
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : LEGAL PROFESSION ACT 2008 (WA)

CITATION : LEGAL SERVICES AND COMPLAINTS
COMMITTEE and BENNETT [2024] WASAT 28

MEMBER : JUDGE H JACKSON, DEPUTY PRESIDENT
MR D AITKEN, SENIOR MEMBER
MS R LAVERY, MEMBER

HEARD : ON THE PAPERS

DELIVERED : 17 APRIL 2024

FILE NO/S : VR 26 of 2023

BETWEEN : LEGAL SERVICES AND COMPLAINTS
COMMITTEE
Applicant

AND

MARTIN LAWRENCE BENNETT
Respondent

Catchwords:

Vocational regulation - Lawyer - Professional misconduct - Consent orders -
Role of Tribunal - Reckless vs grossly careless conduct

Legislation:

Legal Profession Act 2008 (WA), s 5(a), s 402, s 403(1)(a)
State Administrative Tribunal Act 2004 (WA), s 60(2)

Result:

Lawyer found to have engaged in two counts of professional misconduct and one of unsatisfactory professional conduct

Lawyer reprimanded

Lawyer fined \$23,000

Lawyer to pay applicant's costs fixed at \$12,500

Category: B

Representation:

Counsel:

Applicant : Not Applicable

Respondent : Not Applicable

Solicitors:

Applicant : Not Applicable

Respondent : Not Applicable

Case(s) referred to in decision(s):

Australian Securities & Investments Commission In the Matter of Richstar Enterprises Pty Ltd ACN 099 071 968 v Carey (No 17) [2007] FCA 1395

BHP Billiton Ltd v Dunning [2013] NSWCA 421

CD [2020] WASAT 41

Connor v Veitch [2023] WASCA 186

Danberg v Danberg (2001) 52 NSWLR 492, 522

Giudice v Legal Profession Complaints Committee [2014] WASCA 115

Harman v Secretary of State for the Home Department [1983] 1 AC 280

Khosa v Legal Profession Complaints Committee [2017] WASCA 192

Palmer v Dolman [2005] NSWCA 361

Wintle v Stevedoring Industry Finance Committee & James Hardie & Co Pty Ltd [2002] VSC 369

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The parties have proposed that the Tribunal make certain orders in relation to the disciplinary action commenced by the applicant against the respondent, Mr Martin Lawrence Bennett (**the practitioner**).

2 We have determined the application on the documents, pursuant to s 60(2) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**).

3 However, given certain matters which are set out in more detail below, we consider it necessary to provide some brief reasons by way of explanation for that agreement. Those reasons now follow.

Background

4 The practitioner was admitted to practice on 22 December 1978 and at all material times was an Australian legal practitioner within the meaning of s 5(a) of the *Legal Profession Act 2008* (WA) (**LP Act**).

5 The conduct in question occurred in June 2018 and June and August 2019.

6 Significantly for present purposes, the conduct the subject of ground one was the subject of proceedings before her Honour, Pritchard P, whose reasons are reported in **CD** [2020] WASAT 41 (**CD**)

7 The applicant referred five grounds of complaint to the Tribunal on 4 April 2023.

8 On 4 October 2023, the parties filed a Minute of Consent Orders by which they agreed that:

- (i) in relation to two grounds, one of which concerned conduct in June 2018 (**ground one**) and the other in June 2019 (**ground two**), the practitioner engaged in professional misconduct within the meaning of s 403(1)(a) of the LP Act. That is, in each case, the parties are agreed that his conduct involved a substantial failure to reach or maintain a reasonable standard of competence or diligence. In each case the parties describe the conduct as 'grossly careless'; and
- (ii) in August 2019 (**ground three**) he engaged in unsatisfactory professional conduct within the meaning of s 402 of the LP Act. That is, the parties are agreed that his conduct fell 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. The parties describe the conduct as 'careless'.

9 The conduct involved is set out in Schedule A - Statement of Agreed Facts (**Agreed Facts**), a copy of which is annexed to both these reasons and to our orders.

10 In our view, there is no need for us to address the conduct or proposed orders the subject of grounds two or three. What follows is limited to ground one.

The issue and its resolution

11 Ground one alleges that the practitioner was grossly careless in permitting his client to affirm an affidavit which contained information obtained as a result of Tribunal proceedings and which was subject to orders limiting the extent to which that information could be used (**Protected Information**) in circumstances where:

- (a) Prior to the affidavit being affirmed, a senior associate at the practitioner's firm (**SA**) queried with the practitioner whether, given the Tribunal's orders, the Protected Information could be included in the affidavit;
- (b) The practitioner indicated to the SA that the Protected Information *could* be included in the affidavit because he genuinely, but mistakenly, believed that the affidavit was being used for a purpose permitted by the Tribunal's orders;
- (c) In reaching that view, the practitioner:
 - (i) did not carry out, and did not cause to be carried out, any research to confirm his belief;
 - (ii) had no reasonable grounds for his belief; and
 - (iii) did not cause an application to be brought to the Tribunal for a variation of the orders.

12 On 15 December 2023, we listed the matter for directions at which we raised with the parties our concern that, in those circumstances, it might be said that the conduct involved was reckless, rather than grossly careless.

13 As a result of the directions hearing on 16 February 2024, submissions were filed on behalf of the practitioner (Submissions) and, on

20 February 2024, the applicant advised that it had nothing to add to those Submissions, thereby adopting them.

14 The Submissions are focused on the judicial test for recklessness and whether or not the facts fall within that definition.

15 The Submissions submit, correctly in our view, that the relevant test for recklessness in the present circumstances is whether the practitioner was indifferent to, or had a conscious disregard for, the risk that the affidavit might include information the inclusion of which was contrary to the Tribunal's orders.¹

16 As to the application of that definition to the facts in this case, the Submissions say that:

(a) the Agreed Facts as described above at para 11 are 'consistent with' the decision of Pritchard P in **CD** who:

(i) was not persuaded that the practitioner's belief about the use to which the Protected Information could be put was not genuine; and

(ii) accepted that the practitioner had turned his mind to the question whether the use to which the Permitted Information could be put was permitted by the Tribunal's orders and concluded that it was.²

(b) there is nothing in the Agreed Facts (or, it is implied, in the findings of Pritchard P in **CD**) to suggest 'indifference to, or actual conscious disregard of, the risks created by the respondent's conduct' and, therefore, 'a finding of recklessness is not open on the facts before the Tribunal'.³

17 We do not accept that there is nothing in the facts of this case that suggest that the practitioner was indifferent to, or that he consciously disregarded, the risk that the inclusion of the Protected Information was contrary to the Tribunal's orders. Neither do we accept that a finding of recklessness is not open to us.

¹ *Giudice v Legal Profession Complaints Committee* [2014] WASCA 115 (*Giudice*). The language of indifference is used by Martin CJ at [44] and Edelman J at [130]. Buss P uses the language of conscious indifference: at [95]. We have proceeded on the basis that there is no material difference between the two approaches.

² Submissions, para 12.

³ Submissions, para 13.

18 The test of recklessness is a subjective test; it is concerned with the practitioner's state of mind.⁴ It is therefore a question of fact.

19 In *Wintle*, Ashley J set out several factors which might warrant a court refusing to make orders proposed jointly by the parties, including where 'the Court is doubtful whether proposed orders reflect the true state of facts'.⁵ Amongst other authorities, Ashley J cites *Danberg* in which Heydon JA, with whom Spigelman CJ and Sheller JA agreed, concluded a lengthy discussion as to the extent to which admissions or agreements between the parties bind the courts, said:

The courts will act on admissions of or agreements about matters of fact where there is no reason to doubt their correctness. But they are reluctant to do so where there is reason to question the correctness of the facts admitted or agreed.⁶

20 Accordingly, therefore, if we are doubtful about the practitioner's state of mind, as a factual matter, regardless of the agreed position of the parties, it is open to us to refuse to make the orders sought.

21 As noted above, the practitioner's state of mind is critical in a finding of recklessness. In the majority of cases, a person's state of mind can only be determined by inference from all of the facts and circumstances.⁷

22 In seeking to understand the practitioner's state of mind, we are conscious of the need to distinguish between the application of an objective standard (e.g. by saying that the practitioner 'should have known') and the use of objective facts to draw an inference as to the state of the practitioner's mind at the relevant time.

23 That is, a finding that the practitioner 'should have' undertaken research in order to confirm his view, would be a finding that he is grossly careless, not reckless.

24 That is the position that would appear to have been taken by the parties; that the practitioner's professional failing was that he did not do what he should have done. That is, the parties appear to have agreed that the gravamen of the practitioner's conduct was his failure to take steps,

⁴ *Giudice* at [44] (Martin CJ) at [96] (Buss P) and at [130] (Edelman J).

⁵ *Wintle v Stevedoring Industry Finance Committee & James Hardie & Co Pty Ltd* [2002] VSC 369 (*Wintle*) at [20]. Ashley J's list of factors was referred to with approval by the WA Court of Appeal in *Connor v Veitch* [2023] WASCA 186 at [21].

⁶ *Danberg v Danberg* (2001) 52 NSWLR 492, 522 at [160].

⁷ *Khosa v Legal Profession Complaints Committee* [2017] WASCA 192 at [169] citing *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [51].

such as to cause the undertaking of research, in order to confirm his honestly held, but mistaken, belief as to the state of the law.

25 In the hearing before Pritchard P which resulted in the decision referred to above - **CD** - the practitioner gave evidence about his mental state that is consistent with the Agreed Facts summarised at para 11 above.

26 Her Honour expressed real concern as to whether the practitioner's expressed state of mind was genuine. She found that it was 'difficult to fathom' how the practitioner 'could have formed the view he did' given SA raised her concerns (twice) and given that no research was undertaken to consider those concerns and/or to confirm the practitioner's belief.⁸

27 Nonetheless, despite her stated concerns, Pritchard P held that she would **not** infer that the practitioner was being untruthful when he gave that evidence.⁹

28 That conclusion was reached, in part, due to the manner in which the practitioner was cross-examined; in particular, on the basis that certain things were not put to him.¹⁰

29 As such, her Honour accepted that there **were** other alternative scenarios which might explain the practitioner's evidence as to his state of mind. In particular, her Honour accepted that, on the evidence before her, she could not exclude the possibility that the practitioner's views as to whether the affidavit could be filed without breaching the Tribunal's orders may be explained by ignorance of the law or by a lack of care.¹¹

30 But her Honour did **not** make a positive finding that the practitioner's evidence was truthful. Neither did she hold that the practitioner was either reckless or careless as to the truth.

31 As noted above, the position taken by the parties appears to be that the error in the practitioner's conduct was that he failed to do what he should have done; i.e. cause the undertaking of research to confirm his honestly held, but mistaken, belief as to the state of the law.

32 We say 'appears to be' because the finding is not explicit but, in our view, that is the only way that the Agreed Facts and the proposed orders can be read.

⁸ **CD** at [153].

⁹ **CD** at [155].

¹⁰ **CD** at [154].

¹¹ **CD** at [155].

33 In our view, however, the agreed position is not the only way to consider the Agreed Facts in seeking to understand the state of mind of the practitioner.

34 Rather, it is open, in our view, to infer that the practitioner had a conscious disregard for the correctness of his view as to the law.

35 In our view, such an inference may be drawn from the fact that the SA (whom Pritchard P described as 'experienced'¹²) twice raised her concerns with the practitioner¹³ who, despite those concerns being raised with him, did nothing to confirm his view of the law.

36 That is, the practitioner twice had the risk that he was wrong in his view of the law put to him by an experienced senior associate and, without doing anything at all to confirm his view, he dismissed that risk.

37 In our view, the only way that the practitioner could have dismissed the risk without taking any other steps to confirm the correctness of his view and without consciously disregarding or being indifferent to the risk, is if his mind did not admit the possibility that he might be wrong.

38 Any (subjective, internal) acknowledgement by the practitioner that he *might* be wrong in his view would require him (in the application of the above test of recklessness) to take steps to check the correctness of his view. To do otherwise, having acknowledged the risk, would seem to us, amounts to a conscious disregard of the risk.

39 The practitioner is a very experienced litigator. Litigation often reminds participants that even very carefully considered views as to what the law is or is not are often the subject of disagreement with one or more participants disappointed that their view was not upheld by the relevant decision maker. Given that background, it seems quite remarkable to suggest that the practitioner did not even acknowledge the possibility that he was wrong in his view when the SA twice presented him with her concerns.

40 Nonetheless, while we have considerable misgivings in doing so, we have determined to accept the parties' agreed view in this case.

41 An inference as to serious misconduct is only to be drawn from other circumstances where there is no other realistic possibility.¹⁴

¹² *CD* at [157].

¹³ The Agreed Facts do not enumerate how many times SA raised the issue. Her unchallenged evidence in *CD* suggests that it occurred twice: at [104]. See, also, [108] where her Honour speaks of 'each occasion'.

¹⁴ *Palmer v Dolman* [2005] NSWCA 361 at [41].

42 Ultimately, we are not willing to make such a finding. That is, we accept that it is a 'realistic possibility' that the practitioner did not admit the possibility that he was incorrect in his view of the law despite the SA raising her concern with him and, therefore, did not consciously disregard the risk that his view of the law was wrong.

43 In doing so, we give considerable weight to the fact that, in agreeing that the conduct engaged in was grossly careless, rather than reckless, both parties had the benefit of the advice of Senior Counsel.

44 In that regard, we note the decision of French J (as he then was) in *Richstar*.¹⁵

When the Court is presented with a proposed order, agreed between the parties, it must be satisfied, before making it, that it is within the power of the Court to make it and that the proposed order is appropriate. The requirement that the order be "appropriate" does not mean that the Court will refuse to make it simply because it thinks a different order would be preferable. This is particularly the case where the parties are properly advised by competent legal representatives. An appropriate order is one which lies within the range of orders that could reasonably be made on the materials before the Court. ...

45 While that passage is framed in terms of orders, it seems to us that it might equally be applied to findings of fact where, to use the language of *Wintle* and *Danberg*, a finder of fact is otherwise 'doubtful' as to the correctness of an agreed fact.

46 In short, while we have concerns about the parties' agreement that the practitioner did not consciously disregard the risk that his view of the law was wrong, we are not satisfied that that position was not realistically possible.

47 Accordingly, we are content for the orders agreed by the parties to be made.

Orders

On the application of the parties to settle the proceedings:

¹⁵ *Australian Securities & Investments Commission In the Matter of Richstar Enterprises Pty Ltd ACN 099 071 968 v Carey (No 17)* [2007] FCA 1395 at [4].

The Tribunal notes:

The Applicant alleged that there is proper cause for disciplinary action against the Respondent pursuant to section 438 of the *Legal Profession Act 2008* (WA) (Act), as applied by section 37 of the *Interpretation Act 1984* (WA).

The parties have on 4 October 2023 agreed the terms upon which the proceedings could be settled.

The parties have agreed the relevant facts as set out in Schedule A.

The Tribunal orders:

Being satisfied by reason of the Respondent's admission that proper cause exists for disciplinary action against him, and in order to give effect to the agreed terms of settlement, it is on 12 April 2024 ordered pursuant to s 56(1) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**) that:

1. In around June 2018, the Respondent engaged in professional misconduct, within the meaning of section 403(a) of the Act, in that he settled, and caused or permitted to be filed in proceedings in the Supreme Court of Western Australia (**Supreme Court proceedings**), an affidavit affirmed by a client (**Client Affidavit**) in support of an application for pre-action discovery, in circumstances where:
 - (a) the Client Affidavit referred to certain information about the mental health of the client's father;
 - (b) the information was derived from documents which were obtained by the Respondent's firm pursuant to orders (**Tribunal Orders**) made by the State Administrative Tribunal (**Tribunal**);
 - (c) the Tribunal Orders permitted the documents to be used only for the purposes of proceedings in the Tribunal under the *Guardianship and Administration Act 1990* (WA) (**GA Act**) concerning Mr CD;
 - (d) the use of the documents in support of an application in the Supreme Court for pre-action discovery was not a use permitted by the Tribunal Orders;

- (e) the Respondent was grossly careless in causing or permitting the Client Affidavit to be filed in the Supreme Court proceedings.
- 2. In around June 2019, the Respondent engaged in professional misconduct, within the meaning of s 403(a) of the Act, by writing to the Attorney-General for Western Australia requesting his intervention in relation to a charitable trust connected to the family of his clients (**AG Letter**) in circumstances where:
 - (a) the AG Letter made use of and referred to information obtained by the practitioner and his firm by way of discovery in the Supreme Court proceedings, which documents had not yet been tendered in court;
 - (b) by sending the AG Letter, the Respondent breached the implied obligation referred to in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280; and
 - (c) the Respondent's breach of the implied obligation was grossly careless.
- 3. In around August 2019, the Respondent engaged in unsatisfactory professional conduct, within the meaning of s 402 of the Act, in that:
 - (a) the Respondent swore an affidavit on 21 August 2019 (**Practitioner's Affidavit**) in support of an application in the Tribunal to vary the Tribunal Orders *nunc pro tunc*, to address the breach the subject of Ground 1;
 - (b) the Practitioner's Affidavit, read in isolation, did not clearly and fully explain a matter relevant to the Tribunal's consideration of the application, being the extent to which:
 - (i) information from the documents made available to the Respondent's firm pursuant to the Tribunal Orders had been disclosed in the Client Affidavit;
 - (ii) the contents of the Client Affidavit were derived solely from documents made available to the Respondent's firm pursuant to the Tribunal Orders, as opposed to being independently known to the client; and

- (c) the Respondent acted carelessly in failing to clearly and fully explain those matters.
4. Pursuant to s 441(a) of the Act, the Respondent pay a fine to the Legal Practice Board of Western Australia (Board) in the amount of \$23,000.
 5. Pursuant to s 439(d) of the Act, the Respondent be publicly reprimanded.
 6. The Respondent is to pay the Applicant's costs in the sum of \$12,500 pursuant to s 87(2) of the SAT Act.
 7. The amounts specified in orders 4 and 6 are to be paid to the Board by the Respondent within 30 days.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

PN
Associate to Judge Jackson

17 APRIL 2024

SCHEDULE A – STATEMENT OF AGREED FACTS

1. The Respondent (**practitioner**) was admitted to legal practice in Western Australia on 22 December 1978.
2. At all material times the practitioner:
 - 2.1 was an Australian legal practitioner within the meaning of section 5(a) of the *Legal Profession Act 2008* (**LP Act**); and
 - 2.2 practised as a director of Lawfirst Pty Ltd trading as Bennett + Co (**Firm**).
3. In around October 2017, the Firm commenced acting for Ms MD and Ms KD (**Client/Clients**) in relation to the affairs of the Clients' father, Mr CD.
4. At all material times, save for in connection with the NPT Application referred to in paragraph 25 below, the practitioner was the principal on all relevant files relating to the Clients.
5. On around 4 December 2017, Mr CD's wife, Mrs AD, applied to the Tribunal for orders appointing a guardian and administrator for Mr CD (**Guardianship Proceedings**).
6. By orders dated 15 December 2017, the Tribunal granted the Firm access to documents filed in the Guardianship Proceedings (including medical evidence) subject to conditions including, relevantly, that without the prior written approval of the Tribunal, the documents and material to which access was granted could be used only for the purposes of either originating or review proceedings in the Tribunal under the *Guardianship and Administration Act 1990* (WA) (**GAA Act**) concerning Mr CD.
7. By further orders dated 17 January 2018, the Tribunal granted the Firm access to further documents including, relevantly, a letter from a medical practitioner. That further order was subject to the same condition referred to in paragraph 6 above (the orders in paragraphs 6 and 7 are, together, referred to below as the **Tribunal Orders**).

Client Affidavit

8. On 29 June 2018, Ms MD affirmed an affidavit (**Client Affidavit**) in support of an application by the Clients in the Supreme Court of Western Australia for pre-action discovery (**Supreme Court proceedings**). The Client Affidavit was filed with the Court.
9. The Client Affidavit was prepared by the Firm and settled by the practitioner.
10. The Client Affidavit was read and relied on by the practitioner, on behalf of the Clients, at the hearing of the application in the Supreme Court proceedings on 18 December 2018.
11. The Client Affidavit referred to the following information (**Protected Information**) which was derived from the documents obtained by the Firm pursuant to the Tribunal Orders (**Tribunal Documents**):
 - 11.1 [Redacted];
 - 11.2 [Redacted];
 - 11.3 [Redacted];
 - 11.4 [Redacted]; and
 - 11.5 [Redacted].
12. Prior to the Client Affidavit being affirmed and filed:
 - 12.1 a senior associate at the Firm with the day to day conduct of the matter queried with the practitioner, in effect, whether the Protected Information could be included in the Client Affidavit, given the terms of the Tribunal Orders;
 - 12.2 the practitioner indicated to the senior associate, in effect, that the Protected Information could be included in the Client Affidavit;
 - 12.3 the practitioner gave that indication because he considered genuinely, but incorrectly, that the Client Affidavit was being used for a purpose permitted by the Tribunal Orders;
 - 12.4 the practitioner had at no time prior to the filing of the Client Affidavit:
 - a) caused any research to be undertaken, in connection with

the query raised by the senior associate;

- b) any reasonable grounds for believing that the Protected Information could be so included; nor
 - c) caused an application to be brought before the Tribunal, for a variation of the Tribunal Orders so as to ensure that the filing of the Client Affidavit was permitted.
13. In the circumstances referred to in paragraph 12.4 above, the practitioner's conduct in causing or permitting the Client Affidavit to be filed in the Supreme Court proceedings was grossly careless.
14. The practitioner's conduct as described in paragraphs 9 - 13 above fell substantially 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 approved by members of the legal profession of good repute and competence.

Letter to Attorney General

15. On 14 February 2019:
- 15.1 the Clients' application for pre-action discovery in the Supreme Court proceedings was granted; and
 - 15.2 the Supreme Court ordered that access to all documents filed in those proceedings was to be restricted to the parties to the proceedings and the judicial officer, unless otherwise ordered by the Court (**restriction order**).
16. Although the Supreme Court did not make specific orders governing the use of the discovered documents, in reasons for decision dated 20 February 2019, the Master noted that the 'obligations of confidentiality which apply whenever discovery is given would apply to this case'.
17. On about 14 June 2019, the practitioner wrote to the Attorney-General for Western Australia, on the instruction of the Clients, requesting his intervention in relation to a charitable trust connected to the Clients' family (**AG Letter**), and caused the AG Letter to be sent to the Attorney-General.
18. The AG Letter was prepared in draft by a senior associate at the Firm who, at that time, had the day-to-day conduct of the matter on behalf of the

Clients, and who provided it to the practitioner to finalise before it was sent.

19. The AG Letter disclosed certain information concerning the mental health of Mr CD (**Health Information**).
20. The Health Information referred to in the AG Letter was derived from documents obtained by way of discovery in the Supreme Court proceedings.
21. No relevant documents obtained by way of discovery had been tendered into evidence in any court or tribunal and accordingly those documents were subject to the implied obligation referred to in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 (**Harman Obligation**).
22. The practitioner breached the Harman Obligation in writing the AG Letter and causing it to be sent.
23. The practitioner's conduct in including or retaining the Health Information in the AG Letter was grossly careless in that the practitioner did not turn his mind to whether the AG Letter contained information derived from documents the subject of the Harman Obligation in circumstances where:
 - 23.1 it involved a similar use of information as had occurred with respect to the Client Affidavit; and
 - 23.2 the Supreme Court had made the comments referred to in paragraph 16 above.
24. The practitioner's conduct as described in paragraphs 16 - 23 above fell substantially 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 approved by members of the legal profession of good repute and competence.

Respondent's Affidavit

25. In August 2019, the Firm on behalf of the Clients filed an application in the Tribunal to vary the Tribunal Orders *nunc pro tunc* (**NPT Application**) to permit the Clients to refer to the contents of the Tribunal Documents (including the Protected Information) in the Client Affidavit.

26. On 21 August 2019, the practitioner swore an affidavit (**Practitioner's Affidavit**) in support of the NPT Application to which the practitioner did not annex the Client Affidavit or disclose the content of the Client Affidavit, for the stated reason that the Client Affidavit was '*subject to a restriction order*' made by the Supreme Court, being the restriction order referred to in paragraph 15.2 above.
27. The Practitioner's Affidavit, read in isolation, did not clearly and fully explain the extent to which:
 - 27.1 the Protected Information had been disclosed in the Client Affidavit; and
 - 27.2 the contents of the Client Affidavit were derived solely from documents made available to the Firm pursuant to the Tribunal Orders, as opposed to being independently known to the Client.
28. The lack of a clear and full explanation in the Practitioner's Affidavit of the matters referred to in paragraph 27 above, unless remedied, had the potential to affect the Tribunal's consideration and determination of the *nunc pro tunc* application, including potentially causing the Tribunal to erroneously conclude that any Protected Information disclosed in the Client Affidavit had been known to the Clients independently of the documents made available to the Firm pursuant to the Tribunal Orders.
29. The shortcomings referred to in paragraph 27 above would have been remedied by tendering the Client Affidavit as evidence to the Tribunal.
30. The practitioner says, and the Applicant neither agrees nor disputes, that at the time he swore the Practitioner's Affidavit:
 - 30.1 he was concerned that annexing the Client Affidavit to his affidavit might have involved a breach of the Tribunal Orders and/or a breach of the restriction order;
 - 30.2 he was concerned that setting out within his affidavit the specific Protected Information referred to in the Client Affidavit might involve a breach of the Tribunal Orders and/or a breach of the restriction order; and
 - 30.3 he believed the other party to the NPT Application was not

subject to the restriction order and would, in any event, inevitably put the Client Affidavit into evidence in the Tribunal.

31. The practitioner's beliefs referred to at paragraphs 30.1 and 30.2 above were incorrect, as:
 - 31.1 the restriction order had been varied by the Supreme Court on 6 August 2019 in a manner which permitted the Client Affidavit to be used for the purposes of the NPT Application; and
 - 31.2 the practitioner was permitted and obliged to inform the Tribunal clearly and fully, to the best of his knowledge, of the extent to which the Protected Information had been used in the preparation of, or disclosed in, the Client Affidavit, in order for the Tribunal to consider whether to vary the Tribunal Orders *nunc pro tunc*.
32. In circumstances where the practitioner swore an affidavit which did not give a clear and full explanation as set out in paragraph 27 above, the practitioner was careless in failing to inform the solicitors and counsel with conduct of the *nunc pro tunc* application on behalf of the Clients that the Practitioner's Affidavit had been sworn on the assumption that he could not annexe the Client Affidavit to the Practitioner's Affidavit and that another party would tender the Client Affidavit to the Tribunal.
33. The practitioner's conduct as set out in paragraph 32 above fell 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.

Factors relevant to penalty

34. The parties agree that the following factors are relevant to the penalty to be imposed in these proceedings.

Ground 1

35. The Tribunal refused the NPT Application on 30 April 2020, and delivered reasons for doing so on that day. The reasons contained comments adverse to the practitioner. On 4 May 2020, the practitioner wrote to the Legal Practitioners Complaints Committee (as the Applicant then was) self-notifying as to those matters, which are the subject of Ground 1 of these proceedings.
36. The Respondent held an honest belief that the use of the Protected

Information in the Client Affidavit was permitted by the Tribunal Orders, notwithstanding the Respondent had no reasonable grounds for that belief.

37. At paragraph 31 of the Practitioner's Affidavit, the practitioner sincerely apologised to the Tribunal, Mrs AD and Mr CD for the misuse of the Protected Information, in the event the Respondent was incorrect about his belief.
38. The misuse of the Protected Information had the potential to undermine public confidence in the maintenance of the confidentiality of documents provided to the Tribunal in guardianship and administration applications.

Ground 2

39. The senior associate who had prepared the draft of the AG Letter for the practitioner to settle inadvertently overlooked that certain of the references in the AG Letter were derived from information contained in discovered documents and that leave was required before reference could be made to the documents in the letter, and because of that oversight did not bring those matters to the practitioner's attention.
40. In August 2019, the practitioner caused an application to be filed in the Supreme Court for an order *nunc pro tunc* permitting the use of the discovered documents for the limited purpose of preparing and sending the AG Letter.
41. On 22 October 2019, the Supreme Court made such an order.
42. The practitioner, and the senior associate who prepared the draft of the AG Letter, swore affidavits in support of the application for a *nunc pro tunc* order in which they conceded that the letter breached the Harman Obligation, and apologised for that breach.
43. The inclusion of the Health Information in the AG Letter had the potential to undermine public confidence that documents provided under compulsion of a court order will only be used for the purposes for which they are provided.

Ground 3

44. The matters referred to in paragraph 30.

45. The other party to the NPT Application had, by reason of their involvement in the Supreme Court proceedings, a copy of the Client Affidavit.
46. The circumstances surrounding the NPT Application meant it was very likely, if not inevitable, that Mrs AD would tender the Client Affidavit to the Tribunal.
47. The Client Affidavit was tendered to the Tribunal by Mrs AD prior to the hearing of the NPT Application, such that for the purposes of determining the NPT Application the Tribunal had a full and clear understanding of the extent to which information derived from documents the subject of the Tribunal Orders had informed the Client Affidavit.

Generally

48. Since the events the subject of these proceedings, the practitioner has taken steps to ensure that the Firm:
- 48.1 no longer accepts instructions to act in guardianship and administration matters in the Tribunal;
- 48.2 has included a seminar on the Harman Obligation in its annual continuing professional development program.
49. The practitioner has the following disciplinary history:

Date	Conduct	Outcome
1993	Unprofessional conduct by: (a) failing to respond adequately to three written requests from the Barrister's Board; (b) providing misleading information in two letters to the Barrister's Board as to the progress of proceedings in the Supreme Court	\$5000 fine

2000	Undue delay in the prosecution of an action in the Supreme Court *Note: Neglect and undue delay was a classification of conduct under the <i>Legal Practitioners Act 1893</i> which no longer exists.	Reprimand
2007	VR 78 of 2007 Unsatisfactory conduct by neglect and delay in progressing client's matter	\$2000 fine \$2077 compensation
2008	VR 33 of 2008 Unsatisfactory conduct by: (a) failing to respond to agent engaged by the Respondent in relation to unpaid agent's costs, between around 31 March 2005 and 30 July 2007; (b) failing to respond to Legal Professional Complaints Committee, between around 8 December 2006 and 26 June 2007.	\$1500 fine \$2500 fine

Date	Conduct	Outcome
2009	VR 167 of 2009 Unsatisfactory professional conduct by: (a) failing to comply with orders of the Supreme Court which caused the client's claim to be dismissed and judgment to be entered against the client in counterclaim; (b) failing to respond to Legal Profession Complaints Committee on 4 occasions between 15 January 2009 and 4 November 2009.	\$4000 fine \$8000 fine