Legal Profession Complaints Committee

Current Issues at the LPCC

OBLIGATION TO MAINTAIN CONFIDENTIALITY OF COURT DOCUMENTS

There has been a recent rise in the number of complaints being received by the Committee concerning the alleged disclosure of information from documents produced pursuant to a subpoena or as a result of disclosure procedures. In some cases the person alleged to have made the disclosure was the lawyer and in other cases it was the client. All the cases have involved family law proceedings, but the obligation to maintain confidentiality is not limited to family law proceedings.

Although the obligation has often been referred to as an 'implied undertaking' it is a substantive obligation imposed by law.

The obligation was described by Hayne, Heydon and Crennan JJ in *Hearne v Street* [2008] HCA 36 at [98] in the following terms:

> *Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence.* (Endnotes omitted.)

The obligation is to the court and not to the other party to the proceedings.

Although the primary person bound by the obligation is the party who receives the documents or information through the litigation process, the obligation also binds the party's lawyers and anyone who receives the documents or information.

Practitioners need to ensure that not only do they comply with this obligation but they should advise their clients of the obligation and the importance of observing it.

The types of material to which the obligation applies includes:

> *documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an Anton Piller order, witness statements served pursuant to a judicial direction and affidavits.* Per Hayne, Heydon and Crennan JJ in *Hearne v Street* [96] (endnotes omitted).

As the obligation is to the court, a breach of the obligation is a contempt of court. Ignorance of the obligation is not a defence.

Any person who wishes to make use of the documents or information received through the litigation process may seek leave to be released from the obligation. Such an application should be made to the court in which the proceedings were conducted and will be granted when the court is satisfied that there are 'special circumstances' justifying its release.

UNDERTAKINGS

Undertakings are widely used in the profession. They are a useful tool but must be given judiciously as they require strict compliance.

Undertakings are promises to do, or refrain from doing, something and are binding obligations. They are different from mere promises to do or refrain from doing something.

Rule 22(2) of the *Legal Profession Conduct Rules* 2010 provides that a practitioner must ensure the timely and effective performance of an undertaking given by the practitioner to another practitioner unless:

(a) the other practitioner would not reasonably be expected to rely on the undertaking; or

(b) the practitioner is released by the recipient of the undertaking or by a court of competent jurisdiction.

Rule 22(3) provides that a practitioner must ensure the timely and effective performance of an undertaking given by the practitioner

to a third party in the course of providing legal services to a client or for the purposes of the client's business unless released by the recipient of the undertaking or by a court of competent jurisdiction.

The consequences of breaching an undertaking are serious. A practitioner who breaches an undertaking given to a court, commits a contempt of court: *Al-Kandari v JR Brown & Co (a firm)* [1988] 1 All ER 833 at 838 per Bingham J. Likewise, clients or third parties can have recourse to the inherent jurisdiction of the court to enforce a practitioner's undertaking which has been unfulfilled: *Australian Guarantee Corporation (NZ) Ltd v East Brewster Urquhard & Partners* [1990] 2 NZLR 167 at 171 per Fisher J.

A breach of an undertaking by a practitioner in the course of his or her practice is regarded by the courts, regulators and the profession as a very serious matter. As explained by Wylie J in *Countrywide Banking Corporation Ltd v Kingston* [1990] 1 NZLR 629 at 640:

> *to excuse the defendant from performance would … seriously undermine the justifiable claims of the legal profession to standards of integrity and honourable conduct upon which the profession and the public have constantly to rely. In order to demonstrate the insistence by the courts that those standards are to be maintained the disciplining of those who breach them by ordering performance is a very necessary, if regrettable, action to be taken.*

Recently, the Court of Appeal discussed the importance of practitioners fully understanding the meaning of undertakings given and the importance of performing undertakings in *Legal Professional Complaints Committee v Detata* [2012] WASCA 214 (*Detata*).

Detata concerned the Committee's appeal from a decision of the State Administrative Tribunal with respect to the penalty imposed upon the practitioner, following a finding of professional misconduct. The Tribunal found that the practitioner had authorised the release of the balance of the funds held in trust either knowingly or recklessly in breach of an undertaking he had given.

In *Detata*, Martin CJ at [54] explained the public interest in upholding undertakings:

> *the usual effect of the proffer and acceptance of the undertaking will be to obviate the need to commence or to continue legal proceedings. This serves the public interest by preserving the limited resources of the parties and the courts.*

His Honour found that whether the undertaking was given in error or oversight was immaterial. What was vital was that the legal practitioners perform their undertaking no matter how radical they were and irrespective of any change in circumstance or any hardship to the legal practitioner concerned because:

> *… the obligation of a legal practitioner to perform his or her undertaking is a solemn obligation of the utmost importance. Failure to perform that obligation will generally be regarded as professional misconduct, and depending on the circumstances, will often be regarded as serious professional misconduct.* At [54].

The Court of Appeal found that:

1. the terms of the undertaking given by the practitioner were clear and unambiguous;
2. the terms of the undertaking were certainly known to the practitioner;
3. the undertaking was given on behalf of the practitioner, the firm by which he was employed and his client; and
4. the undertaking was given for the purpose of obtaining a benefit for the practitioner's client.

The Court of Appeal set aside the Tribunal's orders with respect to penalty and imposed a fine of $10,000.

The Committee urges practitioners to ensure that the terms of an undertaking to be given are carefully considered, precise, clear and unambiguous and, once given, that the undertaking is strictly performed.