(c)], for the reasons set out above, we are satisfied and we find, that when asked by the Presiding Judge to identify where, in the transcript of the 8 May 2013 hearing, he made the Comment, the practitioner failed to do so.

346 **Fourthly**, as to the allegation in [339(d)], having regard to the passage of the transcript of the 31 July 2013 hearing (which we have drawn from the reasons of the Full Court set out above at [335]) we are satisfied, and we find, that the practitioner made the following statements:

[Redacted].

347 In our view, there is no doubt that the practitioner's statements are properly characterised, as the LPCC contends, as discourteous, intemperate and scandalous (having regard to the meaning of that term, as discussed above), and we make that finding.

348 Furthermore, we are also satisfied, and we find, that the practitioner's statements – to the effect that, by pressing her for a transcript reference, the Presiding Judge was [redacted], and engaging in conduct which gave rise to an apprehension of bias – had no proper basis. It was entirely proper, indeed necessary, for his Honour to identify whether there was any factual foundation for the practitioner's allegation of an apprehension

[345] Exhibit 1.9 at [12].

of bias. And for the reasons already given, there was no proper basis for the practitioner's allegation of apprehended bias on his Honour's part.

349 In addition, the practitioner's statements, in the first two sentences of the passage quoted at [346], constituted the maintenance of the allegation she made in the 5 July 2013 Affidavit, namely that the Presiding Judge made the Comment in the hearing on 8 May 2013. We are satisfied, and we find, that in doing so, the practitioner sought to maintain an allegation which, as we have already found, was false.

350 We are satisfied, and we find, that the practitioner's conduct in making the statements quoted at [346] above was, for the reasons given at [347], [348] and [349], conduct which had the potential to diminish public confidence in the administration of justice and to bring the profession into disrepute. If members of the public were to form the impression that legal practitioners could address a Court in such an appalling manner — without any apparent regard for the impropriety in, or consequences of, doing so — would potentially diminish public confidence in the administration of justice and bring the profession into disrepute.

351 **Fifthly**, as to the allegation in [339(e)], having regard to the observations made by the Presiding Judge in his *ex tempore* reasons for decision on 31 July 2013, we are satisfied and we find that the practitioner misapprehended the test to be applied in determining whether there is apprehended bias by a judicial officer.[346] The Presiding Judge concluded that:

(a) the practitioner had not only failed to identify conduct that might lead him as the judge to be disqualified, but she had overlooked the need to articulate 'the logical connection between the matter and the feared deviation from the course of deciding the case on its merits';[347]

(b) the practitioner failed to appreciate that the test for apprehension of bias was objective, and instead had sought to apply a subjective test;[348] and

(c) in her submissions, the practitioner suggested that his Honour was actually biased, but in her supporting affidavit she only alleged an

[346] See e.g. ***QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*** (2023) 409 ALR 65.
[347] Exhibit 1.9 at [17], [26].
[348] Exhibit 1.9 at [20].

apprehension of bias, and there was no suggestion of actual bias.[349]

352 In our view, each of these considerations, individually and collectively, is evidence of a misapprehension on the practitioner's part as to the test for apprehension of bias, and we so find.

353 **Sixthly,** as for the LPCC's allegations in paragraph [339(f)], we note that the Presiding Judge concluded that the practitioner's allegations did not give rise to any basis for him to disqualify himself. His Honour held:[350]

> [Redacted].

354 Furthermore, in his reasons for decision given on 9 September 2013, which dealt, in part, with the ex-husband's application for costs in respect of the 31 July 2013 hearing in relation to the disqualification application, the Presiding Judge found that:

> [Redacted].[351]

355 Having regard to his Honour's findings in the quoted passages at [353] and [354] above, we are satisfied, and we find, that there was no reasonable basis for the practitioner's allegations that the Presiding Judge's manner, and his behaviour, was evidence of his judicial bias, and of his favouritism towards the ex-husband's Senior Counsel.

***The specific allegations and evidence – disqualification appeal***

356 The LPCC alleged[352] that the practitioner filed the disqualification appeal in the Full Court. The LPCC also alleged[353] that on 1 July 2014 the Full Court heard the disqualification appeal, and in September 2014, dismissed the disqualification appeal. Having regard to the reasons for decision of the Full Court, we are satisfied, and we find, that each of these allegations is proved.[354]

[349] Exhibit 1.9 at [21].
[350] Exhibit 1.9 at [32] – [33].
[351] [Redacted].
[352] Further Amended Annexure A at [26].
[353] Further Amended Annexure A at [33].
[354] Exhibit 1.13 at [1] and [96].

357 The LPCC alleged[355] that in its reasons for decision, the Full Court:

(a) noted that, when asked during the appeal hearing to identify where in the transcript of the 8 May 2013 hearing it showed that the Presiding Judge had made the comment, the practitioner:

> [Redacted];

(b) stated that the appeal:

> [Redacted].

358 Having regard to the reasons for decision of the Full Court,[356] we are satisfied, and we find, that these allegations are proved. We note, for completeness, that the passage in paragraph (b) (which was set out in the Further Amended Annexure A) did not quote what the Full Court said in full. Because it is relevant to the findings we make below, it is appropriate to set out in full what the Full Court said in the relevant passages of its reasons. In these passages, the Full Court was dealing with an application by the ex-husband for an order for that the practitioner pay his costs of the appeal. The Full Court said:[357]

> [Redacted].

359 As we have said, the Full Court was dealing with the costs of the appeal as a whole (which in fact involved two appeals – the disqualification appeal, and an appeal against the costs orders made by the Presiding Judge). Both appeals were dismissed. The observations of the Full Court in the quoted paragraphs apply equally to both appeals, but were clearly directed primarily to the disqualification appeal.

360 The LPCC alleged[358] that in those circumstances, the practitioner's conduct in commencing and maintaining the disqualification appeal when there was no, or no proper, basis to do so was an abuse of process, and further that the scandalous and intemperate comments she made and her conduct of the disqualification appeal, as noted above, had the potential to bring the profession into disrepute.

361 It is clearly not an abuse of process for a party simply to pursue an appeal against a decision by a court, where the arguments they have put to that court have not found favour. The court may have fallen into error.

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[355] Further Amended Annexure A at [33.1] and [33.2].
[356] Exhibit 1.13 at [94], [121] – [122].
[357] Exhibit 1.13 at [94], [121] – [122].
[358] Further Amended Annexure A at [33].

But that is not this case. In this case, the Presiding Judge had concluded that, in effect, the practitioner had not identified any basis for his recusal and that the practitioner had misapprehended the law on the test for apprehended bias, yet the practitioner commenced and maintained the disqualification appeal, in which she merely repeated the submissions she had made to the Presiding Judge, and advanced grounds of appeal which raised irrelevant and unrelated issues, such that the Full Court concluded that the appeal [redacted]. We are satisfied, and we find, that for the practitioner to commence and maintain the disqualification appeal in those circumstances constituted an abuse of the process of the Court.

362 Further, if members of the public were to form the impression that legal practitioners could pursue an appeal with no proper basis and no prospect of success, and could conduct themselves before a court in the manner in which the practitioner did in the appeal Court, as described in the quote at [358] above, without any apparent regard for the impropriety in, or consequences of, doing so, that would potentially diminish public confidence in the administration of justice and bring the profession into disrepute, and we so find.

***The specific allegations and evidence – August 2013 emails***

363 The LPCC alleged[359] that on 28 August 2013, a Registrar of the Court (**Registrar**) emailed the parties to the disqualification appeal to advise that a further hearing was listed for 30 August 2013 (**30 August 2013 hearing**) at which the Presiding Judge would deliver his decision on various interlocutory matters in the federal appeal.

364 The LPCC's allegations in relation to the practitioner's response to that email require an understanding of the context in which it was sent. In his reasons for judgment delivered following the 30 August 2013 hearing (**9 September 2013 reasons**)[360] the Presiding Judge set out the history of how the 30 August 2013 hearing came to be listed. It is convenient to set that history out, in summary form, at this point:

- [Redacted].[361]
- [Redacted].[362]
- [Redacted].[363]

[359] Further Amended Annexure A at [27].
[360] Exhibit 1.10.
[361] Exhibit 1.10 at [1].
[362] [Redacted].

- [Redacted].[364] [Redacted]. [365]
- [Redacted].[366]
- [Redacted].[367]
- [Redacted].[368]
- [Redacted].[369] [Redacted]. [370] [Redacted]. [371]
- [Redacted].[372]
- [Redacted].[373]
- [Redacted].[374]
- [Redacted].[375]
- [Redacted].[376]
- [Redacted]:

  > [redacted].[377]

- [Redacted].

365 The LPCC alleged[378] that the practitioner responded to the Registrar by email in which she advised that she was unavailable on 30 August 2013 and relevantly stated that:

> [Redacted].

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[363] [Redacted].
[364] [Redacted].
[365] [Redacted].
[366] Exhibit 1.10 at [2].
[367] Exhibit 1.10 at [6].
[368] Exhibit 1.10 at [21].
[369] Exhibit 1.10 at [23] ff.
[370] Exhibit 1.10 at [25], [26], [37].
[371] Exhibit 1.10 at [41] – [42].
[372] Exhibit 1.10 at [47] – [48].
[373] Exhibit 1.10 at [50].
[374] Exhibit 1.10 at [50].
[375] Exhibit 1.10 at [51].
[376] Exhibit 1.10 at [52].
[377] Exhibit 1.10 at [52].
[378] Further Amended Annexure A at [27].

366 Having regard to the 9 September 2013 reasons,[379] we are satisfied, and we find, that that allegation is proved. However, in fairness to the practitioner, it is important to consider the comment relied upon by the LPCC within its context. The totality of the practitioner's email of 28 August 2013 was quoted, in full, by the Presiding Judge in the 9 September 2013 reasons. The practitioner said:[380]

> [Redacted].

367 We note that by her reference to the 'October date' the practitioner appears to have been referring to the only hearing date which was otherwise listed at the time, namely the hearing listed for 3 October 2013 to deal with the counsel conflict of interest application. The practitioner thus appears to have understood that the hearing listed on 30 August 2013 was in fact the hearing on 3 October 2013, which had been brought forward. It is not entirely clear why the practitioner would have formed that view, but, taking the most favourable view to the practitioner, we are prepared to infer, and on that basis we find, that she was confused about the listing of the matter on 30 August 2013, and in the absence of an explanation as to why the matter had been listed on that date, assumed that the hearing date on 3 October 2013 had been brought forward.

368 Against that background, we return to the LPCC's allegations. The LPCC alleged[381] that the practitioner's comments (in the fourth paragraph of her email of 28 August 2013 which is quoted at paragraph [366] above) were discourteous, intemperate and/or scandalous, made without any, or any reasonable, basis, and had the potential to diminish public confidence in the administration of justice and/or to bring the profession into disrepute.

369 There is no doubt that the practitioner's comments in the fourth paragraph of her email of 28 August 2013 were discourteous and intemperate. In our view, understood in their context, the only reasonable inference from those comments was that the practitioner was implying that the Presiding Judge had decided to bring forward the 3 October 2013 hearing, and so to cause prejudice to the practitioner, upon his Honour becoming aware that the practitioner had filed an appeal against the disqualification decision. There was absolutely no foundation for that allegation. Understood in that way, we are satisfied, and we find, that the practitioner's comments in the fourth paragraph of her email of 28 August

[379] Exhibit 1.10 at [53].
[380] Exhibit 1.10 at [53].
[381] Further Amended Annexure A at [27].

2013 are properly regarded as scandalous, within the meaning of that term as discussed above.

370 Furthermore, notwithstanding our finding that the practitioner was under a misapprehension as to the purpose of the hearing listed for 30 August 2013, that misapprehension provides no excuse or justification whatsoever for the practitioner's discourteous, intemperate and scandalous comments. We are satisfied that there was no reasonable basis for those comments, and we so find.

371 We have no doubt that for a practitioner to make comments of that nature, about any judicial officer of a Court who is exercising their judicial function, has the potential to diminish public confidence in the administration of justice and to bring the profession into disrepute, and we so find.

372 The LPCC also alleged[382] that by a further email to the Registrar on 28 August 2013 the practitioner confirmed that she would not attend the 30 August 2013 hearing and relevantly stated that:

> [Redacted].

373 Having regard to the 9 September 2013 reasons, we are satisfied, and we find, that that allegation is proved.[383] However, again we consider that it is important to see that comment in its context. In the 9 September 2013 reasons, the Presiding Judge noted that on 28 August 2013, the Registrar replied to the practitioner's email of 28 August 2013 to advise that the hearing on 3 October 2013 had not in fact been brought forward, and confirmed that unless there was consent to an adjournment of the hearing on 30 August 2013, she should attend or arrange for representation.[384]

374 His Honour observed that the practitioner 'then responded as follows [redacted].[385] His Honour then set out the practitioner's email in full. We also set out the text of that email in full below:[386]

> [Redacted].

375 The LPCC alleged[387] that the italicised comments in the quoted passage above were discourteous, intemperate and/or scandalous, made

[382] Further Amended Annexure A at [28].
[383] Exhibit 1.10 at [56].
[384] Exhibit 1.10 at [55].
[385] [Redacted].
[386] Exhibit 1.10 at [56].
[387] Further Amended Annexure A at [28].

without any, or any reasonable, basis, and had the potential to diminish public confidence in the administration of justice and/or to bring the profession into disrepute.

376 There is no doubt that the italicised comments in the practitioner's email quoted in [374] above were discourteous and intemperate. We agree entirely with the Presiding Judge's characterisation that their terms demonstrate the practitioner's lack of respect for the Court. Understood in their context, the only reasonable inference from those comments was that the practitioner was implying that the Presiding Judge had determined to list the proceedings for a hearing on 30 August 2013, in circumstances where the practitioner would not be able to attend, and without any notice to her as to what the hearing was about, and that he had done so upon becoming aware that the practitioner had filed an appeal against the disqualification decision. Understood in that way, we are satisfied, and we find, that the italicised comments in [374] above are properly regarded as scandalous.

377 Given that the Registrar had apparently advised the practitioner, by email, that the 3 October 2013 hearing had not been brought forward, the practitioner could not have been operating under that misapprehension when she sent the email quoted in [374] above. Adopting the view most favourable to the practitioner, we are prepared to infer, and on that basis we find, that the practitioner was not aware of the purpose of the 30 August 2013 hearing. However, that provides no excuse or justification whatsoever for the practitioner to make the italicised comments quoted in [374] above. Furthermore, we are satisfied that there was no reasonable basis for those comments, and we so find.

***The specific allegations and evidence – February 2015 hearing***

378 The LPCC alleged[388] that the balance of the 5 July 2013 Application, apart from the disqualification application, was heard on 12 February 2015 and that his Honour dismissed the balance of that application. Having regard to the 13 March 2015 reasons,[389] we are satisfied and we find that on 12 February 2015, the Presiding Judge heard the balance of the 5 July 2013 application, namely the practitioner's counsel conflict of interest application, and that his Honour dismissed that application.[390]

[388] Further Amended Annexure A at [36].
[389] Exhibit 1.16.
[390] Exhibit 1.16 at [1] – [3].

(As we have already noted, his Honour also dismissed the suppression application[391] and heard and determined various applications for costs.[392])

379 The LPCC alleged[393] that in the 13 March 2015 reasons the Presiding Judge noted that during the 12 February 2015 hearing the practitioner made oral submissions in support of the conflict of interest allegation against the Senior Counsel which were inconsistent with the practitioner's oral submissions made at the 8 May 2013 hearing, including, *inter alia*, that the subject file note that the practitioner claimed recorded the alleged conversation with the Senior Counsel (as referred to in paragraphs [303] to [304] above) could have been made in February or March 2011. The Presiding Judge observed that that claim was made by the practitioner, [redacted]. We pause there to note that in so far as the LPCC alleged (by the use of the words we have italicised) that the practitioner's oral submissions were inconsistent, in more than one respect, with the submissions she had made at the 8 May 2013 hearing, the other inconsistencies were not particularised in the allegation. We have taken the view that the proper course is to construe this allegation as alleging only that the practitioner's oral submissions on 12 February 2015 were inconsistent with the submissions she had made on 8 May 2013 in the one respect described, namely that the subject file note which she claimed had recorded the alleged conversation with the Senior Counsel (as referred to in paragraphs [303] to [304] above) could have been made in February or March 2011.

380 Having regard to what was said by the Presiding Judge in the 13 March 2015 reasons, we are satisfied, and we find, that this allegation is proved. Relevantly, his Honour noted that:

(a) it was 'beyond doubt' that the practitioner's case was that in early 2011 she had a telephone conversation with either the Senior Counsel, or her clerk, about the Senior Counsel taking over from the practitioner's counsel at the time, and appearing for her on 25 January 2011;[394]

(b) [redacted];[395] and

(c) [redacted];[396] and

[391] Exhibit 1.16 at [4] – [5].
[392] Exhibit 1.16 at [6].
[393] Further Amended Annexure A at [36.1].
[394] Exhibit 1.16 at [33].
[395] [Redacted].
[396] [Redacted].

(d) in the 9 September 2013 reasons for decision his Honour had observed that [redacted].[397]

381 The LPCC also alleged[398] that in the 13 March 2015 reasons, the Presiding Judge noted that the practitioner:

> [redacted].

382 Having regard to the 13 March 2015 reasons,[399] we are satisfied, and we find, that that is what the Presiding Judge said. For completeness, however, we note that the passage set out in the LPCC's Further Amended Annexure A does not fully repeat what the Presiding Judge said in the relevant paragraphs of the 13 March 2015 reasons. Again, taking the view most favourable to the practitioner, we have proceeded on the basis that the LPCC seeks to rely only on what is set out in Annexure A, and does not seek to rely on the other criticisms of the practitioner made by the Presiding Judge in the relevant portions of the 13 March 2015 reasons.

383 The LPCC alleged,[400] by reference to the observations by the Presiding Judge quoted at [380(b) and (c)] and [381], that the practitioner's oral submissions made at the 12 February 2015 hearing were discourteous, intemperate and/or scandalous, made without any, or any reasonable, basis and had the potential to bring the profession into disrepute.

384 Dealing first with the practitioner's oral submissions discussed at [380(b) and (c)] above, we are satisfied, and we find, that those submissions were made without any basis, much less any reasonable basis. It is apparent, from the passage quoted at [380(b)], that the Presiding Judge had no doubt that the practitioner did not have any basis for her allegation that she had telephoned the Senior Counsel, or her clerk, in early 2011 (that is, early January 2011) as she had claimed, that he clearly regarded as baseless her attempts to suggest that the alleged conversation may have occurred in February or even March 2011, and that he regarded those attempts as evidence that the practitioner herself recognised that the alleged conversation could not have taken place at the time she had previously suggested. For the sake of completeness, we are not satisfied that the practitioner's submissions, in this respect, can properly be characterised as discourteous, intemperate or scandalous.

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[397] [Redacted].
[398] Further Amended Annexure A at [36.2].
[399] Exhibit 1.16.
[400] Further Amended Annexure A at [36.2].

385 We are, however, satisfied, and we find, that the LPCC has proved its allegation that the practitioner's submissions had the potential to bring the profession into disrepute. For a practitioner to pursue claims, in a court, which have no basis, much less any reasonable basis, has the potential to bring the profession into disrepute because such conduct undermines public confidence in the standards of integrity expected of legal practitioners. The potential for such conduct to bring the profession into disrepute is heightened in circumstances where a practitioner who is personally a party to a proceeding, pursues such claims in an attempt to persuade the court to restrain another practitioner from acting for their opponent in that proceeding, which might well be regarded as an attempt by the practitioner to gain a forensic advantage, or to create a forensic disadvantage for an opponent. Such conduct is likely to engender an apprehension that legal practitioners may use legal tactics, without any proper foundation, to unfairly pursue their own self-interest.

386 Turning next to the practitioner's conduct at the 12 February 2015 hearing, as described by the Presiding Judge in the quoted passage at [381], on the basis of his Honour's description of that conduct, as quoted, we are satisfied, and we find, that the practitioner's conduct can properly be characterised as discourteous, intemperate and scandalous. Making allegations which his Honour described as 'outrageous', especially without previously raising those allegations in the documents she had filed, and thus without putting the other party (the ex-husband's Solicitor) on notice that those allegations would be raised, and without any acknowledgment that the allegations were denied, is clearly conduct which is discourteous and intemperate, at the very least, but moreover, is properly regarded as scandalous, within the meaning of that term discussed above.

387 In our view, for a practitioner to engage in conduct of that kind clearly has the potential to bring the profession into disrepute, especially in circumstances where the practitioner, acting on their own behalf in legal proceedings, pursues such claims in an attempt to persuade the court to restrain another practitioner from acting for their opponent in those legal proceedings. There is no doubt that the practitioner's conduct was all the more egregious, and therefore would have greater potential to bring the profession into disrepute, by virtue of the fact that the practitioner made those allegations despite her offer to the Court and to the ex-husband's Solicitor to forgo making the application to restrain the Solicitor, and instead to pursue her concerns with the Solicitor directly. For a practitioner to be seen to resile from their word is undoubtedly conduct which has the potential to bring the profession into disrepute,

because it has the potential to diminish public trust in the integrity and honesty of legal practitioners.

*The specific allegations and evidence – March 2015 hearing*

388 The LPCC alleged[401] that at a hearing on 27 March 2015 (**27 March 2015 hearing**) the Presiding Judge heard the reinstatement application and the practitioner attended by telephone. The LPCC further alleged[402] that after the practitioner had interrupted his Honour on a number of occasions the practitioner said:

> [redacted].

389 The LPCC further alleged[403] that the Presiding Judge then asked the practitioner to stop and to try and calm down and she responded [redacted].

390 A copy of the transcript of the 27 March 2015 hearing,[404] and of the reasons for decision given by the Presiding Judge in relation to the reinstatement application[405] were in evidence. Those documents confirm, and on that basis we are satisfied, and we find, that the hearing of the reinstatement application took place on 27 March 2015 and that the practitioner appeared by telephone.

391 The transcript of the 27 March 2015 hearing also confirms,[406] and on that basis we are satisfied, and we find, that the practitioner interrupted the Presiding Judge on a number of occasions in the course of the hearing.

392 The transcript also confirms, and on that basis we are satisfied, and we find, that the following exchange took place, immediately following some submissions by the practitioner in answer to a question from the Presiding Judge as to how she would be able to put additional evidence before the Court in relation to the reinstatement application:[407]

> [Redacted].

393 The LPCC alleged that the practitioner's comments set out at [388] and [389] (which are reproduced in their context in [395]) above were discourteous, intemperate and/or scandalous. There is no doubt that the

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[401] Further Amended Annexure A at [37].
[402] Further Amended Annexure A at [37.1].
[403] Further Amended Annexure A at [37.1].
[404] Exhibit 1.17.
[405] Exhibit 1.19.
[406] Exhibit 1.17 (ts 4 – 5, ts 6, s 8, s 10, ts 23 – 24).
[407] Exhibit 1.17 (ts 24 – 25).

practitioner's comments were discourteous and intemperate. We are satisfied, and we find, that the comments were also scandalous, in that they were offensive (in the language used) and further in so far as they implied that his Honour was behaving in a hostile fashion towards the practitioner which was of such a kind as to make a person consider suicide, and also because they alleged that his Honour's conduct of the proceeding had given rise, or would give rise, to an injustice. For the sake of completeness, we should say that we have reviewed the transcript of the 27 March 2015 hearing and there is nothing which, to our minds, could possibly be regarded as justifying the use of such offensive language, or the making of such scandalous remarks.

394 The LPCC alleged[408] that the Presiding Judge determined that none of the practitioner's grounds of appeal in the federal appeal demonstrated any appellable error or had any chance of success and he reserved his decision, and the matter indefinitely. The LPCC alleged that the Presiding Judge held that:

(a) the grounds of appeal comprised narrative and assertions, claims which were nonsense, and did not identify any appellable error by the Federal Magistrate;[409]

(b) the practitioner's [redacted];[410] and

(c) the federal appeal was [redacted].[411]

395 Having regard to the reasons for decision given by the Presiding Judge in relation to the reinstatement application, we are satisfied, and we find, that his Honour held that:

(a) [redacted];[412]

(b) [redacted];[413]

(c) [redacted];[414] and

(d) [redacted].[415]

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[408] Further Amended Annexure A at [38].
[409] Further Amended Annexure A at [38.1].
[410] Further Amended Annexure A at [38.2].
[411] Further Amended Annexure A at [38.3].
[412] Exhibit 1.19 at [39].
[413] Exhibit 1.19 at [39].
[414] Exhibit 1.19 at [52].
[415] [Redacted],

***Arguments advanced by the practitioner in relation to the allegations in Ground 2***

396 The practitioner advanced the following arguments in relation to the allegations in Ground 2.

397 **First**, the practitioner denied that the conflict of interest allegation and application was made without a proper basis. We reject that argument. For the reasons already given, we have found that the conflict of interest allegation, and the counsel conflict of interest application, had no proper basis.

398 **Secondly**, the practitioner alleged that the ex-husband's legal representatives behaved inappropriately, and contended that they should have ceased to act. For the reasons set out above, we reject the practitioner's contention that there was a proper basis for the counsel conflict of interest application.

399 **Thirdly**, the practitioner claimed that she had been denied justice because there was no hearing of any family violence allegations. That argument does not assist the practitioner. Whether there was a hearing of the practitioner's application for a VRO is not to the point.

400 **Fourthly**, the practitioner contended that she was not acting as a legal practitioner but as a party in the proceedings. As we have already explained, a person who is a legal practitioner may engage in conduct outside their practice of the law, which conduct constitutes professional misconduct under the LP Act.

401 **Fifthly**, the practitioner contended that 'the complainants' should not have made a complaint about her conduct. Whether other persons did or did not make a complaint about the practitioner's conduct is irrelevant to whether Ground 2 is established.

402 **Sixthly**, the practitioner denied reading the transcripts inaccurately so as to potentially mislead the Court, because there was no evidence that anyone was misled at all. The practitioner claimed she had merely referred to line numbers on pages of the transcript in order to be efficient, and in any event, pointed to the fact that the transcript was available to the other party to the proceedings. She offered no evidence, nor explanation or elaboration, of that claim by reference to the transcript. For the reasons given above, we reject the practitioner's denial of the allegation that she inaccurately read from the transcript of the proceedings below and that that conduct had the potential to mislead the appeal Court.

403 **Seventhly**, the practitioner contended that there was no evidence that anyone was misled. That does not matter. The LPCC's allegation is that the practitioner's conduct had the potential to mislead, and for the reasons above, we have found that allegation proved.

404 **Eighthly**, the practitioner denied that her allegation that the Presiding Judge should disqualify himself had no reasonable basis, and maintained that the judge's conduct had not been appropriate and gave rise to an apprehension that he was biased against her. For the reasons already given, we have found that the disqualification application was made without any proper basis.

405 **Ninthly**, the practitioner denied that she lodged the disqualification appeal without a proper basis for doing so. For the reasons set out above, we have found that the disqualification appeal was brought without any proper basis.

***The LPCC's Contentions in relation to Ground 2***

406 The LPCC contended that, for the reasons it had identified in the Further Amended Annexure A at paragraphs [18], [20], [25], [27], [29] (sic – [28], [33], [36], [37], and [38.2] – in summary:

- making allegations with no, or no reasonable basis;
- ignoring the rulings and directions of the Presiding Judge;
- not accurately reading from transcripts with the potential that that would mislead;
- writing discourteous, intemperate and scandalous comments, without any, or any reasonable basis;
- commencing and maintaining an appeal without any proper basis to do so; and
- making submissions which were discourteous, intemperate and scandalous;

the practitioner's conduct in the course of the federal appeal would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice, further or alternatively, would be regarded as disgraceful or dishonourable to practitioners of good repute and competence, and is professional misconduct within the meanings of s 403 and s 438 of the LP Act.

407 The LPCC also contended that a reasonably competent practitioner would not conduct herself in proceedings in the manner alleged in the course of the federal appeal and as such her conduct had the potential to diminish public confidence in the administration of justice and/or to bring the profession into disrepute, and was therefore in breach of rules 6(2)(b) and 6(2)(c) of the Conduct Rules, in that:

(a) it could be inferred that the practitioner was not competent to practice as a legal practitioner;

(b) the practitioner caused the ex-husband to waste time and resources in responding to the many arguments advanced in the federal appeal, for which he could not be properly compensated by way of a costs order, which was oppressive and unfair;

(c) the practitioner caused the court to waste time and resources in dealing with her various arguments, which had the potential to undermine public confidence in the administration of justice;

(d) the practitioner's arguments were not arguments which would be considered reasonably arguable by any reasonably competent Australian legal practitioner, and lacked any, or any proper basis or foundation, and were likely to undermine public confidence in the legal profession by giving rise to an apprehension that members of the legal profession are willing to engage the legal process in circumstances where it is not justified.

***Disposition***

*Conduct involving making allegations and commencing an appeal with no proper basis*

408 In our discussion of the LPCC's contentions in respect of Ground 1, we referred to the principles which explain why pursuing an application which does not have any proper basis, and which is an abuse of process, may constitute professional misconduct. Those principles apply to the allegations in Ground 2 concerning the making of allegations in the context of litigation, and in pursuing applications, which do not have a proper basis.

409 Applying those principles here, we consider that the practitioner's conduct in commencing and maintaining the disqualification appeal without any proper basis for doing so, and in making allegations with no, or no proper, basis, for the purpose of the conflict of interest allegation,

and the counsel conflict of interest application, was conduct which would be regarded as disgraceful or dishonourable to practitioners of good repute and competence, within the first limb of ***Kyle***. We are also satisfied that conduct of that kind was a breach of rules 6(2)(b) and 6(2)(c) of the Conduct Rules. Such conduct would waste the time and resources of the Court and would cause inconvenience and cost to the other party, and for that reason was conduct which had the potential to diminish public confidence in the administration of justice and to bring the profession into disrepute.

410 We therefore find that the practitioner's conduct in those respects was professional misconduct under s 403 of the LP Act.

*Not accurately reading from the transcript*

411 In so far as the practitioner misread from transcripts, which had the potential to mislead the appeal Court, in circumstances where she was recklessly indifferent to that possibility, we are also satisfied that that conduct constituted professional misconduct. The proper administration of justice requires that courts be able to rely on what a lawyer says and on what they do.[416] It is for that reason that a practitioner's duty of honesty, fairness and candour, which is owed to a court, is regarded as a fundamental and paramount duty.

412 In ***Legal Profession Complaints Committee and Barber***[417] the Tribunal accepted the Committee's submissions as to the principles in relation to a practitioner's duty of honesty and candour. Those submissions included the following which, with respect, constitute a helpful summary of the basis for, and content of, the duty:

> [I]t is a basic precept of the legal profession that lawyers owe a duty of honesty and candour to the court. It is the general duty of lawyers not to mislead the court by stating facts which are untrue, or mislead the judge as to the true facts, or conceal from the court facts which ought to be drawn to the judge's attention, or knowingly permit a client to deceive the court: *Unioil International Pty Ltd v Deloitte Touche Tohmatsu (No 2)* (1997) 18 WAR 190 at 193; *Kyle v Legal Practitioners Complaints Committee* (1999) 21 WAR 56 at [6], [12], [13], [23], [66] – [67]; *Vogt v Legal Practitioners Complaints Committee* [2009] WASCA 202 at [61]; *Giudice v Legal Profession Complaints Committee* [2014] WASCA 115 at [100].

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[416] See, eg, ***Law Society of New South Wales v Foreman*** (1994) 34 NSWLR 408 at [445] (Mahoney JA); ***Legal Practitioner v Council of the Law Society of the Australian Capital Territory*** [2014] ACTSC 13 at [309] (Refshauge J).

[417] ***Legal Profession Complaints Committee and Barber*** [2015] WASAT 99 at [26] – [27].

> The duty not to mislead the court is of fundamental importance in the due administration of justice, and is paramount and overrides any duty to the client*: Kyle v Legal Practitioners Complaints Committee* (supra) at [19], [23], [66].
>
> It is a breach of that duty for a lawyer to produce a witness statement that the lawyer knows to be false or if the lawyer knows that the witness does not believe the statement to be true in all respects. The duty to correct a false witness statement continues after it is filed. *Kyle v Legal Practitioners Complaints Committee* (supra) at [13], [23].
>
> …
>
> The duty not to 'mislead' the court or tribunal is not limited to positive lies or misstatements. Half-truths, implying a false state of affairs, the creating of a misleading impression, or allowing the client to mislead the court will also be a breach of the duty: *Kyle v Legal Practitioners Complaints Committee* (supra) at [12], [23]; *Vogt v Legal Practitioners Complaints Committee* (supra) at [48]; *Forster v Legal Services Board* [2013] VSCA 73 at [161].
>
> A practitioner's duty is not merely to not deceive the court or tribunal. He or she must be fully frank in what he or she does before it. This obligation takes precedence over the practitioner's duty to the client, to other practitioners and to himself or herself: *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 at 447.
>
> Similarly, *In Re Thom* (1918) 18 SR (NSW) 70, Cullen CJ (with whom the other two members of the Full Court agreed) said (at 74, 75):
>
>> It is of the greatest importance than any mere casuistry in the presentation of evidence should be strictly avoided by those entrusted with the responsible duties of a legal practitioner. It is perhaps easy by casuistical reasoning to reconcile one's mind to a statement that is in fact misleading by considering that the deponent is not under any obligation to make a complete disclosure. By this means a practitioner may be led into presenting a statement of fact which, although it may not be capable of being pronounced directly untrue in one particular or another, still presents a body of information that is misleading, and conceals from the mind of the tribunal the true state of facts which the deponent is professing to place before it. For that reason it is proper on such an occasion as this to express condemnation of any such casuistical paltering with the exact truth of the case.

413 For a practitioner, in the course of his or her practice, intentionally to mislead anyone is a serious breach of the practitioner's professional duty.[418] But for a practitioner to be recklessly indifferent to the possibility

[418] ***Vogt v Legal Profession Complaints Committee*** [2009] WASCA 202 (***Vogt***) at [61] and [70].

of misleading the court will also constitute a very serious breach of that duty. That is because that reckless indifference involves consciously disregarding the risk that the court will be misled. To do so is antithetical to the lawyer's duty of candour and frankness to the court.

414 Complete truthfulness and absolute candour with the court is required as much of a lawyer acting on their own behalf in litigation, as of a lawyer acting for a client.[419] In short, where a lawyer is involved in a legal proceeding, irrespective of the capacity in which they act, they remain bound by fundamental duties of fairness and propriety.[420] Consequently, it is no less serious for a lawyer acting for themselves in legal proceedings to mislead the court.[421]

415 Professor Dal Pont[422] has explained why a lawyer's willingness to mislead a court in a personal capacity is as serious as willingness to mislead a court in a professional capacity:

> For a lawyer to knowingly give false evidence, even outside the course of legal practice is treated severely in a disciplinary forum. The concern is that misleading the court in a personal capacity displays a lack of integrity that may directly translate to dishonesty in a professional environment.
>
> As explained by de Jersey CJ in *Barristers' Board v Young* [2001] QCA 556, in striking off a barrister who had knowingly given false evidence on oath before a Criminal Justice Commission Inquiry:
>
>> The notion of a barrister's deliberately giving false evidence on oath is utterly repugnant to the essence of what goes to make up a barrister's fitness to practise: such as to erode, if not destroy, the complete confidence which a client, a fellow practitioner, the courts and the public should be able, without hesitation, to assume. It is fanciful to think those persons would not be at least sceptical about the honesty, thence fitness and propriety, of a barrister who had so recently lied on oath on important matters before a significant Commission of Inquiry.
>
> It follows that the lawyer's duty of candour to a court or tribunal is not diminished where the lawyer acts in a personal capacity. For instance, it has been doubted that there would be a case "where a practitioner who knowingly swears a false affidavit that is filed in court could be regarded as fit to practice [sic]" [(*Coe v New South Wales Bar Association* [2000] NSWCA 13 (Mason P)]. The same applies as regards lawyer-litigants who deliberately conceal matters that should be disclosed to the court.

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[419] ***Legal Profession Complaints Committee and Segler*** [2010] WASAT 135 (***Segler***) at [69].
[420] ***Amsden*** at [63] – [64] and [68].
[421] ***Segler*** at [69].
[422] GE Dal Pont, Lawyers' Professional Responsibility, 7th ed, 2021, [25.175].

416 In our view, the practitioner's conduct in not accurately reading from transcripts, and being recklessly indifferent to the potential that that would mislead the appeal Court, was conduct which was not different in nature to implying a false state of affairs or creating a misleading impression. Each is a breach of a practitioner's duty of honesty to the Court.[423]

417 We consider that the practitioner's conduct in not accurately reading from the transcripts in the circumstances we have found constituted conduct which would be regarded as disgraceful or dishonourable to practitioners of good repute and competence, within the first limb of ***Kyle***. We are also satisfied that conduct of that kind was a breach of rules 6(2)(b) and 6(2)(c) of the Conduct Rules, because to mislead a court in that way necessarily has the potential to diminish public confidence in the administration of justice and to bring the profession into disrepute.

418 The practitioner's conduct in this respect was therefore professional misconduct under s 403 of the LP Act, and we so find.

*Intemperate, discourteous and scandalous comments and submissions, and showing disrespect for the Court*

419 As for the practitioner's conduct which involved making intemperate, discourteous and scandalous comments and submissions, and her disregard for the rulings made by the Presiding Judge, the practitioner's conduct demonstrated disrespect for the Court itself. We are satisfied, and we find, that for that reason, the practitioner's conduct would be regarded as disgraceful or dishonourable to practitioners of good repute and competence, within the first limb of ***Kyle***. We are also satisfied, and we find, that conduct of that kind was a breach of rules 6(2)(b) and (c) of the Conduct Rules, because to behave in that way in, and in relation to, the Court, conveys a lack of respect for the Court, and for the justice system more broadly, which necessarily has the potential to diminish public confidence in the administration of justice and to bring the profession into disrepute. Legal practitioners have been disciplined for using grossly offensive language in court proceedings,[424] or for persisting in allegations of an offensive and derogatory character directed at judges,[425] or for writing correspondence in intemperate or scandalous terms about a judicial officer.[426]

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[423] ***Kyle*** at [12], [23]; ***Vogt*** at [48].
[424] See, eg, ***Legal Services Commissioner v Turley*** [2008] LPT 4.
[425] ***Legal Practitioners Complaints Committee v De Alwis*** [2006] WASCA 198 at [111].
[426] ***Griffin v Council of the Law Society of New South Wales*** [2016] NSWCA 364.

420 We are therefore satisfied, and we find, that the practitioner's conduct constituted professional misconduct under s 403 of the LP Act.

421 Furthermore, we are satisfied, and we find, that the practitioner's conduct under Ground 2 – individually and collectively – was such as to justify a finding that the practitioner is not a fit and proper person to engage in legal practice. The nature of the conduct was fundamentally at odds with what is expected of legal practitioners, and we do not see how practitioners, clients and the courts could have the confidence in the practitioner which is essential for fitness to practice.

## (k) Ground 3 – allegations, evidence and findings

### *The allegation in Ground 3*

422 In Ground 3, the LPCC alleged that the practitioner engaged in professional misconduct, on the bases outlined in [5] above, in the course of acting in the federal appeal, by preparing, swearing, filing, and failing to correct the 5 July 2013 Affidavit in circumstances where:

(a) the practitioner knew that the 5 July 2013 Affidavit was false and/or misleading in a material respect and intended the Court to rely on the 5 July 2013 Affidavit and to be misled;

(b) alternatively, the practitioner was recklessly indifferent as to whether the 5 July 2013 Affidavit was false and/or misleading in a material respect and as to whether the Court would be misled by the 5 July 2013 Affidavit.

### *The specific allegations and evidence – 5 July 2013 Affidavit*

423 We have already addressed some of the factual allegations made by the LPCC in respect of the 5 July 2013 Affidavit. However, for the sake of convenience, we will (despite some repetition) set out all of the allegations relied upon by the LPCC, in order to set out comprehensively its case in respect of Ground 3.

424 The LPCC alleged[427] that on 5 July 2013 the practitioner filed the July 2013 Affidavit in which she deposed, amongst other things, that:

- (at paragraph 2):[428]

  [Redacted].

[427] Further Amended Annexure A at [21].
[428] Further Amended Annexure A at [21.1].

- (at paragraph 3):[429]

  [Redacted].

- (at paragraph 4):[430]

  [Redacted].

- (at paragraph 5):[431]

  [Redacted].

- (at paragraph 6):[432]

  [Redacted].

425 As we have already noted, the 5 July 2013 Affidavit was in evidence. Having regard to that document, we are satisfied, and we find, that it contains paragraphs 2, 3, 4, 5 and 6, which are in the terms set out above.

426 The LPCC alleged[433] that the 5 July 2013 Affidavit was false and/or misleading in a material respect in that:

(a) at paragraph 2 of the 5 July 2013 Affidavit (as set out in paragraph [424] above) the practitioner deposed that the Presiding Judge made the Comment [redacted];

(b) the true position was that the Presiding Judge did not make the Comment at either the 8 May 2013 hearing or the 28 June 2013 hearing.

427 The LPCC alleged[434] that the practitioner:

(a) knew the 5 July 2013 Affidavit was false and/or misleading (for the reason that the Presiding Judge did not in fact make the Comment at either the 8 May 2013 hearing or the 28 June 2013 hearing) and intended the appeal Court to rely on and be misled by the 5 July 2013 Affidavit;

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[429] Further Amended Annexure A at [21.2].
[430] Further Amended Annexure A at [21.3].
[431] Further Amended Annexure A at [21.4].
[432] Further Amended Annexure A at [21.5].
[433] Further Amended Annexure A at [22].
[434] Further Amended Annexure A at [23].

(b) alternatively, was recklessly indifferent as to whether the 5 July 2013 Affidavit was false and/or misleading and as to whether the appeal Court would be misled by the 5 July 2013 Affidavit.

428 As explained above, we have found that the 5 July 2013 Affidavit was false in a material respect, in that the practitioner deposed that the Presiding Judge made the Comment in response to the practitioner's submissions as to [redacted] when the true position was that the Presiding Judge did not make the Comment, in either the 8 May 2013 or the 28 June 2013 hearing. As explained above, we have found that the practitioner was recklessly indifferent as to whether the 5 July 2013 Affidavit was false, and as to whether the appeal Court would be misled by it.

***The practitioner's response – Ground 3***

429 The practitioner's response to Ground 3 was set out in her Statement of Contentions. Her responses, and our conclusion in relation thereto, are set out below:

(a) The practitioner denied ever providing or swearing to any affidavit which was knowingly false or misleading and denied being recklessly indifferent as to any misleading by her affidavit, and claimed that at all times she had sought to be truthful as to her recollections of facts and memory of events. The practitioner did not give any evidence in support of this claim. On the basis of the evidence we have discussed above, we are satisfied and we find, that the 5 July 2013 Affidavit was false, and that in making the 5 July 2013 Affidavit, the practitioner was recklessly indifferent as to whether its contents were misleading.

(b) The practitioner claimed that she was not acting as a legal practitioner but as a party in the proceedings. As we have already explained, a person who is a legal practitioner may engage in conduct outside their practice of the law, which conduct constitutes unsatisfactory professional conduct or professional misconduct under the LP Act.

(c) The practitioner denied being accountable to the LPCC whilst working outside Western Australia. As we have explained above, in so far as these proceedings concern conduct which occurred outside Western Australia, they are brought with the consent of the relevant regulatory body, pursuant to the LP Act.

(d) The practitioner claimed that the ex-husband's lawyers filed false affidavits, together with submissions which were false or misleading. This allegation is irrelevant to Ground 3 (and to the other Grounds).

(e) The practitioner claimed that the ex-husband has made complaints against his former lawyers. This allegation is irrelevant to Ground 3 (and to the other Grounds).

(f) The practitioner said that she has lodged complaints against the ex-husband's lawyers. This allegation is irrelevant to Ground 3 (and to the other Grounds).

(g) The practitioner stated that she lodged complaints against the relevant judicial officers with the head of jurisdiction of the court concerned, and with Attorneys General, and was advised to continue with her appeals or go to the police. This is irrelevant to Ground 3 (and to the other Grounds).

(h) The practitioner stated that she is seeking remedies for the harm and loss, including the cost of disbursements incurred, and compensation for stress, which she claims was caused to her from the denial of procedural fairness in these proceedings, which she claims were undermined by the conduct of the ex-husband's legal representatives and by the pursuit of vexatious complaints against her. We reject these claims. These proceedings are not a proper vehicle for the pursuit of the remedies referred to by the practitioner.

***The LPCC's contentions in relation to Ground 3***

430 The LPCC contended that in the circumstances described above in relation to Ground 3, the practitioner's conduct in preparing, swearing, filing, and failing to correct, the 5 July 2013 Affidavit, was conduct which would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice, further or alternatively, would be regarded as disgraceful or dishonourable to practitioners of good repute and competence, further or alternatively, by doing so knowingly or recklessly, her conduct comprised a breach of rules 6(2)(b) and 6(2)(c) and/or rules 34(1) and 34(2) of the Conduct Rules, and is professional misconduct within the meanings of s 403 and s 438 of the LP Act.

*Disposition*

431 As we have explained above, making an affidavit which is false in a material respect constitutes a fundamental breach of a practitioner's duty of honesty and candour to the court. It amounts to a most serious breach of a practitioner's professional responsibilities, and casts doubt on their fitness to practice.[435]

432 In this case, we are not satisfied that the practitioner knowingly made a false affidavit. But we are satisfied that the practitioner was recklessly indifferent as to whether the 5 July 2013 Affidavit was false and as to whether the appeal Court would be misled by it. In making that finding, we found that the practitioner was aware, at the time of making the 5 July 2013 affidavit, that there was a risk that it was false and that the practitioner consciously disregarded that risk and proceeded to make the Affidavit. Even when subsequently asked by the Presiding Judge, and by the Full Court, to demonstrate the basis for her claim that the Presiding Judge made the Comment, the practitioner did not seek to correct the Affidavit, nor even to acknowledge that it may have been incorrect, but rather sought to deflect the enquiry, and then was defensive and sought to attack the Presiding Judge for the enquiry. We found that the nature of the practitioner's response was consistent only with the maintenance of a conscious disregard for whether her evidence in the 5 July 2013 Affidavit was false, and to whether the Court might be misled by it.

433 We are in no doubt that the practitioner's conduct in relation to the 5 July 2013 affidavit would be regarded as disgraceful or dishonourable to practitioners of good repute and competence, within the first limb of ***Kyle*** and thus constituted professional misconduct for the purpose of s 403 of the LP Act.

434 Furthermore, we are satisfied, and we find, that the practitioner breached rule 34(1) of the Rules in that she recklessly misled the appeal Court. Furthermore, even when pressed by the Presiding Judge, and the Full Court, to identify the basis for her evidence, at which point it must have been apparent to the practitioner that the 5 July 2013 Affidavit was false, the practitioner failed to correct her evidence, and thereby breached rule 34(2) of the Rules. We are also satisfied, and we find, that the practitioner's conduct constituted a breach of rules 6(2)(b) and 6(2)(c) of the Conduct Rules because the conduct is liable to undermine public confidence in the integrity and honesty of legal practitioners, which necessarily has the potential to diminish public confidence in the

[435] ***Legal Profession Complaints Committee v Brickhill*** [2013] WASC 369 at [21].

administration of justice and to bring the profession into disrepute. We are satisfied that on these bases, also, the practitioner's conduct constituted professional misconduct for the purposes of s 403 of the LP Act.

435 Finally, we are satisfied, and we find, that the practitioner's conduct was such as to justify a finding that she is not a fit and proper person to engage in legal practice, and thus was professional misconduct as defined in s 403(1)(b) of the LP Act. The nature of her conduct was fundamentally at odds with the paramount duty of honesty and candour which a legal practitioner owes to the court. That being the case, we do not see how the practitioner could command the confidence of practitioners, clients and the courts which is essential to engage in legal practice.

## Conclusion and Orders

436 We will hear from the parties as to the terms of the Orders which should be made to give effect to these reasons, and to programme a hearing on penalty and costs. In addition, we will hear from the parties as to the redactions required to be made to these reasons, before they are published. To facilitate that process, we will make the following orders:

1. The name of the Applicant is amended to the Legal Services and Complaints Committee.

2. An unredacted copy of the Tribunal's reasons for decision together with a copy of those reasons containing the proposed redaction of material which is subject to confidentiality requirements (**Reasons**) is to be provided to the parties.

3. Subject to order 4, and pending further order of the Tribunal, the Reasons are not to be published, or otherwise disclosed, to any person other than the parties.

4. The parties are permitted to disclose the Reasons to their legal advisers.

5. By Wednesday 24 January 2024, the Applicant is to file in the Tribunal and give to the Respondent a minute of proposed orders to give effect to the Reasons, and to make programming directions for a hearing on penalty and costs (**proposed orders**), together with a copy of the Reasons (marked Confidential) identifying any further redactions (if any) that it considers are required.

6. By Thursday 1 February 2024, the Respondent is to file in the Tribunal any alternative minute of proposed orders, together with a copy of the Reasons (marked Confidential) identifying any further redactions (if any) that she considers are required.

7. The matter is listed for a directions hearing on Monday 5 February 2024 at 2.15 pm for the Tribunal to make orders to give effect to these reasons, to make programming directions for a hearing on penalty and costs, and to make any orders in relation to the publication of the Reasons with the redaction of confidential matter.

8. If the Respondent wishes to attend that directions hearing she may do so by video conference or telephone.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

PM
Associate to the Honourable Justice Pritchard

22 DECEMBER 2023