



# Understanding Disclosure Obligations

## Presented by Edward Muston SC

### 20th March 2018

#### 1 Understanding Disclosure Obligations

Do I need to tell the Bar Association?

#### 2 Overview

- Fees in advance
- Automatic Show Cause Events under the Uniform Law
- Designated Show Cause Events under the Uniform Law
- Disclosure obligations imposed by your practising certificate
- Disclosure upon renewal of your practising certificate
- The consequences of non-disclosure

#### 3 Fees in Advance

- A barrister who opens a *trust money account* for the purpose of receiving fees in advance in direct access matters is required to notify the Bar Association of certain particulars of the account within 14 days of opening the account: see cl. 15 *Legal Profession Uniform Law Application Regulation 2015*.
- More information about a barrister's obligations in dealing with trust money are contained on the Bar Association's website: <https://www.nswbar.asn.au/coming-to-the-bar/uniform-law>

#### 4 Automatic show cause events

As the holder of a practising certificate you are required by s. 88 of the Uniform Law:

- to give written notice to the Bar Association that an automatic show cause event has occurred within 7 days of that event; and
- to provide the Bar Association with a written statement explaining why, despite the show cause event, you consider yourself to be a fit and proper person to hold a practising certificate within 28 days of that event.

#### 5 What is an Automatic Show Cause Event?

As the holder of a practising certificate, s. 86 of the Uniform Law provides that an automatic show cause event is:

- a bankruptcy-related event; or
- your conviction (which includes entering a plea of guilty, whether or not a conviction is recorded) for a serious offence or a tax offence, whether or not:
  - (i) the offence was committed while you were engaging in legal practice as an Australian legal practitioner or was practising foreign law as an Australian-registered foreign lawyer; or
  - (ii) other persons are prohibited from disclosing the identity of the offender;

6  **What is a bankruptcy related event?**

- Becoming bankrupt under the Bankruptcy Act (or the corresponding provisions of the law of a foreign country or external territory); or
- Being served with notice of a creditor's petition presented to a court under section 43 of the Bankruptcy Act; or
- Presentation (as a debtor) of a declaration to the Official Receiver under section 54A of the Bankruptcy Act of your intention to present a debtor's petition or your presentation (as a debtor) of such a petition under section 55 of that Act; or
- Applying to take the benefit of any law (whether Australian or otherwise) for the relief of bankrupt or insolvent debtors, compounding with your creditors or making an assignment of your remuneration for their benefit.

7  **What is a serious offence?**

- An indictable offence against a law of the Commonwealth, a State or a Territory (whether or not the offence is or may be dealt with summarily); or
- An offence against a law of a foreign country that would be an indictable offence against a law of the Commonwealth, a State or a Territory if committed in Australia (whether or not the offence could be dealt with summarily if committed in Australia).

8  **What is a tax offence?**

Any offence under the *Taxation Administration Act 1953* (Cth)

9  **Designated show cause events**

Designated show cause events are somewhat different. They are triggered by a notice under s. 90 of the Uniform Law alleging that you:

- have engaged in legal practice outside the terms of a condition restricting his or her practising entitlements; or
- have provided legal services not permitted by or under the Uniform Law; or
- do not have, or no longer have, professional indemnity insurance that complies with the Uniform Law.

#### 10 **Responding to a designated show cause event**

- A notice issued under s. 90 of the Uniform Law will require you to provide a statement showing cause why the Bar Council should not take action, specified in the notice, to vary, suspend or cancel the certificate.
- Pursuant to s. 91 of the Uniform Law you must provide the Bar Association with a written statement explaining why, despite the show cause event, you consider yourself to be a fit and proper person to hold a practising certificate within 28 days after service of the notice.

#### 11 **What happens next?**

- Following notification of an Automatic or Designated show cause event the Bar Council must determine that you are a fit and proper person to hold a practising certificate; it must be positively satisfied of this fact.
- Bar Council may, and usually does, conduct an investigation into this issue.
- Neither the investigation nor the assessment of whether you are a fit and proper person is confined in its scope to the basis of the show cause event.
- If the Bar Council determines that you are a fit and proper person, it may still impose a discretionary condition that it considers appropriate in the circumstances.

#### 12 **Disclosure obligations imposed by your PC**

Your practising certificate contains a statutory condition – imposed by s. 51 of the Uniform Law and rule 15 in the *Legal Profession Uniform General Rules 2015* – which requires that you notify the Bar Association in writing within 7 days of any of the following events:

- You are charged with or convicted of a serious offence or a tax offence; or

- You are convicted of a summary offence, although there are some exceptions to this rule; or
- A bankruptcy-related event has occurred in relation to you; or
- You have become the subject of disciplinary proceedings as a lawyer in a foreign country.

Remember a conviction includes entering a plea of guilty whether or not a conviction is recorded.

### 13 **Driving and parking offences**

Pursuant to Rule 15, a conviction for a parking offence or summary offence under transport or traffic legislation need not be notified unless it is:

- an offence where the court has sentenced you to a term of imprisonment,
- an offence that has a maximum penalty of imprisonment of 6 months or more,
- an offence where the court has ordered licence disqualification on conviction,
- an offence, involving driving or operating a vehicle under the influence of alcohol or any other drug.

### 14 **What happens when I disclose the fact that I have been charged?**

- The disclosure of a charge does not trigger a mandatory consideration of whether you are a fit and proper person; but
- May lead to the making of a complaint which will require investigation and determination; or
- May result in steps being taken under ss. 82-84 of the Uniform Law if the Bar Council believes you are unable to fulfil the requirements of an Australian Legal Practitioner.

### 15 **Disclosure upon renewal of your practising certificate**

- Your application for renewal requests that you disclose certain information, a very great deal of which – if you have complied with the obligations identified already – will already have been the subject of disclosure.
- However, the renewal process carries with it a wider obligation of disclosure.

### 16 **The new Rule 13(1) question**

### 17 **Particular considerations under Rule 13**

At renewal, you will be invited to consider Rule 13(1) Legal Profession Uniform General Rules 2015 (a copy of which is attached) and asked to address any matter raised by that rule which has not previously been disclosed to the Bar Association. Rule 13(1) is largely self explanatory and is not confined to your practice as a barrister. Two considerations identified by the rule warrant discussion, namely:

- whether you are currently of good fame and character, which likely requires disclosure of any material default in your taxation obligations; and
- whether you are currently unable to carry out satisfactorily the inherent requirements of practice as an Australian legal practitioner, which likely requires disclosure of any medical condition which places you in this position.

### 18 **The consequences of non-disclosure**

- Failure to provide the required statement in response to an Automatic or Designated show cause event allows the Bar Council to vary, suspend, cancel or refuse to renew your practising certificate.
- Failure to comply with your disclosure obligations under the Uniform Law is unsatisfactory professional conduct and may be professional misconduct: s. 298.
- Intentionally failing to disclose something specifically called for by a question asked in your renewal application is likely to justify a finding that you are not a fit and proper person to engage in legal practice.
- In some cases, the non-disclosure of an event will carry more serious consequences than the underlying conduct itself.

### 19 **Help is available**

- If you have any questions regarding your disclosure obligations, contact the Bar Association on 9232 4055 and ask to speak to a staff member in the Professional Conduct Department. All queries will be treated in confidence.
- If you have any questions regarding trust money accounts, contact Angela Huang, Legal Officer, Professional Conduct at [ahuang@nswbar.asn.au](mailto:ahuang@nswbar.asn.au) or ph 9229 1742.
- The events surrounding a disclosure can involve a wide range of emotional and stress-related challenges. If you require any assistance at all in relation to these issues – or are concerned that a colleague might require such assistance – do not hesitate to contact BarCare. Full details of that service are available at <http://barcare.org.au/>. The Bar Association's sole involvement is to fund and promote that service to ensure assistance is available to all members in need. No information is provided to the Bar Association by BarCare without the express permission of the barrister.

---

# Legal Profession Uniform General Rules 2015

Current version for 18 November 2016 to date (accessed 20 March 2018 at 11:35)

[Chapter 3](#) > [Part 3.3](#) > [Rule 13](#)

---

## 13 Consideration of application for grant or renewal of Australian practising certificate

- (1) For the purposes of section 45 of the Uniform Law, in considering whether an applicant is or is not a fit and proper person to hold an Australian practising certificate, the designated local regulatory authority may have regard to any of the following matters:
  - (a) whether the applicant is currently of good fame and character,
  - (b) whether the applicant is, or has been:
    - (i) an insolvent under administration, or
    - (ii) a director or principal of an incorporated legal practice while the legal practice is or was insolvent, or
    - (iii) a director of a company while the company is or was insolvent,
  - (c) whether the applicant has been convicted or found guilty of an offence in Australia or a foreign country, and if so:
    - (i) the nature of the offence, and
    - (ii) how long ago the offence was committed, and
    - (iii) the applicant's age when the offence was committed,
  - (d) whether the applicant has engaged in legal practice in Australia:
    - (i) when not permitted to do so under a law or previous law of a State or Territory, or
    - (ii) if admitted, in contravention of a condition to which the admission was subject, or
    - (iii) if holding an Australian practising certificate, in contravention of a condition to which the certificate was subject or while the certificate was suspended,
  - (e) whether the applicant has engaged in legal practice in a foreign country:
    - (i) when not permitted to do so by or under a law of that country, or
    - (ii) if permitted to do so, in contravention of a condition to which the permission was subject,
  - (f) whether the applicant:
    - (i) is currently subject to an unresolved complaint, investigation, charge or order under an Australian law relating to the legal profession or under a corresponding foreign law, or

- (ii) has been the subject of disciplinary action, however expressed, under an Australian law relating to the legal profession, or under a corresponding foreign law, that involved a finding adverse to the applicant,
- (g) whether the applicant:
  - (i) is the subject of current disciplinary action, however expressed, in another profession or occupation in Australia or a foreign country, or
  - (ii) has been the subject of disciplinary action, however expressed, in another profession or occupation in Australia or a foreign country that involved a finding adverse to the applicant,
- (h) whether the applicant's name has been removed from:
  - (i) a roll of Australian lawyers, however described or expressed, in any jurisdiction, or
  - (ii) a foreign roll of practitioners,
- (i) whether the applicant's right to engage in legal practice has been suspended or cancelled in Australia or a foreign country,
- (j) whether the applicant has contravened, in Australia or a foreign country, a law about trust money or trust accounts,
- (k) whether, under an Australian law relating to the legal profession or a law of the Commonwealth, a supervisor, manager or receiver, however described, is, or has been, appointed in relation to any legal practice engaged in by the applicant,
- (l) whether the applicant is, or has been, subject to an order under an Australian law relating to the legal profession or a law of the Commonwealth, disqualifying the applicant from:
  - (i) being employed by, or a partner of, an Australian legal practitioner, or
  - (ii) managing a corporation,
- (m) whether the applicant is currently unable to carry out satisfactorily the inherent requirements of practice as an Australian legal practitioner,
- (n) whether the applicant has provided incorrect or misleading information in relation to any application for an Australian practising certificate under an Australian law relating to the legal profession,
- (o) whether the applicant has contravened a condition of a previous Australian practising certificate under an Australian law relating to the legal profession,
- (p) whether the applicant has contravened an Australian law relating to the legal profession,
- (q) whether the applicant has contravened:
  - (i) an order of a court or tribunal made in any proceedings, or

- (ii) (without limitation) an order of a designated local regulatory authority or other person or body under legislation of any jurisdiction so far as the legislation relates to the control or discipline of any Australian lawyers or to the practice of law,
  - (r) whether the applicant has failed at any time to pay a required contribution or levy to the fidelity fund of a jurisdiction,
  - (s) whether the applicant has failed to comply with a requirement under an Australian law relating to the legal profession in relation to professional indemnity insurance,
  - (t) whether the applicant has failed to pay any costs or expenses for which the applicant was liable under an Australian law relating to the legal profession,
  - (u) any other matter that is related to a matter referred to in another provision of this rule.
- (2) In determining whether an applicant has or will have professional indemnity insurance as required by the Uniform Law, the designated local regulatory authority may have regard to:
- (a) evidence in the form of written advice from an insurer or other provider or from an insurance broker to the effect that an insurer or other provider has agreed to issue a policy of professional indemnity insurance, or
  - (b) evidence that the premium for a policy of professional indemnity insurance has been received and accepted by the insurer or other provider for the purposes of the issue of the policy.
- (3) Without limiting any other power of the designated local regulatory authority to refuse to grant an Australian practising certificate, the designated local regulatory authority may refuse to grant an Australian practising certificate for a barrister if the applicant has not successfully completed any examination required by the designated local regulatory authority to be passed as a prerequisite to undertaking a reading program referred to in section 50 of the Uniform Law.