LAW FIRM OWNERSHIP - FITNESS TO OWN THRESHOLD TEST

The UK Legal Services Act has a fit to own test that non-lawyers must "pass" before they can invest or have ownership in a law firm. Does Australia have a corollary? If not, why not?

UK Legal Services Act

A firm which wants to take on a non-lawyer as a "manager" of a recognised body (partnership, LLP or company recognised by the Solicitors Regulation Authority (SRA)) must apply to the SRA for approval of that individual, and satisfy the SRA that the individual is fit and proper to take on that role.

There are limits on non-lawyer participation in a firm's structure:

- No more than 25 per cent of the firm's managers (by number, proportion of ownership or voting rights) can be non-lawyers: rule 14.01(3);
- Under s.9A of the a non-lawyer manager must be an individual, not a corporate person: section 9A of the Administration of Justice Act 1985 (the Act);
- Rule 14.01(3)(d) provides that every non-lawyer who has an ownership interest (or controls any voting rights) in a recognised body must not only be approved under Regulation 3 but must also be a manager of that body.

Any practice appointing a non-lawyer manager must provide the SRA with the information it requires before finalising the appointment. This applies even if the individual has previously been approved by the SRA to be a non-lawyer manager of another LDP.

Individuals needing approval under regulation 3 of the Recognised Bodies Regulations fall into three categories:

- non-lawyers, i.e. individuals who are not members (practising or non-practising) of a legal profession of England and Wales, an Establishment Directive profession, or a foreign legal profession whose members are eligible to become RFLs;
- members of a foreign legal profession whose members are not eligible to become RFLs;
- non-practising barristers and non-practising members of other legal professions, who are prevented by professional rules or training regulations from changing status so as to be able to seek approval as practising lawyers.

Regulation 3 of the SRA Recognised Bodies Regulations 2009 ("the Regulations") contain the basic provisions regarding the criteria and procedures for approving non-lawyer managers, and for withdrawing approval. Approval is obtained by completing a Standard Application Form known as NL1.
It is the responsibility of the applicant (the firm) to make the application for approval, and to confirm that any information provided in connection with the application is correct and complete by signing a declaration of the form. It is the responsibility of the candidate to confirm that any information given about him or her is correct and complete by signing a declaration.

The fee for an NL1 application is £250.

**The NL1 Application Form – key provisions**

**Section 3 - Criminal Records Bureau (CRB) standard disclosure check**

The SRA will not make a decision on the application unless the candidate’s CRB standard disclosure check has been completed.

**Section 5 – Character and suitability of candidate**

For example, question 14 in this section asks whether the candidate has ever been involved in "other conduct" which calls into question his or her honesty, integrity or respect for law. The SRA will interpret this question broadly. Firms must use the question to provide information about matters which are not the subject of another question on the form, but are or may be relevant to the consideration of the candidate's character and suitability—for example, a caution, warning, Anti-Social Behaviour Order, or charge or conviction relating to an offence which is not indictable.

**SRA’s powers**

Under Regulation 3.3(c) the SRA may reject an application if the applicant or the candidate fails to disclose, refuses to disclose or seeks to conceal any matter within Regulation 3.3(a) or (b) in relation to the application. Conduct of this kind could also lead to approval being withdrawn and to disciplinary action being taken against the candidate and/or the applicant.

In relation to the individual applying for authorisation the SRA can reject an application if the individual:

(i) has been committed to prison in civil or criminal proceedings;
(ii) has been disqualified from being a company director;
(iii) has been removed from the office of charity trustee or trustee for a charity by an order within the terms of section 72(1)(d) of the Charities Act 1993;
(iv) is an undischarged bankrupt;
(v) has been adjudged bankrupt and discharged;
(vi) has entered into an individual voluntary arrangement or a partnership voluntary arrangement under the Insolvency Act 1986;
(vii) has been a manager of a recognised body which has entered into a voluntary arrangement under the Insolvency Act 1986;
(viii) has been a director of a company or a member of an LLP which has been the subject of a winding up order, an administration order or administrative receivership; or has entered into a voluntary arrangement under the Insolvency Act 1986; or has been otherwise wound up or put into administration in circumstances of insolvency;
(ix) lacks capacity (within the meaning of the Mental Capacity Act 2005) and powers under sections 15 to 20 or section 48 of that Act are exercisable in relation to that individual;
(x) is the subject of outstanding judgments involving the payment of money;
(xii) is currently charged with an indictable offence, or has been convicted of an indictable offence or any offence under the Solicitors Act 1974, the Financial Services and Markets Act 2000, the Immigration and Asylum Act 1999 or the Compensation Act 2006;
(xii) has been the subject of an order under section 43 of the Solicitors Act 1974;
(xiii) has been the subject of an equivalent circumstance in another jurisdiction to those listed in (i) or (ix); or
(xiv) has been involved in other conduct which calls into question his or her honesty, integrity or respect for law.

The SRA can also not approve an application if the applicant or the individual concerned fails to disclose, refuses to disclose or seeks to conceal any matter in relation to the application.

Under Regulation 4.1 the SRA may impose one or more conditions when granting approval of an individual.

Pursuant to Regulation 6 where the SRA refuses an application, grants an application subject to condition(s), or refuses a permission required under a condition on a body’s recognition, the SRA must notify its reasons in writing. The reasons must be given to the applicant body and the individual.

Regulation 7 sets out the appeal provisions. An applicant who wishes to appeal the SRA’s decision must first proceed thru the SRA’s own appeals procedure and then may appeal to the High Court. Appeals under the SRA’s own appeals procedure must be made within 28 days of receipt of the SRA’s reasons for refusal, or within 28 days of deemed refusal.

Rationale

The fundamental purpose of the approval process is to protect the public and the public’s confidence in the legal profession, in that in order to grant approval the SRA must be satisfied that a non-lawyer is suitable to be involved in the provision of legal services and to exercise influence over a recognised body.

The Legal Profession Act 2004 (NSW)

Australia (NSW) does not have a corollary test. There are however two provisions in the legislation that provide quasi fitness tests.

(1) Section 154 - Disqualification from managing incorporated legal practice

Section 154(1) of the Legal Profession Act 2004 (NSW) provides that the Supreme Court may disqualify a person from managing a corporation that is an incorporated legal practice. An application for disqualification can only be made by the Law Society Council or the OLSC.

A disqualification order will be made by the Supreme Court if it is satisfied that:
(a) the person is a person who could be disqualified under section 206C, 206D, 206E or 206F of the Corporations Act 2001 of the Commonwealth from managing corporations, and

(b) the disqualification is justified.

Section 206C of the Corporations Act provides that a Court may disqualify a person from managing corporations if a declaration is made under section 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision; or section 386-1 (civil penalty provision) of the Corporations Aboriginal and Torres Strait Islander) Act 2006 that the person has contravened a civil penalty provision and the Court is satisfied that the disqualification is justified.

In determining whether the disqualification is justified, the Court may have regard to (a) the person's conduct in relation to the management, business or property of any corporation; and (b) any other matters that the Court considers appropriate.

Section 206D of the Corporations Act provides that a Court may disqualify a person from managing corporations if within the last 7 years, the person has been an officer of 2 or more corporations when they have failed; and the Court is satisfied that: (i) the manner in which the corporation was managed was wholly or partly responsible for the corporation failing; and (ii) the disqualification is justified.

Section 206E of the Corporations Act provides that a Court may disqualify a person from managing corporations if the person (i) has at least twice been an officer of a body corporate that has contravened this Act or the Corporations (Aboriginal and Torres Strait Islander) Act 2006 while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention; (ii) or has at least twice contravened this Act or the Corporations (Aboriginal and Torres Strait Islander) Act 2006 while they were an officer of a body corporate; or (iii) has been an officer of a body corporate and has done something that would have contravened subsection 180(1) or section 181 if the body corporate had been a corporation and the Court is satisfied that the disqualification is justified.

Section 206F of the Corporations Act provides that ASIC may disqualify a person from managing corporations if within 7 years immediately before ASIC gives a notice under paragraph (b)(i) the person has been an officer of 2 or more corporations; and while the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and a liquidator lodged a report under subsection 533(1) (including that subsection as applied by section 526-35 of the Corporations (Aboriginal and Torres Strait Islander) Act 2006) about the corporation's inability to pay its debts; and ASIC has given the person a notice in the prescribed form requiring them to demonstrate why they should not be disqualified; and an opportunity to be heard on the question.
A disqualification order made under section 154 has effect for the purposes only of the Act and does not affect the application or operation of the Corporations Act 2001 of the Commonwealth: section 154(3).

(2) **Section 179 - Prohibition on partnerships with certain partners who are not Australian legal practitioners**

Section 179 further provides, in relation to MDPs that on application by the Law Society Council or the OLSC, the Supreme Court may make an order prohibiting any Australian legal practitioner from being a partner, in a business that includes the provision of legal services if:

(a) the Court is satisfied that the person is not a fit and proper person to be a partner, or

(b) the Court is satisfied that the person has been guilty of conduct that, if the person were an Australian legal practitioner, would have constituted unsatisfactory professional conduct or professional misconduct, or

(c) in the case of a corporation, if the Court is satisfied that the corporation has been disqualified from providing legal services in this jurisdiction or there are grounds for disqualifying the corporation from providing legal services in this jurisdiction.