

CHANGES RELATING TO THE LEGAL PRACTITIONERS

COMPLAINTS COMMITTEE UNDER

THE LEGAL PROFESSION ACT 2007

Overview

1. The principal changes made with respect to complaints and disciplinary action by the *Legal Profession Act 2007* (the Act) relate to the:
 - (a) classification of misconduct which attracts sanction;
 - (b) committee's summary jurisdiction powers;
 - (c) introduction of a 6 year time limit on making complaints.
2. In other respects, the present statutory regime is substantially applied, with many matters which were previously implicit now made explicit, at the cost of an overly long statute.
3. The Legal Practitioners Complaints Committee continues to be the statutory regulatory authority charged with the functions of supervising the conduct of legal practitioners and enquiring into complaints and conduct concerns (s.557). The name of the committee is changed to the Legal Profession Complaints Committee (s.555).
4. The Committee is constituted as a Committee of the Legal Practice Board: (s.555). However, it does not derive its functions from the Board. Rather, the functions are conferred directly on the Committee by the *Act* (s.557). This ensures that, as regards the performance of its functions, the Committee acts entirely independently of the Board.
5. Nevertheless, because the functions of the two bodies are related in many respects, co-operation between them is essential to the effective implementation of the regulatory system established by the *Act*.

Misconduct

6. Under the *Legal Practitioners Act 1893*, the disciplinary matters which could attract sanction were illegal or unprofessional conduct or neglect or undue delay in the course of the practice of law.
7. Under the *Legal Practice Act 2003*, the terminology was changed to unsatisfactory conduct, which was defined to include unprofessional conduct, illegal conduct, neglect or undue delay in the course of legal practice and two new matters: a contravention of the *Act*, the regulations or the rules, and conduct occurring in connection with legal practice that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.
8. That approach has now been replaced by two classes of conduct, in line with the other jurisdictions which have implemented the national legislation:
 - (a) unsatisfactory professional conduct – this includes 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 (s.402); and
 - (b) professional misconduct – this includes:
 - (i) 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
 - (ii) 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 (s.403).
9. Both professional misconduct and unsatisfactory professional conduct are inclusive concepts in the *Act*, ie, they are not defined exhaustively. Although the descriptions of the concepts may have changed, it is clear that what

constituted unprofessional conduct under the old *Act* is covered in the new terms.

10. The term unprofessional conduct and similar terms have been defined judicially as conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, or 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. This concept continues to apply to both classes of conduct referred to in the *Act*.
11. Section 404 lists certain conduct which may be considered unsatisfactory professional conduct or professional misconduct, but the list is not exhaustive:
 - (a) a contravention of this *Act* or a previous *Act*;
 - (b) overcharging;
 - (c) conduct in respect of which there is a conviction for:
 - (i) a serious offence (an indictable offence);
 - (ii) a tax offence;
 - (iii) an offence involving dishonesty;
 - (d) becoming an insolvent under administration;
 - (e) conduct in becoming disqualified from managing or being involved in the management of any corporation;
 - (f) failing to comply with an order of the Committee or the SAT or the Supreme Court exercising jurisdiction under this *Act* or an order of a corresponding disciplinary body;
 - (g) failing to pay a compensation order made under this *Act* or a corresponding law.

Summary jurisdiction

12. The Committee's summary jurisdiction powers are now more restricted than they previously were.
13. The Committee can only exercise summary jurisdiction if it is satisfied that there is a reasonable likelihood the practitioner would be found guilty by the State Administrative Tribunal (SAT) of unsatisfactory professional conduct (but not professional misconduct); the practitioner is generally competent and diligent; the taking of this action is justified having regard to all the circumstances of the case (including the seriousness of the conduct) and whether any other substantiated complaints have been made. The procedure still requires the practitioner's consent (s.426(1)).
14. The Committee's powers have changed, in that the Committee will be able to order compensation. The Committee can publicly or privately reprimand; fine up to \$2,500; make a compensation order (this amount cannot exceed \$10,000 without the consent of the aggrieved person and practitioner), order the practitioner to seek and implement advice in relation to his/her practice and order payment of costs (ss.426(3), 429, 448(5)).

Complaints

15. The parties who can make a complaint remain the same (s.410).
16. As with the present position, the Committee can enquire into matters without complaints (s.421(1)). Matters often come to the attention of the Committee by informal and indirect means.
17. A complaint may be made and dealt with even though the practitioner concerned is the subject of proposed or current criminal or civil proceedings relating to the subject matter of the complaint (s.410(b)).
18. If a client makes a complaint against his/her practitioner, the complainant is taken to have waived privilege (s.469).
19. There is now a time limit for making complaints – a complaint made concerning conduct occurring more than 6 years previously must be dismissed or referred to mediation, unless the Committee determines that it is

just and fair to deal with it, or it involves an allegation of professional misconduct and it is in the public interest to deal with the complaint (s.411).

20. There are now statutory requirements in respect of notifying practitioners of complaints. The Committee can consider the complaint first or conduct preliminary enquiries before giving written notice to the practitioner (s.413(1), (4), (5), (6)).
21. The Committee does not need to give notice if it is of the opinion that doing so will, or is likely to, prejudice the investigation of the complaint, prejudice an investigation by the police or other investigatory or law enforcement body, place a person at risk of intimidation or harassment or prejudice pending court proceedings. In this event, the Committee can postpone giving notice or advise the practitioner of the general nature of the complaint and of his right to make submissions within a specified time period, if it is of the opinion that the practitioner has sufficient information to make submissions (s.413(3)).
22. The practitioner may, within the period specified, make submissions and the Committee must consider such submissions before deciding what action is to be taken (s.414).
23. The Committee has a duty to deal with complaints as efficiently and expeditiously as is practicable (s.431).
24. For the purpose of finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice, 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 (s.403(2)).

Lawyers over whom Committee has powers

25. Generally speaking, the Committee has powers with respect to all Australian lawyers, whether certificated or not, and also all former lawyers (in respect of conduct occurring while they were lawyers).
26. There is a distinction between Australian lawyers and Australian legal practitioners in the *Act*.

27. An Australian lawyer is a person admitted to the legal profession and is either a local lawyer (if admitted in WA) or an interstate lawyer.
28. An Australian legal practitioner is an Australian lawyer who holds a current practising certificate and is either a local legal practitioner (if holds a local practising certificate) or an interstate legal practitioner (if holds an interstate practising certificate).
29. The Committee's powers apply to:
- (a) Australian legal practitioners whether or not the practitioner is a local lawyer, holds a local practising certificate, holds an interstate practising certificate, resides or has an office in this jurisdiction and whether or not the person making the complaint resides, works or has an office in this jurisdiction (s.405);
 - (b) Australian lawyers and former Australian lawyers in relation to conduct occurring while they were Australian lawyers but not Australian legal practitioners (s.406(1));
 - (c) former Australian legal practitioners in relation to conduct occurring while they were Australian legal practitioners (s.406(2)).
30. Section 407 sets out the principles for determining whether conduct complained of is dealt with in this jurisdiction or by a corresponding authority in another jurisdiction.

Mediation

31. The Committee's conciliation power under the current *Act* is replaced by a mediation procedure, which applies where the Committee considers that a complaint (or part thereof) is capable of resolution by mediation. A matter cannot be referred for mediation if the Committee considers the practitioner would be likely to be found guilty of professional misconduct if proceedings were instituted in the SAT (ss.417 – 420).

Decision

32. After investigating a complaint or conduct enquiry, the Committee is required to:

- (a) dismiss the complaint (it may dismiss if it is satisfied that there is no reasonable likelihood that the practitioner would be found guilty by the SAT of unsatisfactory professional conduct or professional misconduct, or it is in the public interest to do so); or
 - (b) if the matter is an enquiry without complaint, decide to take no further action; or
 - (c) exercise its summary jurisdiction procedure under s.426; or
 - (d) refer the matter to the SAT (s.424(1)).
33. The Committee is required to notify the parties of decisions, provide reasons, and advise complainants of appeal rights (s.432).
34. There is a new power to refer a matter for costs assessment by a taxing officer (s.423).
35. There is now an appeal procedure – a person aggrieved by a decision of the Committee to dismiss a complaint may apply to the SAT for a review of the decision. Leave of the SAT is first required if in its reasons for decision the Committee finds the complaint:
- (a) to be trivial, unreasonable, vexatious or frivolous; or
 - (b) in the case of a complaint purporting to be made under s.410(1)(e), a matter in which the complainant does not have, or did not have, a direct personal interest (s.435).
36. There is also a right of appeal by a person aggrieved by a decision of the Committee made under its summary jurisdiction power (s.435).

SAT proceedings

37. The SAT remains the body which determines allegations of misconduct. The power to strike off remains with the Full Court (ss.438, 444). On a report to the Full Court, the SAT's decision is taken to be conclusive on all facts and findings.
38. Some changes are:

- (a) the SAT can make orders relevant to other jurisdictions – it can recommend that the name of a practitioner be removed from an interstate roll, or a practitioner’s interstate certificate be suspended or cancelled or be subject to specified conditions (s.440);
- (b) the SAT may find a person guilty of unsatisfactory professional conduct even though the referral alleged professional misconduct (s.442).

Inter-jurisdictional provisions

39. The Committee can enter into protocols with corresponding authorities in respect of investigating and dealing with conduct that appears to have occurred in more than one jurisdiction (ss.458 – 461).

Investigations

40. Under Part 15 of the *Act*, the Committee has wide powers of investigations in relation to:
- (a) conduct investigations;
 - (b) incorporated legal practice compliance audits – audits conducted under s.118 in relation to an incorporated legal practice by the Board or the Committee;
 - (c) trust account investigations – investigations of the affairs of law practices under Part 9 Division 3, by the Board or the Committee;
 - (d) trust account examinations – external examinations of trust records under Part 9 Division 4, by the Board.
41. The powers include powers, by notice or summons, to require a lawyer under investigation to:
- (a) produce any specified document;
 - (b) provide written information;

- (c) otherwise assist in, or cooperate with, the investigation in a specified manner (s.520(1)).
42. An investigator may also by notice or summons require any other person to give the investigator:
- (a) access to documents relating to the affairs of the lawyer under investigation which the investigator reasonably requires;
 - (b) information relating to the affairs of the lawyer under investigation which the investigator reasonably requires (s.520(2)).
43. The Board may suspend a local legal practitioner's practising certificate while a failure by the practitioner to comply with a notice or summons continues (s.521(6)).
44. An investigator may enter any premises at any time with the consent of the occupier or otherwise under the authority of a search warrant and must produce evidence of their appointment on the reasonable request of the person apparently in charge of the premises or any other person on the premises (s.523(3), (5)).
45. An investigator may apply to a Justice of the Peace for the issue of a search warrant in respect of any premises, if the investigator believes on reasonable grounds that any relevant material is located at the premises. The application for a search warrant must be in writing and must be made by the investigator in person (s.524(1), (2)).

C.L. Zelestis
Chairman

30 June 2008