

Ethics & Professional Responsibility

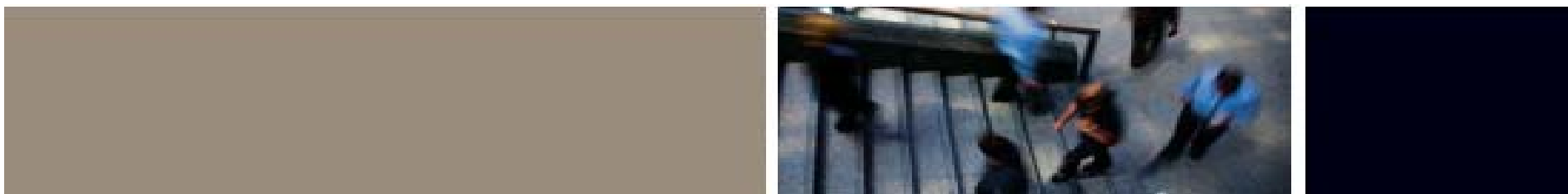
Michael McGarvie

Legal Services Commissioner
CEO Legal Services Board

Clayton Utz Corporate Counsel Day

Tuesday 6 March 2012

Legal Services **COMMISSIONER**

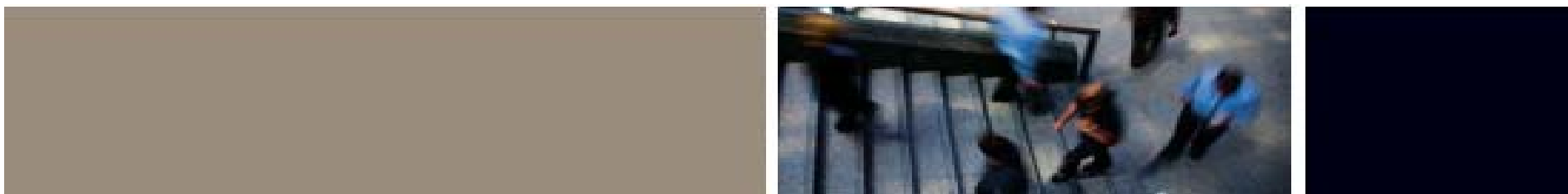


Michael McGarvie

- Solicitor and partner – Holding Redlich 23 years
- CEO Supreme Court of Victoria 2006-09
- Commissioner and Board CEO Dec 2009

Tuesday 6 March 2012

Legal Services **COMMISSIONER**



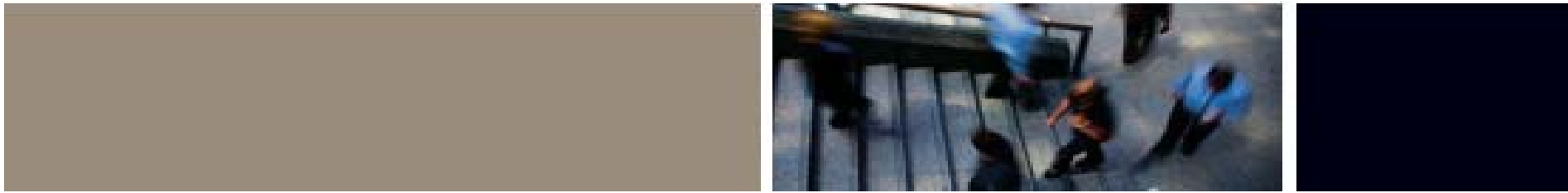
Legal Services Board

330 Collins - 35 people + 7 members

- Registry
- Trust accounts (+LIV)
- Fidelity Fund
- Invested funds
- Receiverships (+LIV)
- Certificates (+LIV + Bar)
- Suitability (+LIV + Bar)
- Foreign licences
- CPD (+LIV + Bar)
- ILP's

Tuesday 6 March 2012

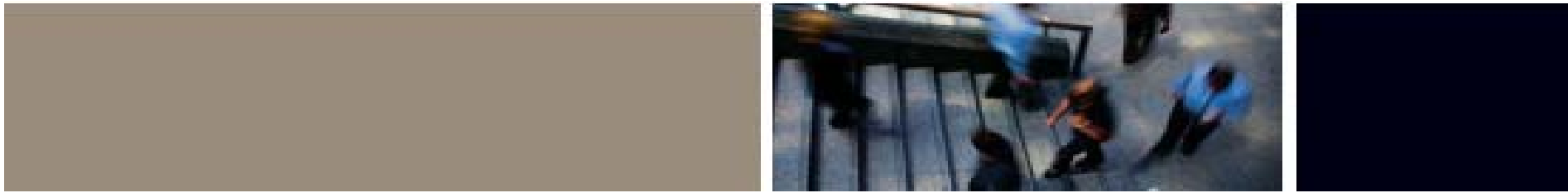
Legal Services **COMMISSIONER**



Legal Services Commissioner

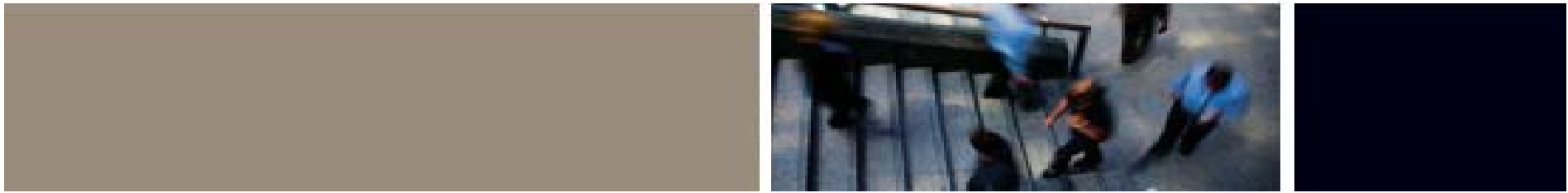
330 Collins - 40 people

- Complaints 2000 pa
- Family (22%)
- Probate + estates (10%)
- Property (12%)
- Small commercial (9%)
- Personal Injuries
- Costs (30%) v. conduct (20%)
- ADR – rapid solve (50%)
- Communicate
- Meet and visit



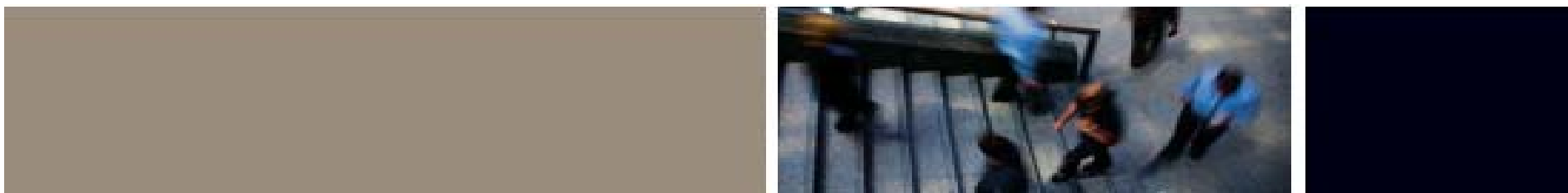
Fitness and propriety: “suitability”

- **What is a ‘fit and proper person’?**
 - Show cause matters: bankruptcy, tax offence, serious offence (you prove you are fit)
 - Suitability matters: material mental impairment, poor fame and character, insolvency, guilty of an offence, disqualified from practice (might affect certificate to practise)
 - Case law (In re OG): relevance of ‘honesty, open candour and frankness’ to admissions authority or legal regulator



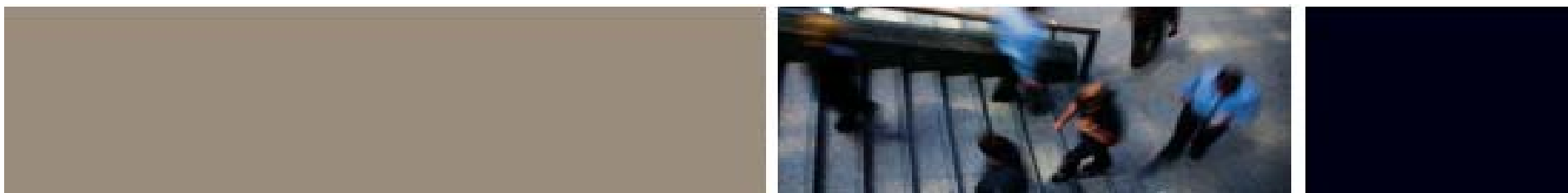
Mental Health Policy

- **LPA:** ‘*material mental impairment*’ is disclosable (capacity rather than illness)
- Fin Rev Aug 2010: “The saddest profession of them all”
- Policy:
 - No requirement to disclose if
 - Do not have a current ‘material mental impairment’ or
 - Have an adequately managed mental condition that does not affect capacity to engage in legal practice
- Focus on functioning/capacity, encourage lawyers to seek treatment



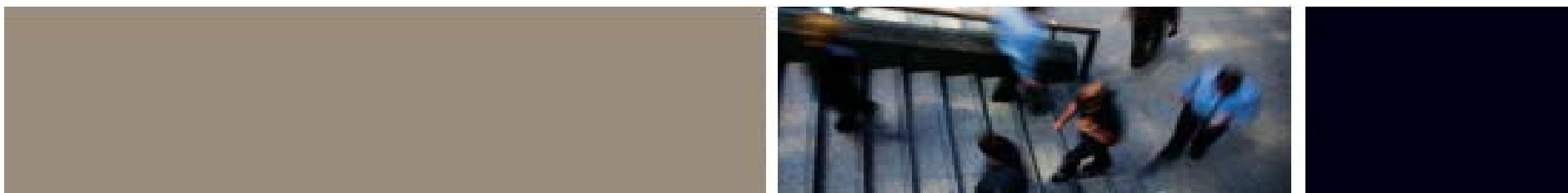
Mental health help

- help for mental health issues:
 - Health practitioner;
 - LawCare;
 - BarCare;
 - Beyond Blue;
 - The Black Dog Institute;
 - The Tristan Jepson Memorial Foundation



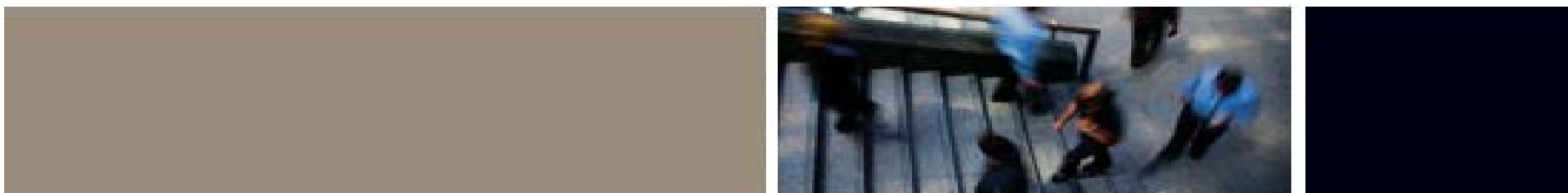
Possible Board responses

- no action
 - Does not have a mental impairment; (illness only)
 - Has a mental impairment that does not affect their being fit and proper to engage in legal practice; (eg move to part time work) or
 - Has a mental impairment that is not material
- condition on PC
- no PC



Undertakings or conditions: examples

- limit scope of work
- see a Dr
- ok's Dr to talk to LSB
- comply with treatment
- abstain from alcohol, drugs or gambling



Fit and Proper Person Policy

- no new obligations
- clarify the current state of the law
- guidance for disclosure
- candour is good; concealment is bad



Must disclose

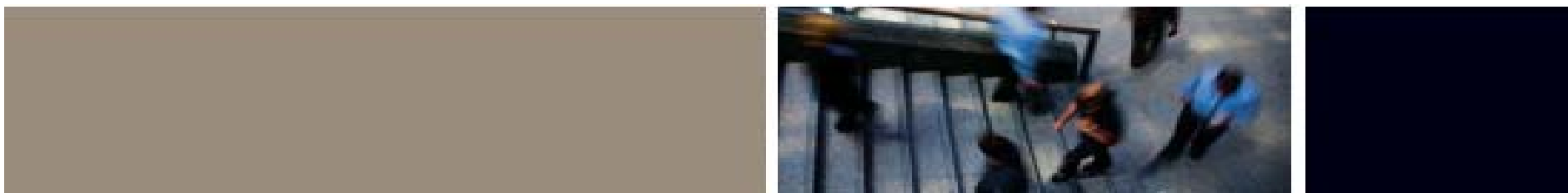
- convictions, charges and pending criminal proceedings
- academic and general misconduct
- contravention of a disciplinary order
- administration of justice offences
- insolvency



Need **NOT** disclose

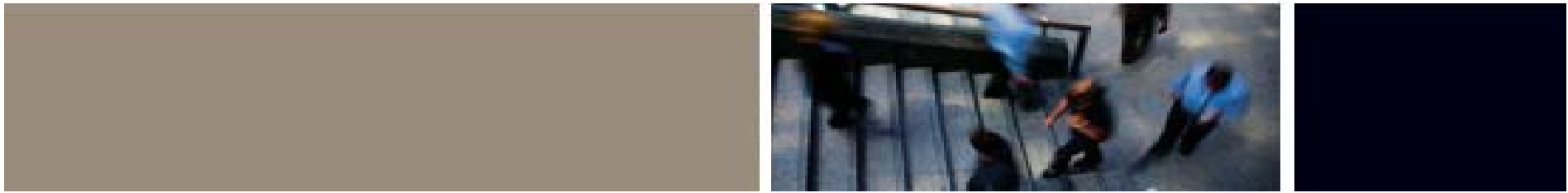
- infringement offences
- minor traffic offences

- unless shows
 - dishonesty
 - disregard for law
 - risk to consumers



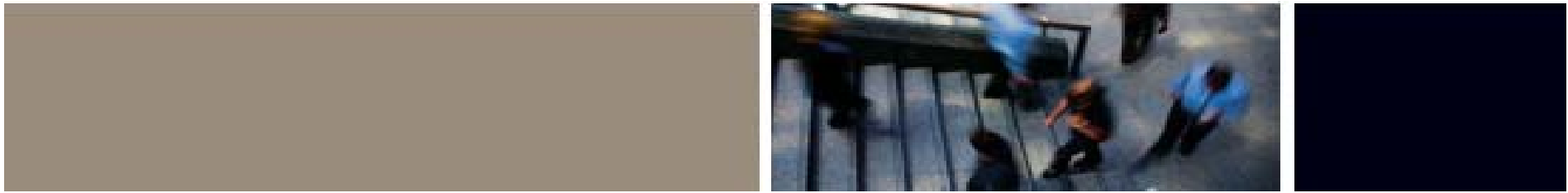
Case examples:

1. Young country lawyer: common law misconduct linked to severe depression. VCAT penalty. Now on treatment recovering well, with full support of family, friends and the firm. Will join LSC in talking about mental health to lawyers.
2. Teenage theft offences: 20 years of non-disclosure. Revealed with full candour and honesty – forgiven.



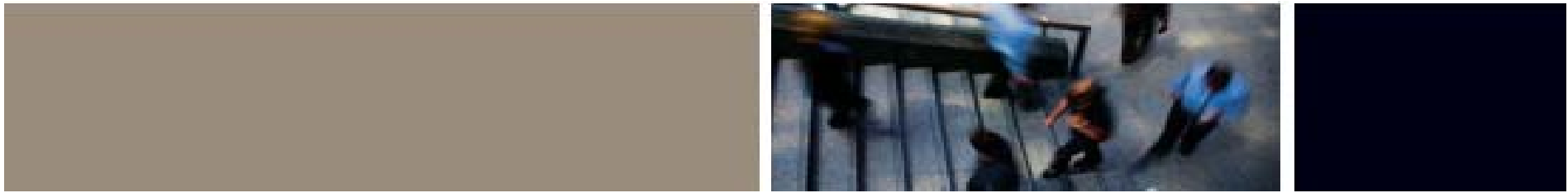
Conduct complaints

- dishonesty & neglect vs relationship breakdown
- follow conduct rules + communicate, serve, smile
- early attempt to assist in resolution
- if not resolved: dismissal or further investigation
- major misconduct fully investigated
- duty to court v duty to client
- prosecute in VCAT



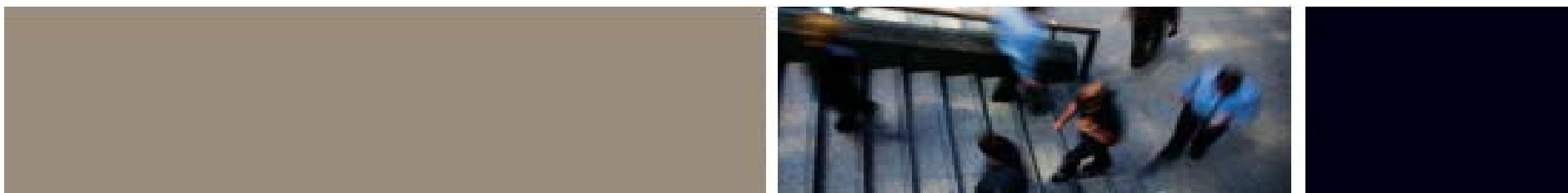
Costs Disputes

- complaints about legal costs
- act impartial in negotiation process
- attempt to assist in resolution
- if resolved, settlement agreement prepared
- if not resolved, right to apply to VCAT



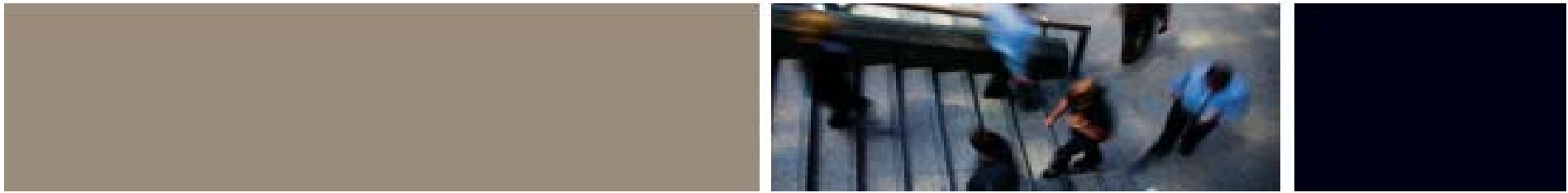
Tips to prevent disputes

- actively communicate with clients – call them first
- use various means of communication
- never assume clients understand costs
- actively manage clients expectations
- keep detailed file notes
- use regulator to help solve



Managing the client relationship

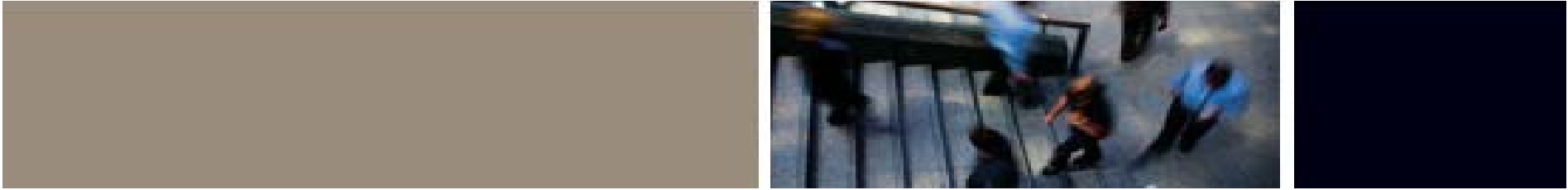
- apologies
- admissions
- not super humans
- honesty
- expectations
- plan for complaints



Case 1 – allegations (Coldham, Brookes, Barton VCAT J112/2010)

- Trust money in the draw

- random LIV trust account inspection
- P bills clients and receives payment (\$500,000)
- P pays disbursement money into office account
- money for barristers and expert witnesses
- P fails to forward funds to payees
- P held money 4 years to reduce overdraft



Case 1 – outcome (Coldham, Brookes, Barton VCAT J112/2010)

- Trust money in the draw

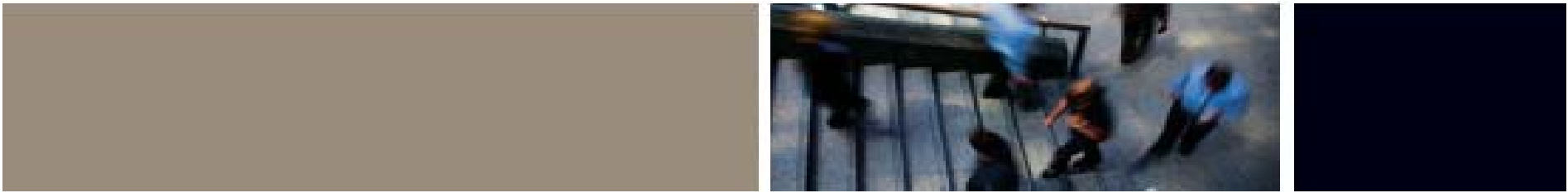
- plea of guilt
- deliberate, long-term strategy
- more serious than other Vic cases
- have engaged in disgraceful and dishonourable conduct upon their own admission
- 9 months' PC suspension and \$50,000 costs order



Case 2 – allegations (Keough VCAT J115/2009)

- plagiarism

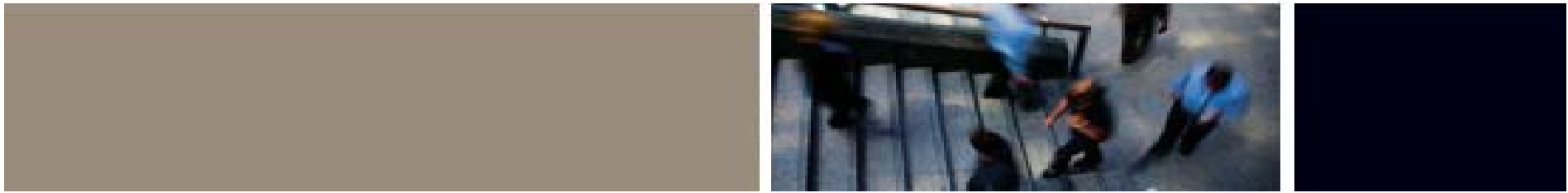
- practitioner completing his Masters degree
- practitioner submitted a plagiarised research paper towards his degree and for inclusion in *Journal of Law and Medicine*
- complaint to LSC by Journal editor
- practitioner claimed no intention to plagiarise



Case 2 – outcome (Keough VCAT J115/2009)

- plagiarism

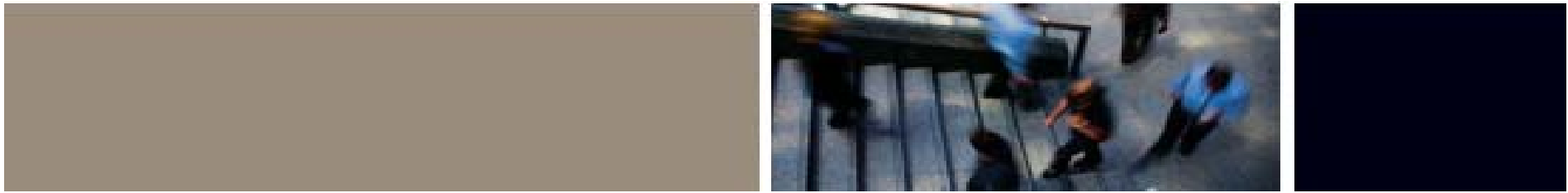
- practitioner did not set out to plagiarise
- however, left insufficient time to prepare paper
- consciously submitted a plagiarised paper
- practising certificate cancelled 6 months, costs order
- conduct doesn't need to be connected to legal practice to amount to professional misconduct



Case 3 – allegations (Mullins [2006] QLPT 012)

- Duties to court

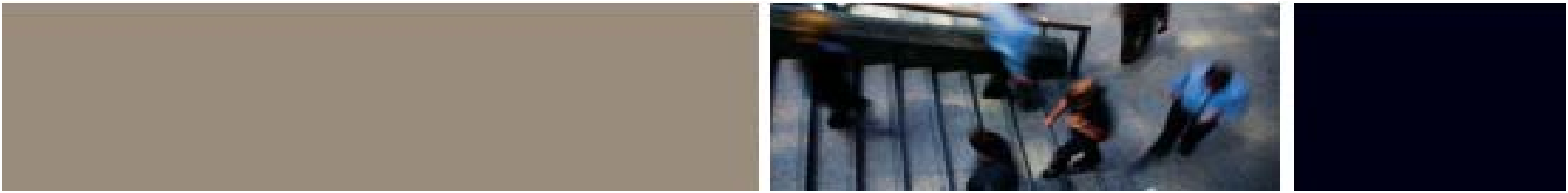
- sol representing client in mediation with insurer for personal injury from a motor vehicle accident
- client diagnosed with cancer; counsel advice was not to disclose to insurer – sol followed
- medical diagnosis affected life expectancy, and therefore potential settlement payout



Case 3 – outcome (Mullins [2006] QLPT 012)

- Duties to court

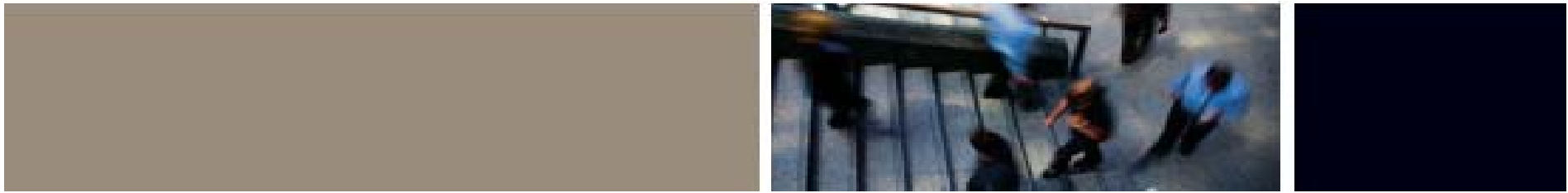
- sol found guilty of professional misconduct for failure to disclose
- duties to court are greater than duties to the client



Case 4 – allegations (LSC v. Irving VCAT J28/2011)

- Duties to community

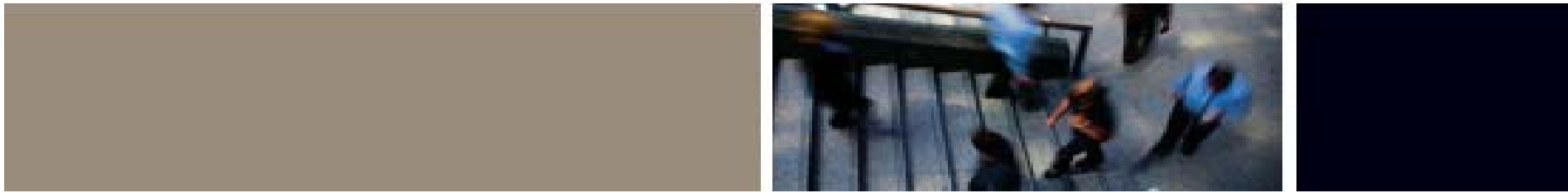
- sol prepared a rescission notice without foundation
- applied deposit moneys held on trust under a contract he was purporting to rescind
- sol gave evidence he knew basis for rescission was false
- defence was “the client ordered me to do it” – acting only as agent or instrument of client



Case 4 – outcome (LSC v. Irving VCAT J28/2011)

- Duties to community

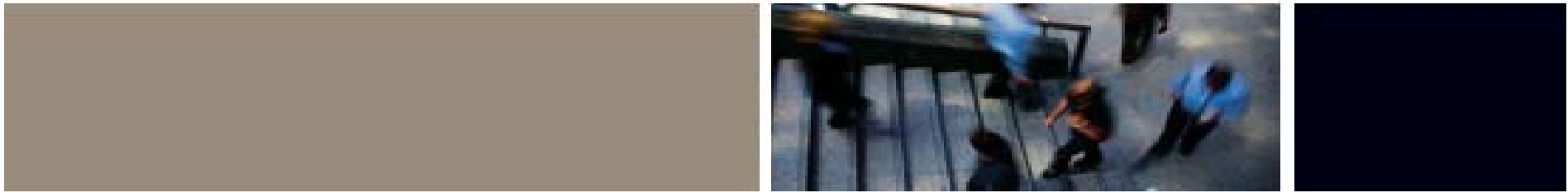
- guilty of misconduct
- member of legal profession always must act according to law – if can't then must terminate retainer
- duty owed not only to client but to the community at large
- duty is cornerstone of practice of law
- failure to meet this standard may easily be “regarded by colleagues of good repute and competency as dishonourable or disgraceful”



Case 5 – appeal (LSC v. Long VCAT J136/2010)

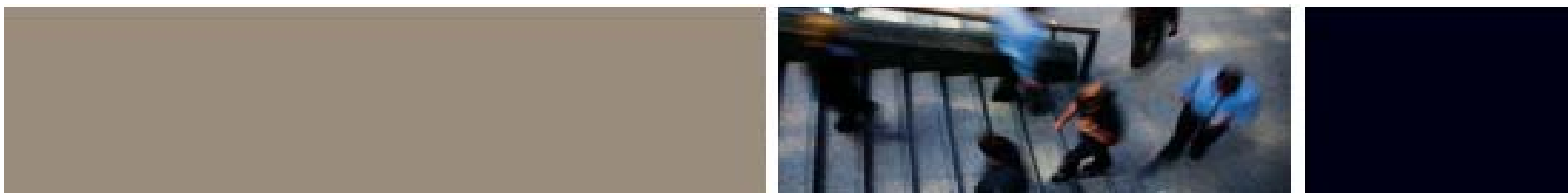
- Tax evasion

- failed to file returns over 12 years
- depression
- guilty plea
- four months' suspension
- LSC's appeal lost – delay in prosecution and hearing case was mitigating factor along with depression and plea of guilt



Legal Profession Act amendments re Corp lawyers – 2nd reading, March 2012

- can now do pro-bono work outside CLCs
- will have pre-approved PII insurance
- still must otherwise do only work for employer – unless has full PC



National Legal Profession Reform

- simplify regulation
- reduce complexity and inconsistency
- one system – 4 (?) jurisdictions
- national Commissioner + National Board
- national office funded by admission fee