JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	LEGAL PROFESSION ACT 2008 (WA)
CITATION	**:**	LEGAL SERVICES AND COMPLAINTS COMMITTEE and KHOSA [2023] WASAT 90
MEMBER	**:**	JUDGE H JACKSON, DEPUTY PRESIDENT MR D AITKEN, SENIOR MEMBER MR R POVEY, MEMBER
HEARD	**:**	20 – 24 March 2023
DELIVERED	**:**	5 OCTOBER 2023
FILE NO/S	**:**	VR 159 of 2017
BETWEEN	**:**	LEGAL SERVICES AND COMPLAINTS COMMITTEE Applicant AND MANRAJ SINGH KHOSA Respondent

Catchwords:

Vocational regulation – Legal practitioner – Allegations of professional misconduct – Allegation of failure to pay counsel's fees – Allegations of false or misleading representations – Allegation of failure to respond to requests for information and documents – Findings of professional misconduct

Legislation:

Interpretation Act 1984 (WA), s 37(1)(d), s 38

Legal Profession Act 2008 (WA), s102, s 104, s 402, s 403, s 403(1)(a), s 403(1)(b), s 428(1), s 438, s 438(1), s 520, s 520(1), s 520(1)(a), s 520(1)(c), s 520(5), s 531, s 531(2), s 532(3), s 532(3)(a), s 532(3)(b)
Legal Profession Conduct Rules 2010 (WA), r 4(2), r 26, r 50, r 50(3)
Legal Profession Uniform Law Application Act 2022 (WA), s 260(a)
State Administrative Tribunal Act 2004 (WA), s 9, s 32, s 39(1)
State Administrative Tribunal Rules 2004 (WA), r 39B(5)

Result:

The practitioner engaged in professional misconduct.

Category: B

Representation:

Counsel:

Applicant	:	Mr AJ Musikanth SC & Mr C Beetham & Mr FX Hall
Respondent	:	No Appearance

Solicitors:

Applicant	:	Legal Services and Complaints Committee
Respondent	:	No Appearance

Cases referred to in decision(s):

Arevalo v Fallows [1992] WASC 714
Aurora Construction Materials Pty Ltd v Victorian WorkCover Authority [2017] VSC 573
Badran v Public Transport Authority of Western Australia [2017] WASCA 28
BHP Billiton Ltd v Dunning [2013] NSWCA 421
Damberg v Damberg (2001) 52 NSWLR 492
Fidock v Legal Profession Complaints Committee [2013] WASCA 108
Gandini v Legal Profession Complaints Committee [2013] WASCA 168 (S)
Khosa v Legal Profession Complaints Committee [2017] WASCA 192
Kyle v Legal Practitioners' Committee [1999] WASCA 115; (1999) 21 WAR 56
Law Society of New South Wales v Youssef [2018] NSWCATOD 187
Legal Profession Complaints Committee and Chang [2019] WASAT 67
Legal Profession Complaints Committee and Goldsmith [2022] at WASAT 43
Legal Profession Complaints Committee and Goldsmith [2022] WASAT 43 (S)

Legal Profession Complaints Committee and Khosa [2015] WASAT 107
Legal Profession Complaints Committee and Khosa [2015] WASAT 107 (S)
Legal Profession Complaints Committee and Lee-Steere [2010] WASAT 189
Legal Profession Complaints Committee v Lourey [2022] WASCA 114
Legal Services and Complaints Committee and Bostock [2022] WASAT 100
Legal Services and Complaints Committee and Lourey [No 2] [2023] WASAT 77
Re Robb (1996) 134 FLR 294
Re Veron; Ex parte Law Society of New South Wales [1966] 1 NSWR 511
Russo v Legal Services Commissioner [2016] NSWCA 306
Shand v Doyle [1997] ANZ ConvR 134
Taikato v The Queen (1996) 186 CLR 454
Vogt v Legal Practitioners Complaints Committee [2009] WASCA 202
Western Australian Planning Commission v the Board of Valuers [2018] WASCA 145
Westgem Investments Pty Ltd In Its Own Right As Trustee For Hossean Pourzand And Jenny Maria Pourzand Atf The Helen Trust v Commonwealth Bank of Australia Ltd [No 5] [2019] WASC 310
Wilson v McDonald [2009] WASCA 39

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The applicant, by referral under s 428(1) of the *Legal Profession Act 2008* (WA) (**LP Act**), seeks findings of professional misconduct and consequential orders against the respondent (**practitioner**) pursuant to s 438 of the LP Act.

2 The applicant alleges three grounds (**Grounds**) against the practitioner, the first two of which are concerned with the alleged failure to pay counsel's fees and the associated conduct of the practitioner, including allegations that he made false and/or misleading representations, while the third is concerned with the alleged failure of the practitioner to appropriately respond to requests for information and documents made by the applicant as part of its investigations.

3 In each case, the applicant alleges that the practitioner engaged in professional misconduct in three distinct senses.

4 For the reasons that follow, we are satisfied that with one exception, in each case, and in each sense, the Ground is made out and the practitioner is guilty of professional misconduct.

5 We will hear from the parties as to the orders that ought to be made to give effect to these reasons and as to the questions of penalty and costs.

Outline of Factual History and Overview of Allegations

6 The practitioner was, from 1 November 2012 to 30 June 2015, the sole legal practitioner director of an incorporated legal practice (**ILP**) trading as Angove Law (**Angove**).[1]

7 From August 2013 until March 2014, the practitioner acted for Rosebridge Nominees Pty Ltd (**client**) in Supreme Court proceedings CIV 1235 of 1999 (**Proceedings**).[2]

---

[1] Minute of Proposed Substituted Annexure A dated 30 January 2023 (**Substituted Annexure A**), para 2.1; Response to Applicant's Substituted Annexure A dated 11 January 2018 (*sic* – 2019) (**Response**). By Order 1 made 27 February 2023, the applicant was given leave to rely on Substituted Annexure A and service, by Order 2, of it was dispensed with. Substituted Annexure A makes some changes to the Grounds. These are shown marked-up in para 133 below.
[2] Substituted Annexure A, para 3; Response, para 3.

8 In or about 27 August 2013, Angove entered into a costs agreement with the client (**Costs Agreement**) as part of which a fee estimate was given that the overall legal costs, including counsel's fees as disbursements payable by the client under the Costs Agreement, was likely to be in the order $125,000.[3]

9 On the same day that the Costs Agreement was entered into, the client deposited $7,500 into Angove's trust account.

10 In early October 2013, the practitioner briefed Senior Counsel to appear on behalf of the client in the Proceedings and the practitioner asked the client to deposit $250,000 into Angove's trust account.[4]

11 On around 10 October 2013, the client deposited $75,000 into Angove's trust account.[5] A few days later, on 14 October 2013, the client authorised the withdrawal and disbursement of monies held in Angove's trust account for the payment of any invoices rendered by Angove or counsel.[6]

12 Mr B was engaged by Angove to act as junior counsel for the client in the Proceedings pursuant to an offer of retainer dated 18 October 2013. The practitioner signed that retainer on 14 November 2013 in his capacity as Angove's sole legal practitioner (**Retainer**).[7]

13 The Retainer provided, as is commonly the case, that Angove was to be liable for the payment of all Mr B's invoices 'even if' Angove had 'not received funds from [the] client to pay the bill'.[8]

14 On 18 October 2013, Mr B also provided Angove with his costs disclosure, in which he estimated that his fees in the proceeding would be between approximately $135,000 and $180,000.[9]

15 Mr B issued several invoices for the work carried out:

(a) on 30 October 2013 he issued an invoice for $24,472.80 (**October Invoice**);[10]

---

[3] Substituted Annexure A, para 4; Response, para 4.
[4] Substituted Annexure A, paras 5 – 6; Response, paras 5 – 6.
[5] Substituted Annexure A, para 7; Response, para 7.
[6] Substituted Annexure A, para 8; Response, para 8.
[7] Substituted Annexure A, para 10; Response, para 10.
[8] Substituted Annexure A, para 11; Response, para 11.
[9] Substituted Annexure A, para 13; Response, para 13.
[10] Substituted Annexure A, para 19; Response, para 19. A copy of the October Invoice is at Legal Profession Complaints Committee Book of Documents, dated 16 July 2018 (**Exhibit 1**) pages 505 – 509.

(b) on 2 December 2013 he issued an invoice in the amount of $58,018.95 (**November Invoice**);[11]

(c) on 24 December 2013 he issued an invoice in the amount of $34,882.65 (**December Invoice**);[12]

(d) on 31 January 2014 he issued an invoice in the amount of $48,648.60 (**January Invoice**);[13]

(e) on 28 February 2014 he issued an invoice in the amount of $6,598.35 (**February Invoice**).[14]

16 At no time were any additional funds paid by the client into Angove's trust account.

17 Two payments were made by Angove to Mr B in part payment of his invoices. On around 29 November 2013 Angove paid Mr B $7,000[15] and on around 18 December 2013 it paid Mr B $5,000.[16]

18 On each date the entirety of the Angove invoice was paid.[17] Indeed, at all times since the deposit into the trust account on 10 October 2013 the practitioner caused each Angove invoice to be paid in full when due.[18]

19 Further, on 29 November 2013, the practitioner emailed Mr B in relation to the part payment of $7,000. The email said:

> I confirm that a part payment of $7,000 was made via EFT on your invoice. I had reached the payment limit for the day.
>
> I will attend to the outstanding balance next week.[19]

---

[11] Substituted Annexure A, para 26; Response, para 26. A copy of the November Invoice is at Exhibit 1, pages 499 – 504.
[12] Substituted Annexure A, para 28; Response, para 28. A copy of the December Invoice is at Exhibit 1, pages 519 – 524.
[13] Substituted Annexure A, para 33; Response, para 33. A copy of the January Invoice is at Exhibit 1, pages 514 – 518.
[14] Substituted Annexure A, para 35; Response, para 35. A copy of the February Invoice is at Exhibit 1, pages 510 – 513.
[15] Substituted Annexure A, para 22; Response, para 22.
[16] Substituted Annexure A, para 27; Response, para 27.
[17] Substituted Annexure A, paras 22.4 and 27; Response, paras 22 and 27.
[18] Substituted Annexure A, para 29; Response, para 29.
[19] Substituted Annexure A, para 23; Response, para 23.

20 The balance of Mr B's invoices, including those invoices sent after 29 November 2013, were never paid.

21 Ground 1 is, broadly framed, that the practitioner failed to pay Mr B's invoices in circumstances which included the preferential payment of Angove's invoices ahead of those of Mr B and/or that the email of 29 November 2013 made a representation that was false or misleading (or both), given that at the time it was sent there were insufficient funds to pay the balance of Mr B's invoice.

22 Mr B terminated the Retainer on or around 20 March 2014.[20]

23 On 28 April 2014, Mr B wrote to the practitioner alleging that his outstanding fees at that stage were $160,621.35.[21] He also took further steps in an effort to secure payment of his outstanding fees, including obtaining a certificate of taxation from the Supreme Court.[22]

24 On 4 June 2015, Mr B's solicitors (**Nova Legal**) demanded payment from Angove for the outstanding fees of $137,815, which was the taxed amount minus the sum of $12,000 which had previously been paid, plus interest.[23]

25 On 15 June 2015, Nova Legal demanded that the practitioner provide a payment plan in respect of the outstanding fees by no later than 17 June 2015.[24]

26 On 16 June 2015, the practitioner called the Legal Practice Board of Western Australia (**LPBWA**) and made an appointment to speak to Ms Fulham, the LPBWA's Executive Director.[25]

27 On 17 June 2015, the practitioner, his wife, Ms Fulham and Mr Mylotte (also of the LPBWA) all attended the meeting arranged on the previous day.[26] On that day, the practitioner also lodged an application with the Australian Securities and Investment Commission (**ASIC**) to incorporate a new company – Law on Newcastle Pty Ltd (**LoN**).[27]

---

[20] Substituted Annexure A, para 37; Response, para 37.
[21] Substituted Annexure A, para 39; Response, para 39.
[22] Exhibit 1, page 179.
[23] Exhibit 1, page 216.
[24] Substituted Annexure A, para 66; Response, para 67. Exhibit 1, page 223.
[25] Witness Statement of Elizabeth Rose Alison Fulham dated 13 March 2020 (**Exhibit 8**), para 5.
[26] Exhibit 8, para 4; Witness Statement of Tony Mylotte dated 10 March 2020 (**Exhibit 9**), para 6.
[27] Exhibit 1, pages 442 – 443.

28 On 19 June 2015, the practitioner opened a bank account with ANZ Bank under the name 'Law on Newcastle Pty Ltd Law Practice Trust Account'.[28]

29 On 23 June 2015, the practitioner filed with the LPBWA a Form 7 *Notice of a Corporation's Intention to Provide Legal Services* (**Form 7**) by which notice was given that LoN would provide legal services.[29]

30 On 9 July 2015, the practitioner filed with the LPBWA a Form 9 *Notice of Cessation of Legal* Practice *by a Former Incorporated Legal Practice* (**Form 9**) by which notice was given that Angove would cease providing legal services.[30]

31 In each of the Form 7 and the Form 9, the practitioner answered questions to the effect that Angove's practice was ***not*** being taken over by LoN.

32 Ground 2 is, broadly framed, that the practitioner attempted to avoid Angove's liabilities to Mr B by 'deriving' the new practice of LoN from the existing practice of Angove and that, as part of that attempt, he made false and/or misleading representations in both the meeting on 17 June 2015 and in the Form 7 and Form 9 as to Angove's solvency and as to the reality that Angove's practice was taken over by the new legal practice of LoN.

33 Mr B complained to the applicant about the practitioner's failure to pay his fees. As part of its investigation into that complaint, and in relation to its investigation into matters which subsequently arose, the applicant requested that the practitioner provide information and documents. It also issued summonses to the same effect.[31]

34 Ground 3 is that the practitioner failed, in relation to five distinct requests and summonses and without reasonable excuse, to respond within an appropriate time period to those requests and summonses.

Procedural history

35 The applicant's referral of this matter was lodged with the Tribunal in August 2017.

[28] Exhibit 1, page 569.
[29] Exhibit 1, pages 567 – 569.
[30] Exhibit 1, pages 570 – 585.
[31] Exhibit 1, pages 245 – 246.

36 In November 2019, the Tribunal provisionally listed the matter for final hearing of three days commencing on 25 March 2020. By orders made 25 February 2020 those hearing dates were confirmed.

37 The hearing dates were vacated on 17 March 2020, a mere week prior to the listed final hearing, following the filing of documents by the practitioner just prior to that date, which appear to have taken the applicant by surprise.

38 Following a lengthy series of interlocutory skirmishes regarding that late-filed material, the matter was, on 5 July 2022, relisted for a final hearing for a duration of five days from 20 March 2023.

39 There were various other events that occurred between July 2022 and February 2023, which it is unnecessary to relate.

40 On Thursday 23 February 2023, ahead of a directions hearing listed for Monday 27 February 2023, the practitioner advised by email to the applicant that he would seek orders at the forthcoming directions hearing vacating the dates for the final hearing. He attached a draft affidavit setting out his 'personal circumstances' which were said to have 'changed' and which would form the factual basis for the forthcoming application.

41 The applicant indicated that such a course would be opposed, following which the practitioner filed with the Tribunal (early on the morning of Monday 27 February 2023) a minute of proposed orders and an affidavit sworn Sunday 26 February 2023 which set out in some detail his responsibilities as a carer for his parents-in-law, his obligations to study pursuant to his mutual obligations as a recipient of welfare payments and a description of his injuries received in a car accident in 2020, which were said to make it impossible for him to prepare for and attend the hearing on the listed dates.

42 By orders made 27 February 2023 President Pritchard, amongst other things, provided the practitioner with the opportunity to file and serve any further affidavit on which he wished to rely in support of his application to adjourn.

43 The application to adjourn was heard on Wednesday 8 March 2023. The President dismissed the application and gave extensive *ex tempore* reasons.

44 In light of what happened almost immediately after that date, it is necessary to note that in her Honour's reasons, the President addressed in some detail the question of the practitioner's medical condition and its impact on his ability to prepare for and attend at the hearing.

45 In particular, her Honour described as the third reason relied upon by the practitioner for the application to adjourn that he was 'involved in a car accident in 2020 and that, as a result, has been unable to move with speed and unable to work continuously since that time'.[32]

46 In dismissing this aspect of the application, her Honour said that the 'difficulty' with the evidence relied upon by the practitioner was that at that stage the matter had been listed for a final hearing since July 2022 but in the course of his exchange with her Honour, the practitioner had acknowledged that he had, in effect, left the bulk of the preparation for the final hearing to the months of January and February 2023. Her Honour described that as, in effect, a conscious decision not to prepare ahead of time in circumstances where the practitioner had effectively assumed that nothing would change so as to impede that preparation, notwithstanding that he was aware of what he said were his physical limitations to prepare.

47 On Thursday 9 March 2023, the practitioner obtained a medical certificate under the letterhead of a suburban medical practice in the following terms:

> ***Medical Certificate***
>
> 09/03/2023
>
> THIS IS TO CERTIFY THAT
>
> Mr Manraj Khosa has a medical condition and will be unfit for work from 09/3/2023 to 24/3/2023 inclusive.
>
> Dr [redacted]

48 That is, by a certificate obtained the day after the practitioner was refused his application to vacate the hearing dates on grounds that included his medical state, he obtained a medical certificate that said he was unfit for work from that date until the date listed as the final date for hearing of the matter.

[32] ts 32, 8 March 2023.

49 Notwithstanding the date of the certificate, it was not filed with the Tribunal until the following Monday, 13 March 2023 at 3.58 pm, when the practitioner forwarded it to the President's Associate under cover of an email that said:

> Dear Associate,
>
> Please find attached a medical certificate from my doctor for the period 09/3/2023 to 24/3/2023 inclusive due to my medical conditions.
>
> Thank you.
>
> Best regards
>
> Manraj Khosa.

50 As the presiding member of the panel hearing the matter, Judge Jackson was forwarded the email. By email from his Associate on Tuesday 14 March 2023, the practitioner was advised that the panel was unclear what it was that the practitioner was asking and that, should he wish to seek an adjournment of the final hearing (still listed to commence on the following Monday, 20 March 2023) he should 'make such an application promptly and it should be supported by suitable material in addition to the medical certificate…'.

51 On Wednesday 15 March 2023, the practitioner's wife (Ms Ruba), emailed the Associate in terms which, amongst other things, advised that the practitioner was too unwell to do anything necessary for the making of an application to vacate and that her email was 'the extent of any formal application to adjourn/vacate any proceedings, that can be provided to the Tribunal …'

52 By return email from the Associate, Ms Ruba was advised that her email had been taken as an application to vacate the final hearing dates and that, on the basis of her email, the Tribunal understood that no further information or material would be provided in support of that application. The Associate's email also advised that the application to vacate was listed to be heard on Thursday, 16 March 2023 at 3.30 pm and orders to that effect were made.

53 The application to vacate was listed for that time on the basis that it had previously been listed by President Pritchard to deal with an application by the applicant to exclude parts of Ms Ruba's witness statement. The parties were, therefore, assumed to be available to attend the application to vacate at that time.

54 The Associate's email also advised that the author of the medical certificate was expected to attend the directions hearing to allow the applicant, and perhaps the Tribunal, to ask the doctor questions. However, given the short notice, the email indicated that if the doctor was unavailable at that time, then his Honour would entertain an application by the respondent to have the application heard at any other time between 1.00 pm and 4.00 pm on Friday, 17 March 2023.

55 By email of 9.38 am on 16 March 2023, Ms Ruba stated that the doctor's 'online booking application *(sic)* shows that he has no available appointments today. This would suggest that he will be unavailable to attend the Tribunal this afternoon.' She said that she would advise 'once [she was] able to confirm [the doctor's] availability'.

56 Ms Ruba did not say in that email that she would not attend the hearing at 3.30 pm on 16 March 2023 but that is what happened. Given that there was no appearance by or on behalf of the practitioner, orders were made: (1) adjourning the application to vacate the hearing dates to 1.00 pm on 17 March 2023 (the following day); (2) giving the practitioner leave to seek an alternative time for the listed hearing at any time between 1.00 pm and 4.00 pm on 17 March 2023[33]; and (3) that the application to vacate would be dismissed if, without reasonable excuse, there was no appearance by the practitioner and/or his representative, together with the doctor.[34]

57 Those orders were published in the ordinary way. In addition, the Associate emailed Ms Ruba with a copy of the orders at 4.40 pm on 16 March 2023.

58 At 4.50 am (that is not a typographical error) on 17 March 2023, Ms Ruba emailed the Associate and raised three matters.

59 First, she advised that the Tribunal had previously been advised that listing a hearing on 17 March was impossible due to her father's cardiologist's appointment.[35]

60 Secondly, she advised that: (1) she had been able to speak to the doctor who had authored the medical certificate; (2) she had made an appointment to meet with the doctor on Monday, 20 March 2023 at

[33] Save that any application must have been made by 11.00 am on that day.
[34] The order explicitly allowed such appearance to occur in person or by Microsoft Teams.
[35] The transcript of the hearing before her Honour on 8 March 2023 (at page 37) shows that the practitioner advised that the practitioner was to take his father to a cardiologist's appointment at 2.30 pm on Friday, 17 March 2023.

12.30 pm; and (3) at that appointment she would show the doctor the Tribunal's orders and ascertain from him his availability to attend at the Tribunal.

61 Thirdly, she raised her concern that the Tribunal had made orders without her involvement which, she said, 'worries her'.

62 Nonetheless, Ms Ruba attended the hearing at 1.00 pm on 17 March 2023 and pursued the application to vacate based on the medical certificate.

63 Judge Jackson dismissed the application giving *ex tempore* reasons which focused on two matters:

1. That the effects of the car accident suffered by the respondent in 2020 had been a matter raised before President Pritchard on 8 March 2023 in support of the unsuccessful application to vacate on that date.

2. That the medical certificate was so devoid of detail as to render it of very little utility in an application to vacate a hearing in circumstances where an application to adjourn had been refused on the date immediately prior to that of the certificate.

64 In particular, his Honour's reasons noted that the medical certificate does not:

(a) indicate that its author knows the practitioner well or regularly treats him;

(b) identify the medical condition said to be suffered by the practitioner;

(c) explain the steps, if any, the doctor had undertaken to ascertain what it is that the practitioner is suffering from;

(d) explain what symptoms the practitioner was experiencing;

(e) state that the doctor is aware that the practitioner is party to legal proceedings, had previously and unsuccessfully applied to adjourn the hearing or that he would rely on the medical certificate in support of a further application to avoid attending the proceedings;

(f) state what it is about the relevant medical condition that makes the practitioner unfit for work; or

(g) state that the practitioner is, in fact, unfit to attend the hearing. Rather, it says only that he is unfit for work.

65 Judge Jackson was also critical of the steps taken to put the author of the medical certificate before the Tribunal in circumstances where:

(a) the President had dismissed a previous application on 8 March 2023;

(b) the medical certificate was dated (and it was assumed had been provided on) 9 March 2023 but had not been provided to the Tribunal until 13 March 2023; and

(c) the hearing was listed to commence on 20 March 2023 in circumstances where that listing date had been in place since July 2022.

66 In his reasons, Judge Jackson stated that he had *not* reached a conclusion as to whether or not the practitioner was medically incapable of attending the hearing but, rather, his refusal of the application was because the medical certificate was insufficient in the circumstances to satisfy him that the practitioner was, in fact, medically incapable of attending the principal hearing.

67 At the conclusion of the hearing on 17 March 2023, Judge Jackson advised Ms Ruba that she should advise the practitioner that the hearing would commence as listed at 9.30 am on Monday, 20 March 2023.

68 At 1.45 am (again, that is not a typographical error) on Monday, 20 March 2023, Ms Ruba sent an email to the Associate (copied to the applicant) attaching three documents – the original medical certificate, an application to dismiss the proceedings and a further document said to be a letter from the same doctor, which was also dated 9 March 2023.

69 The letter states as follows:

> 09/03/2023
>
> **To Whom It May Concern**
>
> Mr Manera *(sic)* Khosa is registered under my care. I have known this patient for about 9 years. He has a number of long term medical

conditions. He has also has *(sic)* a number of social stresses at present. These include:

1. Uncontrolled hypertension – this is currently under management and review. He also has Non-Insulin Dependent Diabetes and is under specialist care for this.

2. Neck pain and back pain following Road Traffic Accident. He was seen by Pain Management Specialist in Dec 2022 and is currently undergoing treatment for his chronic pain.

3. Non-insulin Dependent Diabetes which is under specialist care.

I am concerned that given the above physical and mental stresses, a Disciplinary Hearing may cause a deterioration in his physical state. I would be grateful if the above could be taken into account and his hearing deferred for 4 weeks.

Yours faithfully

Dr [redacted] …

70 The date of the document appeared incorrect in that, had it been created on 9 March 2023, it might be expected to have been filed with the Tribunal previously. We were also concerned with the circumstances in which it was filed – late on a Sunday night/very early Monday morning, after Ms Ruba had previously advised that she was unable to speak to the doctor until Monday lunchtime.

71 Ms Ruba appeared by telephone at the commencement of the hearing at 9.30 am on 20 March 2023 when we indicated to her that we were concerned that the doctor's letter may not be legitimate.

72 As a result of those concerns, Ms Ruba advised that the letter had been provided to her by email from the doctor's clinic. At 10.02 am the clinic emailed the Associate with a copy of the letter which in our view was sufficient, despite the circumstances in which it was produced, to satisfy us that the letter was written by the doctor.

73 In any event, it was unnecessary to deal with that issue or, indeed, rule on the application to vacate the hearing on Monday, 20 March 2023 because, in a verbal exchange with us soon after the hearing commenced, Ms Ruba said that the practitioner was, at that time, being seen as a patient at Fiona Stanley Hospital.

74 On that basis, the Tribunal adjourned the hearing to 9.30 am on the following day (Tuesday 21 March 2023) and gave the practitioner leave

to: (1) file and serve any material associated with or relating to his admission at Fiona Stanley Hospital by 5.00 pm on 20 March 2023; and (2) make a further application to adjourn or vacate the hearing on 21 March 2023 but 'only on the basis of any material filed and served by 5.00 pm on 20 March 2023'.

75 However, before making those orders we heard, and dismissed as without merit, an additional application by Ms Ruba to dismiss the proceedings.

76 That application was made by written form attached to Ms Ruba's email of 1.45 am on 20 March 2023. It sought dismissal of the proceedings on the basis that the proceedings themselves were in breach of s 9 of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**). Specifically, the application was made on the basis that the proceedings 'are not speedy', 'are formal', and 'are technical'.

77 Ms Ruba made further oral submissions in support of that application. Specifically, she pointed to the fact that the proceedings were by that stage, in her view, nine years old.[36] She said that the proceedings had, over time, become increasingly formal and technical and pointed in these regards to the arrangements made for the uplifting of an 'Almanac' and for forensic examination of it by experts in the United States.

78 As indicated above, we dismissed that application as being without merit. The *ex tempore* reasons given acknowledged that the proceedings had been on foot for a period which could reasonably be described as too long and that there were formal and legally technical aspects to the case as it then was.

79 However, the reasons explained, none of those matters were reasons that warrant the dismissal of the proceedings. Rather, in our view the extensive delay provided a proper basis for the final hearing of the proceedings to proceed.

80 In any event, those reasons explained, s 9 of the SAT Act sets out the objectives of the Tribunal. A failure to meet those objectives, unless it is due to a failure by the applicant to prosecute its case (which is not the case here), ought not provide a basis on which the proceedings may be dismissed. That is particularly so in circumstances

[36] Ms Ruba, in calculating the nine years, had regard to previous disciplinary proceedings brought by the applicant against the practitioner (VR 34 of 2015), which were the subject of decisions by the Tribunal [2015] WASAT 107 and, later, the Court of Appeal: [2017] WASCA 192.

where the proceedings concern serious allegations of misconduct against a professional.

81 Returning to the practitioner's application to vacate the substantive hearing, Ms Ruba provided the Tribunal, by two emails sent either side of 5 pm on 20 March 2023, two further applications to vacate – one on medical grounds and the second on the ground that the practitioner was unable to pay the fees of his expert – Mr Speckin.

82 In support of the application to vacate on medical grounds, in addition to the original medical certificate and the doctor's letter, was a single page document headed, 'Fiona Stanley Hospital Emergency Medicine Summary' (**Summary**).

83 On its face, the Summary appears to be a document created by that Hospital and is in the form of a letter to the general practice clinic at which the doctor, who authored the medical certificate of 9 March 2023 and the subsequent letter, practices.

84 The Summary states that the practitioner had presented to the Fiona Stanley Hospital Emergency Department at 5.24 am on Monday, 20 March 2023 with, amongst other things, a headache described as '4/10' (which we understand to be an indication of the level of pain), an episode of blurred vision and pain 'over paraspinal muscles', all of which were said to have started 'simultaneously on Saturday'. The notes of the history taken includes reference to additional stressors, such as the ill-health of his parents-in-law, that he had been preparing for the hearing and that his general practitioner had given a medical certificate to the Tribunal which was 'denied'.

85 The Summary lists his prior medical history as Type 2 Diabetes, hypertension and the effects of a motor vehicle accident in 2020. It describes both the physical examinations and investigations undertaken of the practitioner, including a CT brain scan and an ECG. Both the examination and investigation were described in terms that we understand as normal. The 'principal diagnosis' given is 'Neurological – + Headache – Headache'.

86 However, neither Ms Ruba nor any one else on behalf of the practitioner, or the practitioner himself, attended at the hearing to prosecute those applications.

87 Rather, at about 9.00 am (i.e. 30 minutes prior to the scheduled commencement of the hearing), a letter of several pages' length, and

purportedly sent/signed by both Ms Ruba and the practitioner, was emailed to the Associates of Judge Jackson and the President, which detailed several complaints regarding the current proceedings and its handling by both the applicant and the Tribunal.

88 Prior to the commencement of the hearing we had, therefore, only time to briefly scan the document but noted that at both its commencement and its conclusion it indicated that neither Ms Ruba nor the practitioner would participate any further in the proceedings.

89 Immediately prior to commencing the hearing, Judge Jackson's Associate tried to make contact with Ms Ruba on the phone number that had been previously used to contact her and by which she attended the hearing on both 17 and 20 March 2023. Ms Ruba failed to answer that call.

90 The hearing commenced at 9.30 am. The practitioner was not in attendance and neither was anyone else on his behalf.

91 Immediately after the commencement of the hearing, and before anything substantive was said by the applicant's counsel, two further unsuccessful attempts to call Ms Ruba were made by the Associate.

92 The failure to answer the phone was, in our view, consistent with the stated intention of, apparently, both Ms Ruba and the practitioner to not attend the hearing. We therefore determined to proceed with the hearing notwithstanding the absence of the practitioner and anyone on his behalf.

93 However, before proceeding to the applicant's case, we determined both applications to vacate the hearing which had been filed at about 5 pm on 20 March 2023.

94 The first application addressed was that made on medical grounds. As noted above, the application was based on the medical certificate, the doctor's letter and the Summary.

95 Again, we gave *ex tempore* reasons which, given the history as described above, focused on the Summary. The reasons included that the Summary indicated that both a physical examination and other investigations were carried out on the practitioner with no abnormality identified and that it gave 'headache' as the principal diagnosis of the practitioner's ailment.

96 Our reasons also included that the Summary gave as the practitioner's 'past medical history' that he suffers from Type 2 Diabetes, hypertension and the results of a motor vehicle accident in 2020, each of which had been addressed in previous reasons given refusing applications to vacate.

97 But, in any event, we explained, that history is not, *of itself* such as to warrant the vacation of the hearing. The motor vehicle accident injuries had been addressed by the President on 8 March 2023 and high blood pressure and Type 2 Diabetes are, as noted by the doctor in his letter of 9 March 2023, matters which are being addressed by specialists. In the absence of further information explaining why those conditions, in isolation or together, were such as to make the practitioner's preparation for, and attendance at, the hearing medically dangerous or even difficult, the bare statement that the practitioner suffers from those conditions is insufficient to warrant further adjournment of the hearing.

98 We also gave *ex tempore* reasons for dismissing the practitioner's second application, which was made on the basis that the practitioner is unable to pay the fees of his expert.

99 Whether or not a party calls and relies upon expert evidence is a matter for them, as is any associated payment of fees.

100 In any event, a bald assertion to the effect that the practitioner lacks the funds to pay for his expert, in an application filed on what should have been the second day of a hearing and in circumstances where the hearing has been listed for approximately eight months is not a matter sufficient to warrant vacation of those hearing dates.

101 There is a further matter which, had Ms Ruba sought to attend the substantive hearing of the matter, would have required attention. That is her ability to appear as the practitioner's agent, given that we understand that she is not a legal practitioner.

102 Section 39(1) of the SAT Act imposes limits on the ability of non-legal practitioners to appear for a party before the Tribunal but makes provision for exceptions in paragraphs (a) – (f).

103 At the brief hearing on 20 March 2023, we indicated to Ms Ruba that s 39(1)(e) *might* provide her with an opportunity to appear, but we expressed concern with the proposition that Ms Ruba might continue to act as the practitioner's agent in circumstances where his case relied

upon her evidence. Indeed, her evidence was heavily relied upon by the practitioner in his Response to Ground 2, and particularly what was said at the meeting with the LPBWA on 17 June 2015.

104 Given the non-attendance by Ms Ruba at the hearing on 21 March 2023, it was not necessary to determine that matter.

105 Rather, having given our reasons for dismissing the final two applications to vacate, the applicant opened its case, tendered its four bundles of documents (Exhibits 1 – 4), as well as the affidavits of Ms Plenderleith and Mr Hall (x2) (Exhibits 5 – 7) and called three witnesses, Ms Fulham, Mr Mylotte and Mr B. Each of them adopted as their evidence-in-chief written witness statements that had been filed with the Tribunal in 2020 (Exhibits 8 – 10). They were also each asked questions of clarification by us.

106 At the conclusion of the applicant's case we adjourned the hearing to the following day, being 22 March 2023.

107 At the scheduled commencement of the hearing of 9.30 am on 22 March 2023, there was again no appearance by or on behalf of the practitioner.

108 The Associate again tried to telephone both Ms Ruba and the practitioner before the substantive commencement of the day's hearing. Again, on both occasions, the call went unanswered.

109 As a result, at the time at which the practitioner would have been invited to open his case, he was not present to do so, either in person or by a representative.

110 Accordingly, no witnesses were called on behalf of the practitioner to adopt their witness statements (or to give *viva voce* evidence) and be cross-examined. Neither did the practitioner himself give any evidence. Likewise, there was no tender of any documents in support of the practitioner's case, whether those contained in his various bundles or otherwise. Equally, no submissions were made by or on behalf of the practitioner.

111 Again, such an approach by the practitioner is consistent with what we understand to be his position as communicated by the letter received by the Associate at 8.58 am on 21 March 2023.

112 The Tribunal is bound to afford natural justice to the practitioner, as it is to all parties in proceedings before it.[37]

113 In the circumstances, we are satisfied that that required us to provide the practitioner with an opportunity to understand the allegations against him and to be given an opportunity to prepare for and attend a hearing where he can call evidence and make submissions in answer to those allegations.[38] He has been given that opportunity.

114 In our view, the practitioner's right to natural justice does not oblige us to have regard to material filed by or on his behalf ahead of the hearing, but which is not tendered or otherwise put into evidence at the hearing.

115 Indeed, to do so would be to deny natural justice to the applicant in that such a course would be to deny the applicant the opportunity to test the veracity of that material through cross-examination.

116 The most obvious example concerns what was said at the meeting with Ms Fulham and Mr Mylotte at the LPBWA's offices on 17 June 2015. It is the practitioner's case that Ms Ruba took contemporaneous notes of that meeting in an 'Almanac'.

117 The Almanac was the subject of previous orders that allowed the applicant to uplift it and have it tested. Expert evidence was filed on behalf of each party that went to the issue of the date on which the writing in the Almanac was created.

118 But Ms Ruba did not attend to give evidence. She has not, therefore, adopted her witness statement as her evidence-in-chief. She has also, critically, not made herself available for cross-examination.

119 In those circumstances we are of the view that it would be grossly unfair to the applicant for us to have regard to her witness statement.

120 Equally, in the absence of any evidence from Ms Ruba, the Almanac is not before us as evidence and neither is any evidence of the circumstances in which it was produced – i.e. whether it contains contemporaneous notes of the meeting on 17 June 2015.

---

[37] s 32(1) and (6), SAT Act.
[38] ***Western Australian Planning Commission v the Board of Valuers*** [2018] WASCA 145 at [111] – [120], esp [115].

121 As a result, the opinion evidence of the experts engaged on behalf of each of the parties as to when the writing contained in the Almanac was written is irrelevant.

122 That is a remarkable result given the time and effort, and resulting delays to the proceeding, that has gone into the production of the written expert reports, including the joint statement dated 7 April 2022 produced by the two opposing experts following their conferral (**Joint Statement**).

123 But that is but one result of the practitioner's decision not to participate in the hearing.

124 Order 39B(5) of the *State Administrative Tribunal Rules 2004* (**SAT Rules**) provides that where a joint statement is produced following a conference of experts, the Tribunal will, unless it orders otherwise, 'admit the joint statement filed by the experts into evidence at the hearing of the proceeding'.

125 Given our view that, in the absence of any evidence from Ms Ruba, the joint statement of the experts is irrelevant, we made an order on 22 March 2023 to the effect that the Joint Statement will ***not*** be admitted into evidence.

126 On 22 March 2023, we also made orders that: (1) we would not have regard to any material other than the applicant’s Substituted Annexure A, evidence tendered on behalf of the applicant, the *viva voce* evidence given by the witnesses called by the applicant, the applicant's written submissions and the practitioner's Response;[39] and (2) that the hearing was adjourned to Friday 24 March 2023 for closing submissions.

127 In our view, the order limiting the material to which we would have regard necessarily follows as a result of the practitioner's decision to refuse to participate in the proceedings – there is nothing before us that has been put into evidence by or on behalf of the practitioner.

[39] The most recent of the practitioner's responses was filed on 20 December 2019 – 'Response to Applicant's Substituted Annexure A dated 11 January 2018 (*sic* 2019)'. It responded to the applicant's 'Substituted Annexure A dated 11 January 2019'. The differences between the 11 January 2019 Annexure A and that of 30 January 2023 are identified by marked up text which is replicated by us where we have quoted relevant passages.

128 The sole exception is the Response, which is not, in our view, evidence but, rather, is somewhat analogous to a pleading in curial proceedings.

129 The practitioner's Response provides a useful framework within which the applicant's case might be tested. It also contains very many admissions made by the practitioner.

130 We are satisfied, and we find, that there is nothing in the material before us that gives us cause to doubt the correctness of the facts admitted by the practitioner. In that regard we rely on the fact that the practitioner is a legal practitioner. We are also satisfied, and we find, that where there are contemporaneous documents, the admissions are consistent with those documents. Accordingly, we are satisfied that we are entitled to act on the admissions contained in the Response.[40]

131 The orders made on 22 March 2023 also, in our view, gave the practitioner notice that the hearing had proceeded in his absence, that we had determined not to consider any of the material which had been filed by him or on his behalf save for the Response, that the applicant's case had closed and, that, if he wished to participate further in the hearing, he would be entitled to make closing submissions when we recommenced on Friday 24 March 2023.

132 In the event, the practitioner failed to attend at the adjourned hearing on 24 March 2023, either in person or through a representative.

The Grounds

133 As noted above, by Orders made 27 February 2023 the applicant was granted leave to rely on Substituted Annexure A, which sets out three Grounds alleged against the practitioner.

Ground 1

> That the practitioner MANRAJ SINGH KHOSA (the ***practitioner***) between on or about 18 October 2013 and on or about 31 March 2014 in the course of acting for Rosebridge Nominees Pty Ltd (the ***client***) in the matter of *Rosebridge Nominees Pty Ltd v Commonwealth Bank of Australia, Corrs Chambers Westgarth & WFB Pty Ltd (CIV 1235 of 1999)* (the ***Proceedings***) engaged in professional misconduct, within the meaning of sections 403 and 438 of the *Legal Profession Act 2008*

[40] ***Damberg v Damberg*** (2001) 52 NSWLR 492 at [154] and [160]; ***Westgem Investments Pty Ltd In Its Own Right As Trustee For Hossean Pourzand And Jenny Maria Pourzand Atf The Helen Trust v Commonwealth Bank of Australia Ltd [No 5]*** [2019] WASC 310 at [116].

(WA) (the ***Act***), in that his conduct fell short, substantially or consistently, or both, , *[sic]* of the standard of professional conduct observed by members of the legal profession of good repute and competence, further or alternatively, would justify a finding that he is not a fit and proper person to engage in legal practice, further or alternatively, would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, in circumstances where:

a) at all material times the practitioner was aware the client was having difficulty funding the Proceedings and on or around ~~9~~10 October 2013 had deposited into trust only $75,000 (the ***client funds***) of the $250,000 requested by the practitioner on account of legal fees and disbursements for the Proceedings;

b) on 18 October 2013 he engaged Mr B[ ] to act as junior counsel for the client in the Proceedings and signed a retainer agreement with Mr B[ ] in his capacity as the sole legal practitioner director of Angove Law Pty Ltd (***Angove Law***) on 14 November 2013 (the ***Retainer***) in which he agreed, pursuant to the Retainer, that Angove Law would be liable for the payment of Mr B[ ]'s fees even if Angove Law did not receive funds from the client to pay Mr B[ ]'s fees;

c) on 18 October 2013 Mr B[ ] provided costs disclosure with a costs estimate of between $135,000 and $180,000 for his fees in the Proceedings;

d) at all material times neither Angove Law or the practitioner personally had the capacity to pay Mr B[ ]'s fees in excess of the client funds if the client did not make payment of those fees to Angove Law;

in that the practitioner:

e) failed to pay 5 invoices issued by Mr B[ ] between on or around 30 October 2013 (the ***October invoice***) and on or around 28 February 2014 and, further, in preference to paying Mr B[ ]'s outstanding fees from the client funds, instead applied the client funds in payment of invoices issued by Angove Law, which conduct was in breach of the Retainer and the practitioner's professional obligations pursuant to Rule 26 of the *Legal Profession Conduct Rules 2010* (the **Conduct Rules**);

f) on 29 November 2013, and subsequent to making a $7,000 part-payment of the October invoice from the client funds, prepared and sent an email to Mr B[ ] which represented, in effect, that:

i. the ~~client~~ funds in the bank account from which the $7,000 part payment was made that were available to pay the October invoice (**available funds**) were sufficient to meet the October invoice in full, however due to the daily payment limit being reached on Angove Law's bank account, the maximum payment the practitioner was able to make to Mr B[ ] that day was $7,000; and

ii. sometime during the week commencing Monday, 2 December 2013, the practitioner would, accordingly, pay the balance of the October invoice,

(the ***Payment representation***)

which Payment representation was to the knowledge of the practitioner false or misleading, or both, and/or had the potential to mislead Mr B [ ], as the true position was that at the time the email was sent ~~the balance of the client funds~~ the available funds ~~was~~ were ~~either $14,325.64 or~~ $12,093.19~~,~~ and ~~in any event was~~ were insufficient to pay the balance of the October invoice.

Ground 2

That the practitioner between about June 2015 and about July 2015 engaged in professional misconduct, within the meaning of sections 403 and 438 of the Act in that his conduct fell short by a substantial degree of the standard of professional conduct observed by members of the legal profession of good repute and competence, further or alternatively, would justify a finding that he is not a fit and proper person to engage in legal practice, further or alternatively, would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, by:

a) at a meeting with officers of the Legal Practice Board (***Board***) held on 17 June 2015 to discuss the potential closure of Angove Law:

i. informing the Board, in effect, alternatively, conveying the impression to the Board, that Angove Law could meet its current debts and was solvent;

ii. failing to inform the Board, as was in fact the case, that:

A. at the time Angove Law had significant outstanding debts, including an amount of $137,815 which was due and payable by Angove Law to Mr B[ ] for his fees; and

B. Angove Law did not have the financial means to pay that amount to Mr B[ ], (together, the **17 June representation**),

which 17 June representation was to the knowledge of the practitioner false or misleading, or both, and/or had the potential to mislead the Board as the true position was that Angove Law was unable to meet its debts and was insolvent; and/or

b) making representations to the Board in:

(i) a Form 7 dated 23 June 2015 that a new legal practice of Law on Newcastle Pty Ltd (***LoN***) was not taking over an existing legal practice; and

(ii) a Form 9 dated 9 July 2015 that Angove Law was not being taken over by a new legal practice

(together, the ***written representations***),

which written representations were to the knowledge of the practitioner false or misleading, or both, and/or had the potential to mislead the Board, as the true position was that the existing legal practice of Angove Law was taken over by the new legal practice of LoN,

c) attempting to avoid the liabilities of Angove Law, including the obligation to pay Mr B[ ]'s fees pursuant to the Retainer and the practitioner's professional obligations under Rule 26 of the Conduct Rules by deriving the new incorporated legal practice of LoN from the existing practice of Angove Law; and/or

d) engaging in the conduct the subject of (a) and/or (b) above as part of that attempt.

Ground 3

That the practitioner between about 25 September 2015 and about 27 September 2016 during an investigation by the Applicant of a complaint against the practitioner, and after 28 September 2018 during an investigation by the Applicant against the practitioner pursuant to section 421 of the Act, engaged in professional misconduct within the meaning of sections 403, 404(a) and 438 in that his conduct fell short, substantially or consistently, or both, of the standard of professional conduct observed or approved by members of the profession of good repute and competence, further or alternatively, would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, by, without reasonable excuse:

a) failing to respond to correspondence from the Applicant requesting information and documents dated 31 August 2015, 5 October 2015 and 2 November 2015 until required to do so by summons issued by the Applicant to the practitioner pursuant to section 520(1) of the Act dated 20 November 2015 for the provision of documents and information, in breach of Rule 50(3) of the Conduct Rules;

b) failing to respond to correspondence from the Applicant requesting information and documents dated 17 February 2016, 23 March 2016 and 13 May 2016, in breach of Rule 50(3) of the Conduct Rules;

c) failing to respond to correspondence from the Applicant requesting information and documents dated 15 June 2016 until required by summons issued by the Applicant to the practitioner pursuant to section 520(1) of the Act dated 27 July 2016 for the provision of documents and information, in breach of Rule 50(3) of the Conduct Rules;

d) failing to respond to a summons issued by the Applicant to the practitioner pursuant to section 520(1) of the Act dated 12 September 2016 for the provision of documents and information by 4.00pm on 27 September 2016 in contravention of sections 520(5) and 532(3) of the Act; and/or

e) by 28 September 2018 or at all, failing to respond to correspondence from the Applicant requesting information and documents dated 14 September 2018, in breach of Rule 50(3) of the Conduct Rules and/or section 531(2) of the Act.

The Statutory Regime and Legal Principles

134 As noted above in the Introduction, the proceedings were commenced by the applicant pursuant to its referral to the Tribunal under s 428(1) of the LP Act. Section 438(1) of that Act provides that the Tribunal 'has jurisdiction to make a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct'.

135 The LP Act was repealed on 1 July 2022 by s 260(a) of the ***Legal Profession Uniform Law Application Act 2022*** (WA). However, for the reasons explained in ***Goldsmith***[41] and ***Bostock***[42] the LP Act has ongoing operation in matters referred to the Tribunal by the applicant where both the conduct the subject of referral, and the referral itself, occurred prior to that date.

136 Sections 402 and 403 of the LP Act contain non-exhaustive definitions of the terms 'unsatisfactory professional conduct' and

---

[41] ***Legal Profession Complaints Committee and Goldsmith*** [2022] WASAT 43 (S) (***Goldsmith (S)***) at [5] – [34]. The Court of Appeal has recently granted an appeal against this decision – ***Goldsmith v Legal Services and Complaints Committee*** [2023] WASCA 136 (***Goldsmith [2023]***). The appeal was not concerned with this issue.
[42] ***Legal Services and Complaints Committee and Bostock*** [2022] WASAT 100 at [44] – [52].

'professional misconduct', respectively. Section 402 of the LP Act states as follows:

> For the purposes of this Act –
>
> ***unsatisfactory professional conduct*** 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.

137 Section 403 of the LP Act states as follows:

> (1) For the purposes of this Act –
>
> ***professional misconduct*** *includes* –
>
> (a) 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
>
> (b) 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.
>
> (2) For the purpose of finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), 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.

138 As was recently observed by the Tribunal in ***Lourey [No 2]***,[43] the Court of Appeal has twice confirmed that the statutory definition of 'professional misconduct' in s 403 of the LP Act includes conduct which satisfies either of the two limbs described in ***Kyle***,[44] as well as conduct which falls within the description in s 403(1)(a) or (b).[45]

---

[43] ***Legal Services and Complaints Committee and Lourey [No 2]*** [2023] WASAT 77 (***Lourey [No 2]***) at [223].
[44] ***Kyle v Legal Practitioners' Committee*** [1999] WASCA 115; (1999) 21 WAR 56 (***Kyle***) at [61].
[45] ***Fidock v Legal Profession Complaints Committee*** [2013] WASCA 108 (***Fidock***) at [105] – [106]; ***Legal Profession Complaints Committee v Lourey*** [2022] WASCA 114 (***Lourey [2022]***) at [197]. See also ***Goldsmith [2023]*** at [56].

139 In ***Kyle*** the Court held that conduct which satisfied what was then described, in the applicable legislation, as 'unprofessional conduct' but which is now referred to as 'professional misconduct', was:[46]

> … 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.

140 More recently, in ***Lourey [2022]***, the Court of Appeal observed:

> The definitions [of 'unsatisfactory professional conduct' and 'unprofessional conduct'] are not exhaustive. They are inclusive. Each definition states that the expression being defined includes specified conduct. The inclusive part of each definition does not diminish the generality of the ordinary and natural meaning of the expression 'unsatisfactory professional conduct' or 'professional misconduct' in relation to a legal practitioner.[47]

141 Each of the three Grounds alleged by the applicant in this case are that the conduct in question constitutes professional misconduct in three different senses.

142 First, it is said that the conduct in question 'fell short, substantially or consistently, or both, … of the standard of professional conduct observed by members of the legal profession of good repute and competence'. That is, save for the inclusion of the term 'consistently', a statement of the second limb in ***Kyle***.[48] As noted in ***Lourey [No 2]*** (at [57]), there is also some overlap with the test set out in s 403(1)(a), especially when read with s 402.

143 Secondly, it is said, 'further or alternatively', that the conduct 'would justify a finding that he is not a fit and proper person to engage in legal practice'. That is a statement of the test in s 403(1)(b) of the LP Act.

144 Thirdly, it is said (again, further or alternatively), that the conduct 'would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence.' That is a statement of the first limb in ***Kyle***.[49]

---

[46] ***Kyle*** at [61] (Parker J, Ipp J and Steytler J agreeing).
[47] ***Lourey [2022]*** at [197] citing ***Fidock*** at [34] – [36].
[48] ***Kyle*** at [61].
[49] Ibid.

145 In ***Lourey [2022]***, the Court of Appeal found that the Tribunal had denied the applicant procedural fairness when it found that Mr Lourey's conduct constituted professional misconduct as per the definition in s 403(1)(a) of the LP Act but failed to address whether conduct constituted professional misconduct under the two limbs in Kyle.[50]

146 The Court's decision in ***Lourey [2022]***, in effect, confirms that the statutory definition of professional misconduct in s 403(1) of the LP Act includes, as a separate and distinct test, both limbs in ***Kyle***. It also requires that we address each of the three senses in which each Ground alleges the conduct constitutes professional misconduct.

147 Returning to the statutory framework, Ground 3 alleges that the practitioner failed, without reasonable excuse, to provide information and documents pursuant to requests and, in some cases, pursuant to summonses issued under s 520(1) of the LP Act. That section provides:

> (1) For the purpose of carrying out a complaint investigation in relation to an Australian lawyer, an investigator may, by notice or summons served on the lawyer, require the lawyer to do any one or more of the following —
>
> (a) to produce, at or before a specified time and at a specified place, any specified document (or a copy of the document);
>
> (b) to produce, at a specified time and at a specified place, any specified document (or a copy of the document);
>
> (c) to provide written information on or before a specified date;
>
> (d) to otherwise assist in, or cooperate with, the investigation of the complaint in a specified manner.
>
> (2) …
>
> (3) An investigator may require that information required to be given under subsection (1) or (2) be verified on oath or affirmation or by statutory declaration.
>
> (4) …
>
> (5) A person who is subject to a requirement under subsection (1), (2) or (3) must comply with the requirement.
>
> Penalty: a fine of $5 000.

[50] ***Lourey [2022]*** at [187], [195] – [201].

148 Ground 3 alleges that the failure to provide the information and documents occurred without reasonable excuse. That appears to be a reference to s 532(3)(b) of the LP Act. Indeed, subground 3(d) alleges a contravention of that section, which is headed 'Obligations of Australian lawyers' and provides:

> (1) The duties imposed on an Australian lawyer by this section are additional to obligations imposed under other provisions of this Part, whether or not the lawyer is the subject of the investigation, examination or audit concerned.
>
> (2) …
>
> (3) An Australian lawyer who is subject to —
>
> (a) a requirement under section 520; or
>
> (b) a requirement under provisions of a corresponding law that correspond to that section,
>
> must not, without reasonable excuse, fail to comply with the requirement.

149 The previous section, s 531 of the LP Act, is also relevant. Subground 3(e) alleges conduct in contravention of s 531(2), which provides that a 'person must not, without reasonable excuse, obstruct or mislead an investigator exercising a power under this Act.'

150 Both subgrounds 1(e) and 2(c) refer to the practitioner's obligations under Rule 26 of the *Legal Profession Conduct Rules 2010* **(Conduct Rules**) while subgrounds 3(a), (b), (c) and (e) refer to Rule 50(3) of the Conduct Rules.

151 The Conduct Rules appear to have been repealed as a result of the repeal of the LP Act.[51] They were however, in force at the time of all conduct the subject of the three grounds alleged against the practitioner. The terms of the relevant Rules are set out below. In each case they create obligations and standards of behaviour. To the extent that it is necessary to do so, in our view, s 37(1)(d) of the *Interpretation Act 1984* (WA) has the effect of preserving those obligations notwithstanding the repeal of the LP Act and any consequential repeal of the Conduct Rules. The relevant Rules provide as follows:

[51] Although, note s 38 of the *Interpretation Act 1984* (WA).

26. Responsibility for fees of other practitioners

(1) Unless otherwise agreed, a practitioner who engages another practitioner to advise or assist in a matter is responsible for the payment of the other practitioner's fees.

(2) A practitioner must pay fees referred to in subrule (1) within a reasonable time, whether or not the client has provided sufficient funds.

(3) …

50. Dealing with regulatory authority

(1) In this rule —

regulatory authority means a local regulatory authority and an interstate regulatory authority.

(1) A practitioner must be open and candid in his or her dealings with a regulatory authority.

(2) A practitioner who is requested by a regulatory authority to provide comments or information in relation to the practitioner's conduct or professional behaviour must —

(a) respond to the request within a reasonable time and in any event within 14 days (or such extended time as the regulatory authority may allow); and

(b) provide in writing a full and accurate account of his or her conduct in relation to the matters covered by the request.

152 As to the burden and standard of proof, the Tribunal said the following in ***Chang***, which we adopt:[52]

The [applicant] bears the onus of proof in relation to the allegations of professional misconduct it makes against the practitioner. The civil standard of proof ('on a balance of probabilities') applies together with the *Briginshaw* approach, which requires clear and cogent evidence to be adduced by the Committee and for the Tribunal to feel an actual persuasion of the occurrence or existence of relevant facts before it can find the practitioner guilty of professional misconduct (or unsatisfactory professional conduct). The *Briginshaw* approach applies in disciplinary proceedings, because of the nature and seriousness, and potential consequences, of allegations of wrongdoing (or incompetence) made in such proceedings. As Dixon J said in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361 - 362:

[52] ***Legal Profession Complaints Committee and Chang*** [2019] WASAT 67 (***Chang***) at [8].

> Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

153 In these reasons, when we express ourselves as satisfied, and make a finding, we do so on the balance of probabilities and on the basis of evidence which we regard as clear and cogent, having regard to what was said in the above quoted passages.

Ground 1

154 In its submissions, the applicant addressed this Ground as three sub-grounds as follows:

(a) The practitioner failed to pay five invoices issued by Mr B – subground 1(a);

(b) The practitioner paid the fees of his own firm, Angove, in preference to Mr B's outstanding fees – subground 1(b);

(c) The practitioner represented to Mr B, having paid him $7,000 of the $24,472.80 owing for the October invoice, that: (1) there were sufficient funds in the account from which the $7,000 had been paid to pay the balance; (2) he had only paid $7,000 because he had reached the bank's daily payment limit; and (3) he would pay the balance the following week, when, in fact, he had inadequate funds to pay the outstanding balance – subground 1(c).

155 In his opening submissions, Mr Musikanth SC, who appeared with Mr Beetham for the applicant, submitted that Ground 1 should be read as if the words 'and/or' is contained between paragraphs (e) and (f) of the Ground.

156 In doing so, he accepted that a finding of professional misconduct could not be made on the sole basis that the practitioner had failed to pay Mr B (subground 1(a)) but, he submitted, such a finding was open

if such failure occurred in either or both of the circumstances outlined in paragraphs (e) or (f).[53]

157 We agree that that is a fair reading of the Ground. Paragraph (e) of Ground 1 contains within it both subgrounds 1(a) and 1(b) and, while paragraph (f)/ subground 1(c) is capable of being read as a self-contained ground of itself, its inclusion as the final of six paragraphs, the previous five of which deal with the circumstances surrounding the failure to pay, means that it can also be read, in our view, as a factor which aggravates the practitioner's failure to pay Mr B's fees.

158 In any event, for the reasons which follow, we are satisfied, and we find, that each of subgrounds 1(a), 1(b) and 1(c) are made out. It is immaterial, therefore, whether or not paragraphs (e) and (f) to Ground 1 ought to be construed conjunctively or disjunctively or both.

Subground 1(a)

159 In his Response, the practitioner admits that Mr B was engaged to act as junior counsel for the client in the Proceedings by Angove, pursuant to the Retainer.[54] He also admits that the Retainer provided, amongst other things, that:

(a) Mr B's retainer 'will be by Angove Law Pty Ltd';

(b) Angove 'will be liable for payment of all bills even if [Angove has] not received funds from [its] client to pay the bill'; and

(c) payment of each bill is due within 30 days.[55]

160 The practitioner's admissions in that regard are consistent with paragraphs 3 and 4 of Mr B's witness statement,[56] which cross-references a copy of the Retainer.[57] Mr B gave evidence at the hearing by which he adopted the contents of his witness statement as his evidence-in-chief. He was not cross-examined.

161 The practitioner also admits that Mr B issued each of the October Invoice, the November Invoice, the December Invoice, the January Invoice and the February Invoice.

[53] ts 51 – 52, 21 March 2023.
[54] Response, para 10.
[55] Response, para 11.
[56] Witness Statement of [Mr B] dated 20 July 2020, **(Exhibit 10)**.
[57] Exhibit 1, pages 155 – 156.

162 The practitioner also admits, in effect, that he paid only $12,000 towards the October Invoice. The relevant paragraphs of the applicant's Statement of Facts and Contentions (**SFC**) [58] allege, respectively, that:

(a) a payment of $7,000 was made in part-payment of the October Invoice on 29 November 2013;

(b) a further part-payment of $5,000 toward the October Invoice was made on 18 December 2013 as a consequence of which the balance of client funds was $3,367.61 which was insufficient to pay the remainder of the October Invoice, let alone the November invoice;

(c) following a meeting with the client on 29 January 2014, the practitioner sought the deposit of further funds from the client by 31 January 2014, which did not occur;

(d) on 17 March 2014, the practitioner advised the client that Angove would seek to withdraw from the Proceedings and that if the outstanding fees were not paid, recovery action against the client would be commenced;

(e) by letter of 28 April 2014, Mr B stated that he had billed Angove $172,621.35 and that he had received only $12,000 and demanded that he be paid $160,621.35 in outstanding fees;

(f) on 20 February 2015, Mr B sent a copy of a certificate of taxed costs to the practitioner and sought payment of his taxed costs by 3 March 2015 whether or not the client had paid Angove, to which the practitioner wrote in response on 5 and 11 March 2015 saying, in effect, that he was unable to commit to a repayment plan;

(g) By emailed letter of 4 June 2015, Nova Legal demanded payment of $137,815 (being the taxed amount less than $12,000) plus interest, to which no payment was made at any time.[59]

[58] Response, paras 22, 27, 31 – 32, 36, 39, 58 – 62 and 66 – 67; SFC, paras 22, 27, 31 – 32, 36, 39, 57 – 61 and 65 – 66.

[59] Mr B's Witness Statement does not attend to each of those matters in any real detail. At para 5 he says that he caused a complaint to be made to the applicant against the practitioner 'for failure to pay the balance of [his outstanding fees'] for work reflected in the various invoices which are then identified. At para 6 he identifies the certificate of costs.

163 Mr B's Witness Statement is consistent with those allegations and admissions, although it does not address all of that material in so much detail.

164 We have said, at para [162] above, that the facts alleged in that para are admitted by the practitioner 'in effect'.

165 In all but one case, the practitioner's Response admits the relevant paragraph of the SFC. The exception is para 27 of the SFC, which is summarised at paragraph [162(b)] above. The Response does not, in terms, either admit or deny the facts alleged in that para. Rather, it alleges that:

(a) in or about late November/ early December 2013, the practitioner informed Mr B that the client had not made any further payment to Angove but that as soon as such payment was made, the various invoices would be paid, to which proposal 'Mr B[ ] agreed';

(b) the practitioner 'made counsel [i.e. Mr B] aware of the failure of the Client to place further funds in trust';

(c) the practitioner 'recollects' that the failure of the client to put further funds in trust was discussed at 'various conferences' including on 29 January 2014.

166 The effect of that para of the Response is, in our view, to admit that no payments were made to Mr B after $5,000 was paid on 18 December 2013, and that at least a discussion was had with Mr B after that occurred.

167 At its highest, para 27 of the Response might be said to allege that Mr B agreed not to pursue his outstanding fees until the client deposited funds into Angove's trust account for that purpose (**Alleged Agreement**).

168 In his witness statement, Mr B expressly denies that the Alleged Agreement was reached.[60] Further, and in apparent support for that denial, he says, correctly, that there is no such record of the Alleged Agreement in the Substituted Further Supplementary Book of Documents, dated 13 July 2020 (**Exhibit 3**).[61] That, (i.e. Exhibit 3) he says, comprises a complete copy of his handwritten file notes of all

[60] Exhibit 10, para 9.
[61] Exhibit 3.

discussions (both by phone and in person) between him and the practitioner from 4 November 2013 to 24 December 2013.[62]

169 There is nothing before us to rebut Mr B's evidence. As we have already said, he was not cross-examined and the practitioner neither gave evidence nor tendered any documents.

170 That is, in our view, sufficient to dispose of the matter and we find that the practitioner and Mr B did not reach agreement in terms consistent with the Alleged Agreement.

171 We are comforted in that regard by actions subsequent to the date of the Alleged Agreement of the practitioner which, in our view, are inconsistent with the suggestion that the Alleged Agreement was reached.

172 First, at para 27 of the Response, the practitioner alleges that the Alleged Agreement was reached 'in about the end of November 2013 and early December 2013'. But the practitioner made payments to Mr B on 29 November 2013 and 18 December 2013 without making any reference to the Alleged Agreement. Those payments were made out of funds previously deposited which were not exhausted until 3 January 2014. If such an agreement was to be reached it seems to us more likely that it would occur after the exhaustion of funds and with some form of written acknowledgement.

173 Secondly, Mr B issued invoices on each of 24 December 2013 (payable by 29 January 2014),[63] 31 January 2014 (payable by 3 March 2014),[64] and 28 February 2014 (payable by 30 March 2014).[65] Had the Alleged Agreement been reached it seems unlikely that Mr B would have included, as express provisions of the relevant invoices, the relevant dates by which payment was required in each case and, had such inclusion occurred in error, it seems likely that the practitioner would have reminded Mr B of the terms of the Alleged Agreement upon receipt of those invoices.

[62] Exhibit 10, para 9.
[63] Exhibit 1, page 524.
[64] Exhibit 1, page 518.
[65] Exhibit 1, page 513.

174 Thirdly, there would appear to be nothing written by the practitioner to Mr B in response to his letter of 20 March 2014 terminating his retainer.[66]

175 Fourthly, there was nothing raising the terms of the Alleged Agreement from the practitioner in correspondence between him and Mr B to the effect that the moneys claimed were not yet due and payable. In that regard:

(a) Mr B wrote to the practitioner on 28 April 2014 demanding payment, and the practitioner admits[67] that he did not respond in writing. Significantly, he does allege[68] that he met with Mr B in the first week of May 2014 when he spoke to Mr B about his financial affairs but he does not claim that the Alleged Agreement was raised.

(b) Mr B also wrote to the practitioner on each of 26 May 2014,[69] 3 June 2014,[70] 9 June 2014,[71] 16 June 2014,[72] 23 June 2014[73] and 4 July 2014[74] either demanding immediate payment of his outstanding fees, demanding an answer to previous correspondence, requesting a payment plan be put in place or inviting the practitioner to settle the matter. The practitioner admits that he did not respond to any of them.[75]

(c) By letter of 17 June 2014 Mr B asked the practitioner to confirm receipt of previous correspondence to which the practitioner responded on 20 June 2014 in which he stated that Angove would issue a final letter of demand to the client and would provide 'regular updates' as to the recovery of fees from the client.[76] There is no mention of the Alleged Agreement in that letter.[77]

(d) The practitioner wrote to Mr B on 1 July 2014 in which he stated, amongst other things:

[66] SFC, para 37; Response, para 37.
[67] Response, para 40.1; SFC, para 40.
[68] Response, paras 40.3 and 40.5.
[69] Exhibit 1, pages 162 – 163.
[70] Exhibit 1, page 164.
[71] Exhibit 1, page 165.
[72] Exhibit 1, page 166.
[73] Exhibit 1, pages 170 – 171.
[74] Exhibit 1, page 175.
[75] Response, paras 42, 44, 46, 48 and 51; SFC, paras 42, 44, 46, 48 and 51.
[76] Response, para 49; SFC, para 49.
[77] Exhibit 1, page 169.

> As to the payment of your outstanding fees, I am still not in a position to make any proposal to you on a repayment plan as the financial position of the Practice is still uncertain.[78]

That is, plainly, completely at odds with any suggestion that he had reached agreement with Mr B that the latter's fees were not due and payable unless and until Angove was put in funds by the client.

(e) On 20 February 2015, Mr B sent a copy of the certificate of taxation to the practitioner and demanded payment. On 5 March 2015 he wrote again as there had been no response. In response to the second letter the practitioner emailed on 5 March 2015 saying, amongst other things, that 'the financial position of the practice is still uncertain enough that the practice is not able to make any commitment to a repayment plan or any plan'.[79] An email including similar text was sent on 11 March 2015.[80] Again, such statements are at odds with the terms of the Alleged Agreement.

(f) Finally, the practitioner's response to the demand by Mr B's solicitors for payment, such as it was, did not include any reference to the Alleged Agreement.[81]

(g) There is nothing in the Response, or in anything else properly before us, that purports to explain why the Alleged Agreement was not even mentioned, let alone relied upon, to explain why no payment was made.

176 For these reasons, we repeat that we are satisfied and we find, that the practitioner did not reach agreement with Mr B in the terms alleged in para 27 of the Response (i.e. the Alleged Agreement).

177 Indeed, we are satisfied, and we so find, that the practitioner did not subjectively believe that he had reached such agreement with Mr B.[82]

178 We so find based on the absence of any written variation to the Retainer to reflect such an agreement, the practitioner's failure to refer to or rely on the Alleged Agreement to explain and justify non-payment in response to numerous demands for payment, and his statements on 1 July

[78] Exhibit 1, pages 173 – 174.
[79] Response, para 62; SFC, para 61; Exhibit 1, page 188.
[80] Response, para 63; SFC, para 62; Exhibit 1, page 199.
[81] Response, paras 66 and 67; SFC, paras 65 and 67; Exhibit 1, pages 188 – 191 and 199.
[82] *cf* ***Legal Profession Complaints Committee and Goldsmith*** [2022] at WASAT 43 (***Goldsmith***) at [151].

2014 and 5 and 11 March 2015 that implicitly acknowledge that the fees were due and payable.

179 For these reasons, we find that subground 1(a) is made out. That is, we find that the practitioner failed to pay any of the November Invoice, the December Invoice, the January Invoice and the February Invoice and failed to pay all of the October Invoice, which together are the five invoices issued by Mr B between on or around 30 October 2013 and on or around 28 February 2014.

Ground 1(b)

180 The gravamen of this subground, which is contained in para (e) of Ground 1, is that the practitioner paid Angove in preference to paying Mr B the sums outstanding to him.

181 The starting point is that the client made two payments into Angove's trust account of $82,500; $7,500 on 27 August 2013 and $75,000 on ~10 October 2013.[83]

182 The October Invoice was issued on 30 October 2014 for $24,472.80.[84]

183 By that stage, the practitioner had already made three payments to Angove, which left a balance of $72,731.34.[85]

184 On 1, 15 and 29 November 2013 the practitioner paid Angove's invoices #67 of 31 October 2013,[86] #80 of 15 November 2013[87] and #81 of 29 November 2013 in full in the sums of $4,961[88], $3,494.70[89] and $2,232.45[90] respectively, as well as Senior Counsel's fees of $25,000 (on 1 November 2013) and $16,833 (on 29 November 2013). He also, on 29 November 2013, paid $7,000 of the October Invoice.

185 In addition, there were two smaller sums of $277 and $840 paid on 11 and 29 November 2013 from the trust account, which appear to be Court fees.[91]

[83] Response, paras 4 and 7.
[84] Exhibit 1, pages 505 – 509.
[85] Exhibit 1, page 297.
[86] Exhibit 1, pages 322 – 323.
[87] Exhibit 1, pages 318 – 319.
[88] Exhibit 1, page 324.
[89] Exhibit 1, page 316.
[90] Exhibit 1, page 311.
[91] Exhibit 1, page 298.

186 As a result, as at 29 November 2013, there remained $12,093.19 in Angove's trust account[92] while Angove owed Mr B $17,472.80 for the balance of the October Invoice.

187 On 2 December 2013, Mr B issued his November Invoice for $58,018.95.

188 On about 18 December 2013 the practitioner paid Mr B $5,000 in further part payment of the October Invoice and paid Angove $3,503.58[93] in payment of invoice #82.[94]

189 Mr B's December Invoice, in the sum of $34,882.65, was issued on 24 December 2014.[95]

190 On 3 January 2014, the practitioner paid Angove $3,323.87[96] in payment of invoice #87,[97] which payment, together with a further payment of Court fees of $222 on 17 December 2013[98] left only $43.74 in the Angove Law Trust Account.[99]

191 That is, between (and including) the issue of the October Invoice on 30 October 2013 and 3 January 2014 (when the trust account sums were exhausted), Mr B issued invoices to the value of $117,374.40 of which only $12,000 was paid (10.22%), while all of the invoices issued by Angove to the value of $17,515.60 were paid in full, with the balance being paid to Senior Counsel in part payment of his fees as well as some minor payments as Court fees.

192 The practitioner admits that the payment of $3,323.87 to Angove on or about 3 January 2014 exhausted the client funds and that at all times from the deposit of the client funds: (1) he caused each Angove invoice to be paid in full; (2) that he had paid Senior Counsel $41,833 but (3) that he only paid Mr B $12,000 of the October Invoice.[100] Relevantly, the paragraph of the Response (para 29) which admits the relevant para of the SFC (para 29) also cross-references para 27.1 of the Response, which contains within it the terms of the Alleged Agreement.

---

[92] Exhibit 1, page 298.
[93] Exhibit 1, page 307.
[94] Exhibit 1, pages 305 – 306.
[95] Exhibit 1, pages 519 – 524.
[96] Exhibit 1, page 304.
[97] Exhibit 1, pages 302 – 303.
[98] Exhibit 1, page 298.
[99] Exhibit 1, page 299.
[100] Response, para 29; SFC, para 29.

193 That appears to be the basis for (indeed, it is the only apparent basis for) the practitioner's denial of para 30 of the SFC which alleges, amongst other things, that the practitioner paid Angove 'in priority to and to the exclusion of' Mr B's invoices.

194 We repeat our finding above that the practitioner and Mr B did not reach the Alleged Agreement.

195 In the absence of any other basis which might suggest otherwise, we therefore agree with the applicant's submission, and we find, that there is an inescapable inference that the practitioner made payments from funds held in trust for invoices issued by Angove in preference to paying Mr B his outstanding fees.

Ground 1(c)

196 The gravamen of Ground 1(c) is that the practitioner intentionally misled Mr B by his email of 29 November 2013.

197 The practitioner admits[101] that, following his payment of $7,000 to Mr B on 29 November 2013 he emailed Mr B (**29 November Email**) in terms which included:

> I confirm that a part payment of $7,000 was made via EFT on your invoice. I had reached the payment limit for the day.
>
> I will attend to the outstanding balance next week.

198 The applicant both alleges (at para 24 of the SFC) and submits[102] that the above passage represents, in effect, that:

(a) the funds in the relevant bank account (that from which the $7,000 part payment was made) were sufficient to meet the October invoice in full but, due to the daily payment limit being reached, the maximum payment the practitioner was able to make to Mr B on that day was $7,000; and

(b) sometime during the following week, the practitioner would, accordingly, pay the balance of the October invoice.

(Payment Representation)

[101] Response, para 23; SFC, para 23.
[102] Applicant's Submission for Hearings dated 20 February 2023 (**Applicant's Written Submissions**), para 37.

199 At para 24.1 of the Response, the practitioner 'admits that the daily payment limit had been reached or close to it which resulted in a payment of $7,000'. Para 24.3 of the Response is in the following terms:

> [The practitioner] says that a further payment of [*sic* – no figure is given] to be made the following week. The [practitioner] further says that requests had already been made to the Client for further funds to be placed in trust as had been agreed by the client. The Client had agreed to make a further deposit of funds into the Practice's trust account. The [practitioner] was waiting for the deposit to be made.

200 Three things are to be noted. First, the practitioner neither admits nor denies that the 29 November Email gives rise to the Payment Representation. Secondly, para 24.3 omits the figure which the practitioner says was to be made in the following week. Thirdly, it alleges that following the practitioner's request the client had agreed to deposit the funds into trust, although no details (including dates) are given.

201 In addition, the practitioner denies para 25 of the SFC which provides that:

> The Payment representation was to the knowledge of the practitioner false or misleading, or both, and/or had the potential to mislead Mr B[], as the true position was that at the time the 29 November email was sent the available funds were $12,093.19 and were insufficient to pay the balance of the October invoice of $17,472.80 (as referred to in sub-paragraphs 22.3 and 22.4 above).[103]

202 Although the Response denies the whole of paragraph 25, it would appear that the practitioner's denial is, in essence, limited to a denial as to either or both that:

(a) the 29 November Email amounted to the Payment Representation as alleged by the applicant; and

(b) the Payment Representation was intentionally false, as there was a genuine but mistaken belief that additional funds would be received from the client in sufficient time for the payment of the outstanding balance to be made within the relevant timeframe.

[103] Particulars omitted.

203 At the very least, it would appear common ground between the parties that the Trust Account balance as at the end of 29 November 2013 was $12,093.19. That appears to be so as the receipts and payments pleaded elsewhere are either admitted (paras 7, 8, 20, 21 and 22) or not denied (para 4).

204 In particular, in the Response, the practitioner admits paragraph 22.4 of the SFC which concludes that, 'the balance of the client funds [on 29 November 2013] was $12,093.19.' In any event, the Trust Account Statement prepared by Angove for the client records that sum as the closing balance on 29 November 2013.[104] For these reasons we are satisfied, and we find, that as at the end of 29 November 2013 the balance of Angove's trust account was $12, 093.19.

205 There is nothing in the material before us that supports the practitioner's allegation that the client, or one of its representatives had, prior to 29 November 2013, agreed to place further funds in Angove's trust account, which would justify the belief that the practitioner appears to allege in para 24.3 of the Response that he had when he sent the 29 November Email. In particular:

(a) there are no further details alleged in the Response, whether directly or as particulars;[105]

(b) there is no file note of a meeting between the practitioner and the client that records such an agreement;[106] and

(c) there is no correspondence either to or from the practitioner which records such an agreement.

206 That is all consistent with the practitioner's own (and more contemporaneous) account of events in his 'Memorandum of Response

[104] Exhibit 1, pages 314 – 315.
[105] We contrast para 27.3 which alleges a meeting on 29 January 2014 at which, it is alleged, Mr Tony Grego, a director of the client, promised to place funds in trust the next day, which did not occur.
[106] Pages 32 – 36 of Exhibit 1, pages 32 – 36 are copies of the practitioner's notes for 25 October 2013 to 5 December 2013. They record conferences on 25 October, 4 November, 11 November and 4 December 2013. On both of 4 November and 4 December the notes record meetings between the practitioner and Mr Grego at which it is recorded that the practitioner handed Mr B's invoices to Mr Grego. The other conferences included Mr B, Senior Counsel and others. At none of them do the notes record a discussion as to the need for additional funds to be paid into trust by the client. In addition, the practitioner's letter to the applicant of 4 December 2015 attaches file notes from December 2013, the earliest of which is dated 6 December 2013, which records a request to Mr Grego for further funds.

to the [Applicant]' which he provided to the applicant on 4 December 2015.[107]

(a) At paragraphs 35 and 36, he refers to Mr B's October Invoice and the part-payments made on 29 November and 18 December 2013;

(b) He then says, at para 37, that he was then 'aware that the funds in trust were reducing … [and] [o]n that basis [he] started requesting funds to be placed on trust';

(c) At para 38, he then says that the 'requests recorded were on 6 December 2013, 19 December 2013 …'

207 That is, the practitioner does not identify any document recording a request of the client seeking more funds, let alone any agreement from the client to provide more funds, that predates or is contemporaneous with the 29 November Email.

208 Accordingly, we are satisfied, and we find that the practitioner did not ask the client for any additional funds prior to sending the 29 November Email which, if it had occurred, might have provided a factual basis for the allegation made by him in para 24.3 of the Response.

209 We note in this regard that even if there was a basis for the factual allegation in para 24.3 of the Response, it is different from the terms of the Payment Representation.

210 The Payment Representation is *not* to the effect that part payment has been made and that the balance will be paid upon receipt of further, promised, funds from the client. If there *had* been a promise for further funds the practitioner could have, and should have, emailed Mr B in terms which note that promise and which undertook to make further payment once the funds had been received.

211 But that is not what the practitioner did. Rather, he sent the 29 November Email, which, in our view, amounted to a representation consistent with the Payment Representation.

212 We are satisfied, and we find, that the terms of the 29 November Email allow no other inference. The statement that the practitioner 'will

[107] Exhibit 1, pages 248 – 258.

attend to the outstanding balance next week' must be read in the context of:

(a) the immediately preceding paragraph of the email which is in terms that which clearly suggest that the reason (and only reason) that only $7,000 was paid was because the daily payment limit prevented the payment of a greater sum; and

(b) the fact that 29 November 2013 was a Friday.

213 When read in that context, the statement that the practitioner 'will attend to the outstanding balance next week' clearly and plainly implies that there are sufficient funds in the account from which the payment was made to make the further payment and that the further payment will be made on a day early in the following week when Friday's daily limit will no longer apply.

214 That representation was factually incorrect; there was only $12,093.19 remaining in Angove's trust account at the time when the email was written, which sum was considerably less than the 'outstanding balance' which the practitioner represents would be paid the following week.

215 We are also satisfied, and we find that the practitioner knew the Payment Representation was factually incorrect when he sent the email.

216 Regardless of whether or not there was, in fact, a daily payment limit which had been reached, we find that he must have been aware that the balance of funds at the time he sent the email was less than the sum outstanding and was insufficient to pay that balance.

217 That is so because he was personally making each payment on 29 November 2013. He admits that that was so.[108] He must, therefore, have been aware of the balance in the account at the end of each transaction.

218 That is sufficient to dispose of this subground. However, to the extent that it is necessary or useful to do so, we also infer, and we so find, that the practitioner knew that there was no realistic chance that the client would make payment of funds into trust sufficient to allow

[108] Para 22 of the SFC, which the practitioner admits at para 22 of the Response, alleges that 'the practitioner paid from the client funds by way of EFT' each of the 29 November 2013 payments outlined in para [184] above.

him to pay the balance. That is so for the reasons set out above at paras 205 – 208.

219 Accordingly, we are satisfied, and we find, that:

(a) the 29 November Email contained the Payment Representation; and

(b) the Payment Representation was, to the knowledge of the practitioner, false and misleading.

Does the Conduct so Found in Ground 1 Constitute Professional Misconduct?

220 As noted above, in opening, the applicant accepted that non-payment of Mr B's fees, on their own, would not be sufficient to warrant a finding of professional misconduct.

221 We agree. While there is no doubt that the 'wilful and persistent refusal to pay counsel's fees' *can* amount to unsatisfactory professional conduct or professional misconduct, all of the facts and circumstances particular to the case must be assessed before reaching that conclusion.[109]

222 The applicant submits that the practitioner's failure to pay Mr B's fees despite Rule 26 of the Conduct Rules (which requires payment within a reasonable time) and the terms of the Retainer, in circumstances where that failure went on for several years and where he made preferential payment to Angove should lead to the conclusion that he engaged in professional misconduct.[110]

223 In support of that submission the applicant relies upon the Tribunal's recent decision in ***Goldsmith***.[111] In that case, the Tribunal held that, when considered in isolation, the failure to pay within a reasonable time may arguably not be so great as to constitute professional misconduct, but when considered together with other matters,[112] it was found to constitute professional misconduct.

[109] See, for example, ***Re Robb*** (1996) 134 FLR 294 (***Re Robb***) at [310].
[110] Applicant's Written Submissions, paras 31 – 32.
[111] ***Goldsmith*** at [173] – [175]. Again, we note that the Court of Appeal has recently allowed an appeal against this decision – ***Goldsmith [2023]***.
[112] Those matters being: Mr Goldsmith's failure to respond at all to several demands for payment between the issuing of the invoice on 21/11/2016 and 9/2/2017; the terms of Mr Goldsmith's response which, amongst other things, the Tribunal found included false statements; and his subsequent email which included the threat of a formal complaint should senior counsel lodge a formal complaint regarding his failure to pay.

224 We agree that in this case the mere failure to pay Mr B's fees may not be such as to warrant a finding of professional misconduct. Our reasons for that view are expressed in more detail below.

225 In our view a closer analogue decision than ***Goldsmith*** to the present facts is that of ***Re Robb***.[113] In that case the Full Bench of the ACT Supreme Court found the conduct to amount to professional misconduct. It said:

> Delay or failure by a solicitor to pay counsel is of course not a new phenomenon and will probably occur from time to time so long as there is a divided profession … There will no doubt often be reasons advanced in order to justify such delay or failure. <u>But where the solicitor holds a client's funds for the very purpose and uses them for the solicitor's own ends</u>, then the solicitor's conduct is such that the Court must take steps to ensure that the solicitor concerned and other members of the profession who might act likewise, whether through indifference or ignorance, understand the seriousness of their breach of duty.
>
> …
>
> It is necessary then that the order of the Court, although not punitive in character, deliver the message that no matter how efficient, eminent or popular the practitioner, conduct like that in the present case must be understood by all practitioners to amount to professional misconduct.[114]

226 Accordingly, we give the practitioner's priority of Angove's fees over those of Mr B considerable weight. We also give weight to the very considerable period of delay, which has continued for years, and to the considerable sums involved.

227 Although perhaps not relevant to whether the conduct amounts to professional misconduct, we also note the fact that Mr B continued to incur fees for which he was unlikely to be paid as a result of the practitioner's failure to advise Mr B of the lack of funds in trust.

228 There are, however, two other factors which weigh somewhat on the other side of the ledger, even if they cannot be described as mitigatory. They include that, while the practitioner did obtain a benefit from the preferential payment, the sums paid to Angove were not considerable in the context of the sums outstanding; while the sums

---

[113] ***Re Robb*** at [329] - [330].
[114] Underlining added. The passage is cited with approval in ***Russo v Legal Services Commissioner*** [2016] NSWCA 306 at [77].

would no doubt have been welcome to Mr B had they been paid, they would not have made much difference to the total sum outstanding.[115]

229 In addition, the evidence suggests that the preferential payments were made in circumstances of considerable financial hardship for both Angove and the practitioner personally. That is, we accept that the practitioner was in something of an invidious position in that he was obliged to pay Mr B (and nothing we say should be understood to undermine that obligation and the seriousness of its breach) but, equally, had Angove's dire financial straits required it to close its doors the situation for Mr B would have been much the same.

230 Notwithstanding those two other factors, in our view the conduct constitutes professional misconduct.

231 There can be no doubt that the conduct amounts to a breach of Rule 26 of the Conduct Rules in that the sums owed were not paid within a reasonable time.

232 In our view, the deadline for payment of about 30 days was reasonable and that timeframe has been exceeded many times over. Rule 4(2) of the Conduct Rules provided that a breach of the rules 'may constitute unsatisfactory professional conduct or professional misconduct'.

233 For the reasons set out above, the simple failure to pay Mr B's fees within a reasonable period is not, in our view, sufficient for it to warrant professional misconduct. But we are satisfied, and we find, that the failure to pay Mr B the very considerable sums outstanding over a very lengthy period of time and in circumstances where he paid Angove in preference to Mr B's outstanding fees, amounts to professional misconduct in that it is:

(a) conduct that falls substantially short of the standard of professional conduct observed by members of the legal profession of good repute and competence; and

(b) conduct that would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence.

234 We are not satisfied that such conduct justifies a finding that the practitioner is not a fit and proper person to engage in legal practice.

---

115 As at 3 January 2014, the practitioner would still have owed $87,860 to Mr B even if none of the Angove invoices had been paid.

235 But when considered together with the Payment Representation the conduct is, in our view, sufficient to warrant such a finding, and we so find. That is, we find that the practitioner engaged in conduct which amounts to professional misconduct in the sense that he is not a fit and proper person to engage in legal practice, as well as the other two senses previously referred to.

236 The distinction, in our view, rests upon the element of dishonesty. While the decision to prefer payments to Angove ahead of sums owed to Mr B clearly involves placing his own personal interests over his ethical obligations (such that it amounts to professional misconduct), in our view it does not, of itself, amount to dishonesty.

237 But, as we have found, the practitioner made the Payment Representation knowing it was false.

238 Integrity and honesty are essential characteristics expected of a practitioner, and accordingly the Court and this Tribunal has generally taken a very serious approach when dealing with dishonesty by a practitioner.[116]

239 Intentionally misleading anyone is a serious breach of the practitioner's professional duty.[117]

240 In our view, in the present circumstances, the Payment Representation would, without more, constitute professional misconduct. When combined with the failure to pay Mr B and the preferential payment of Angove, the conclusion is inescapable that the conduct is sufficiently serious to warrant a conclusion that the practitioner is not a fit and proper person to engage in legal practice.

Ground 2

241 Ground 2 concerns the practitioner's conduct in 2015 when he ended the provision of legal services by Angove and commenced the provision of legal services by LoN.

242 The ground alleges that, as part of an attempt to avoid the liabilities of Angove, including the obligation to pay Mr B's fees, the practitioner 'derived' the new legal practice of LoN from the existing practice of Angove and, for the same purpose, that he was dishonest in his representations with the LPBWA on three occasions –

---

[116] ***Gandini v Legal Profession Complaints Committee*** [2013] WASCA 168 (S) (***Gandini***) at [36].
[117] ***Vogt v Legal Practitioners Complaints Committee*** [2009] WASCA 202 (***Vogt***) at [61].

at a meeting on 17 June 2015 and in his written answers to questions on the Form 7 and the Form 9 lodged on 23 June 2015 and 9 July 2015, respectively.

Subground 2(a)

243 Subground 2(a) concerns the conduct of the practitioner at a meeting with Mr Fulham and Mr Mylotte on 17 June 2015.

244 In submissions, Mr Musikanth SC sought to place that meeting in a chronological context by noting that:

(a) 17 June 2015 was the deadline by which Nova Legal demanded that the practitioner provide a plan for the payment of Mr B's fees in its letter to the practitioner of 15 June 2015;[118] and

(b) it was also the date on which the practitioner had lodged an application with ASIC for the registration of LoN.[119]

245 Ms Fulham gave evidence at the hearing at which she adopted her witness statement[120] as her evidence-in-chief and supplemented it with some additional evidence. She was not cross-examined and no evidence was given which contradicted with her evidence.

246 Ms Fulham's evidence was that the meeting on 17 June 2015 was arranged on the previous day following contact by the practitioner and that the purpose of the meeting was to discuss the requirements for closing a legal practice.[121]

247 Her evidence was that the practitioner attended the meeting with Ms Ruba and that during the meeting she (Ms Fulham) asked him (the practitioner) why he proposed to close Angove. Her evidence was that he answered that he was trying to distance himself from 'the Douglases'.[122] She said that she recalled that the practitioner and Ms Ruba appeared to her to be 'resentful of the position they were in with the Douglases.'[123]

---

[118] Exhibit 1, page 223.
[119] Exhibit 1, pages 442 – 443.
[120] Exhibit 8.
[121] Exhibit 8, para 8.
[122] Oliver and Stephanie Douglas had been involved in the practice in various ways, including as clients - see ***Legal Profession Complaints Committee and Khosa*** [2015] WASAT 107 (***Khosa***). More relevantly, Ms Stephanie Douglas was, at one stage, both a shareholder and non-legal director of Angove.
[123] Exhibit 8, para 9.

248 Ms Fulham's evidence is that during the meeting she discussed with the practitioner certain aspects of Angove's financial circumstances and that the practitioner said to her that:

(a) The client owed fees to Angove, as did the Douglases;

(b) Angove had around 10 active files and had ~$16,000 in trust and that he had been trying to build the practice;

(c) If Angove's WIP (work in progress – i.e. work undertaken but not billed) was billed it could meet its current overheads;

(d) Angove was not yet in a position of insolvency but that the practitioner was 'concerned' and had started recovery proceedings against the client for legal fees which she understood to be a 'not insignificant amount';

(e) He had concerns that he and Ms Ruba would become personally bankrupt.[124]

249 Ms Fulham's evidence was that the discussions described in sub-para (d) above were 'generic' and that she did not receive any detailed financial information from the practitioner.[125]

250 Her evidence was also that there was no indication from the practitioner during the meeting that Angove had any significant outstanding debts or that Angove was, or was imminently, insolvent. Rather, her evidence was that the impression she obtained from what was said and not said was that while Angove 'was not travelling well', Angove was able to meet its present overheads and that the only relevant outstanding debts that were raised in the meeting were those owed to Angove by others.[126]

251 Ms Fulham's evidence is consistent with her contemporaneous file note[127] and an email of 17 February 2016 from Ms Fulham to Ms Donaldson, the applicant's Senior Legal Officer, which Ms Fulham sent in response to Ms Donaldson's previous enquiry.[128]

252 In particular, we note that Ms Fulham's file note records the following:

[124] Exhibit 8, para 10.
[125] Exhibit 8, para 10(c).
[126] Exhibit 8, paras 11, 13 and 15.
[127] Exhibit 1, page 372.
[128] Exhibit 1, pages 370 – 371.

Angove Law – insolvency? – Not yet – concerned
*started recovery proceedings [*name of client*]*
Douglas, S exiting the firm

Active files ~10 Bill WIP can meet current overheads
…

253 We sought various clarifications of Ms Fulham during her *viva voce* evidence at the hearing. Most relevantly, in response to a question about debts being owed and, in particular, that she had previously said that the only debts mentioned were those owing to Angove, Ms Fulham said that she 'asked the question whether there was a concern over insolvency [and] [t]he response was that they [the practitioner and Ms Ruba] were not concerned in that regard.'[129]

254 Mr Mylotte gave evidence at the hearing at which he adopted his witness statement.[130]

255 In his witness statement he states that he took no notes during the meeting of 17 June 2015 and that, following a perusal of documents he had been able to recall certain matters, including that the meeting was held to discuss notification requirements regarding the closure of a legal practice and the commencement of a new legal practice, both of which were being proposed by the practitioner. He could also recall that there had been some discussion of the practitioner's personal financial position, but in that regard he was unable to remember any details and he could not recall at all whether there had been any discussion of Angove's solvency.[131]

256 In his Response, the practitioner denies that he failed to disclose at the meeting that Angove owed significant unpaid debts which it was unable to pay. Rather, he says that he made full disclosure about Angove's financial position.[132]

257 However, because of his failure to attend the hearing, and consequent failure to call witnesses and tender documents, there is no evidence before us that supports those contentions.

[129] ts 78, 21 March 2023.
[130] ts 86, 21 March 2023.
[131] Exhibit 9, paras 8 – 11.
[132] Response, paras 70 – 71, esp 71.2.

258 In the absence of anything by way of contemporaneous evidence to rebut that of Ms Fulham's file note, we accept her evidence, and therefore find, that the practitioner:

(a) did ***not*** disclose to the LPBWA that Angove owed a significant amount in unpaid fees to Mr B;

(b) did ***not*** disclose to the LPBWA that Angove had no capacity to pay those fees;

(c) did ***not*** disclose any debt owed by Angove save for 'current overheads';

(d) did ***not*** disclose that Angove was insolvent;

(e) to the contrary, conveyed the impression that, while there were concerns with its finances, Angove could meet its current financial obligations and was currently solvent;

(f) answered a direct question from Ms Fulham about Angove's solvency by saying, in effect, that he was not concerned in that regard.

259 Accordingly, we find that at the meeting of 17 June 2015 the practitioner conveyed the impression to Ms Fulham, by both what he said and what he did not say, both of which are set out above, that Angove was at that stage solvent, in that it could meet its debts as and when they fell due.

260 We are satisfied, and we find, that impression was false in that, as at the date of the meeting, Angove was insolvent.

261 So much should be evident from what we have already found in relation to Ground 1 but, to be clear, as at mid-June 2015:

(a) more than 15 months had passed since the most recent of Mr B's invoices had been issued;

(b) the sum total of Mr B's outstanding invoices was very considerable (in excess of $130,000);

(c) no payments had been made by Angove to Mr B since 18 December 2013;

(d) there was no realistic chance of the client making any further payments of money into trust or of paying Mr B directly.

262 In those circumstances, the payment of the substantial debt owed to Mr B required Angove to earn the sums owing from other sources or for the practitioner to pay the debt himself.

263 But there was no realistic chance of either of those events occurring in that:

(a) Although Ms Fulham's evidence is that the practitioner told her that Angove had 10 active files and $16,000 in trust,[133] the Response states that when Angove ceased operation in early July 2015, it had 'only approximately four files' none of which were active and only one of which had a prospect of ongoing work.[134] The latter version is consistent with the practitioner's Memorandum of Response to the applicant dated 4 December 2015, in which he states that only four client files were transferred from Angove to LoN when the latter started provided legal services (in July 2015).[135]

(b) The practitioner was also in personal financial difficulties such that by October 2014 he was defaulting on his home mortgage such that the mortgagee commenced legal proceedings in January 2016.[136]

264 The practitioner admitted in both his Memorandum of Response to the applicant of 4 December 2015[137] and his Response[138] that Angove was insolvent at the time of his meeting with Ms Fulham and Mr Mylotte.

265 Indeed, as is indicated above, the practitioner contends in both documents that he advised Ms Fulham of that insolvency at the meeting.[139]

266 We do not accept that contention. It is not supported by the contemporaneous documentary evidence. It also strikes us as most

[133] Exhibit 8, para 10(b).
[134] Response, paras 78.5 and 78.6.
[135] Exhibit 1, page 257, para 79.
[136] Response, paras 52.5 – 52.7.
[137] Exhibit 1, page 256 – albeit that the practitioner says that Angove was insolvent because its liabilities exceeded its assets, rather than due to its inability to pay debts as and when they fell due.
[138] Response, paras 70 – 71.
[139] Response, para 71.7; Exhibit 1, page 256, para 77.

unlikely that Ms Fulham, as the Executive Officer of the LPBWA would, upon receiving such advice, take no steps as a result but, rather, allow the practitioner to cease providing legal services through Angove and allow him to provide legal advice through LoN.

267 Ms Fulham's evidence was that her usual practice in dealing with an insolvent practice (which she said had inevitably involved practices which already had a liquidator appointed before she was involved) was to have an external manager appointed.[140] As she was satisfied that, despite concerns, Angove was not insolvent, she did no more than provide advice as to the process for closing a practice.[141]

268 Mr Mylotte's evidence was consistent with that of Ms Fulham. It was to the effect that Ms Fulham was responsible for dealing with insolvent practices and that Ms Fulham inevitably advised that an insolvent practice must not trade, that bankruptcy may affect a practitioner's right to practice, and that the LPBWA would appoint a manager in the case of insolvency or impending insolvency.[142]

269 For the above reasons, we are satisfied, and we find, that as at the time of the 17 June 2015 meeting, Angove was insolvent and the practitioner knew that was the case.

270 We are also satisfied, and we find, that the practitioner gave the impression, both by what was said and what was not said at the meeting, that Angove was not insolvent and that, while he had some concerns with its finances, it was able to meet its current liabilities.

271 Accordingly, we are satisfied that the practitioner represented, at the meeting of 17 June 2015, that Angove was solvent, when that representation was false in that Angove was insolvent and the practitioner knew Angove was insolvent and therefore knew the representation was false.

Subground 2(b)

272 Subground 2(b) alleges that the practitioner knowingly made false representations when completing and submitting the Form 7 and the Form 9 to the LPBWA in June and July 2015.

[140] Exhibit 8, para 13.
[141] Exhibit 8, para 15.
[142] Exhibit 9, paras 12 – 13.

273 There are thus two elements to the subground – that the representations were false when they were made and that the practitioner knew that they were false when he made them.

274 Form 7 and Form 9 are pro-forma documents which the LPBWA requires to be completed and filed with it whenever it is intended that an ILP will start providing legal services[143] (Form 7) or when it is intended that an ILP will cease providing legal services[144] (Form 9).

275 The practitioner admits that he filed with the LPBWA a Form 7 on 23 June 2015:

(a) which date followed the receipt by Angove of demands for payment from Nova Legal, Mr B's solicitors;

(b) which represented that LoN would ***not*** be taking over an existing ILP; and

(c) in which he certified that the information contained in the form was true and correct and that no relevant information had been omitted.[145]

276 A copy of the completed Form 7 is included in Exhibit 1. It is signed by the practitioner and dated 23 June 2015. In response to Q17, which asks '[w]ill the proposed ILP [being LoN] be taking over an existing practice?', the practitioner has marked the box next to the answer 'No'.[146]

277 The practitioner also admits that he filed with the LPBWA a Form 9 on 9 July 2015:

(a) which represented that Angove had *not* been taken over by another law practice;

(b) in which he certified that the information contained in the form was true and correct and that no relevant information had been omitted.[147]

278 A copy of the completed Form 9 is also included in Exhibit 1. It is signed by the practitioner and dated 9 July 2015. In response to Q12,

[143] LP Act, s 102.
[144] LP Act, s 104.
[145] Response, paras 73 and 75.
[146] Exhibit 1, pages 567 – 569.
[147] Response, paras 74 – 75.

which asks '[h]as the former ILP [being Angove] been taken over by another law practice?', the practitioner has marked the box next to the answer 'No'.[148]

279 The applicant alleges that: (1) the answer to Q17 to the Form 7 and to Q12 to the Form 9 were false, in that LoN did 'take over' the practice of Angove Law; and (2) the practitioner knew that those answers were false.

280 We accept the applicant's submission, and we find, that the ordinary meaning of 'take over' is to 'assume or acquire control of'.[149]

281 We also find that that is what the questions asked in the Forms seek to understand – is it the case that Practice A will assume (or has assumed) or acquire (or has acquired) control of Practice B?

282 We also accept the applicant's submission, and we find, that to 'take control' of a practice involves the assuming or acquiring of control of the 'key external manifestations' of the practice.[150]

283 The applicant relied upon no authority for that submission and we have been unable to find any that deals with this issue either way.

284 In the present circumstances, the practitioner was both the sole shareholder and the director of Angove and LoN at the relevant time. In that sense he was the controlling mind of both entities and there is therefore no useful analogy in principles concerning control of corporate entities.

285 In the absence of any other analogue we are satisfied that the appropriate focus ought to be how the business of the provision of legal services is being carried on and, particularly, how the business inter-faces with the public, and fee-paying clients in particular.

286 The applicant submits that Angove was 'taken over' by LoN in that the latter assumed control of each of: (1) the relevant lease/ premises; (2) the means of communication with and by the practice; (3) the means by which legal work is done (legal texts, computers and software); and (4) the practice's clients.[151]

[148] Exhibit 1, pages 570 – 571.
[149] *Macquarie Dictionary*.
[150] ts 139, 24 March 2023.
[151] ts 66, 21 March 2023

287 The applicant submits that that occurred in circumstances in which:

(a) LoN commenced practice on or around 1 July 2015 and Angove Law ceased trading on around 7 July 2015;[152] and

(b) on each date, the practitioner was the only legal practitioner director of the relevant entity.[153]

288 In his Response, the practitioner admitted that:

(a) LoN assumed occupation of, and operated from, the premises previously occupied by Angove;[154]

(b) the telephone and facsimile numbers formerly used by Angove were transferred to LoN;[155]

(c) LoN met the payment of rent due under the lease previously entered into by Angove;[156]

(d) LoN acquired:

a. items of office equipment, text books and a file management software program, Filepro, from Angove;[157] and

b. a file of Angove, being the only file of Angove that had a prospect of ongoing work.[158]

289 Turning briefly to the issue of client files, we note that the evidence as to the number of Angove's files that were taken over by LoN is somewhat inconsistent.

290 As noted above, the Response (at para 78.6) states that '[o]nly one of Angove files comprised a matter with the prospect of ongoing work' and that at 'the client's election the file was transferred to' LoN. That para must be read in the context of para 78.5 of the Response, which states that at the time Angove ceased offering legal services,

[152] Response, paras 76 – 77; Exhibit 1, pages 569 – 570.
[153] Exhibit 1, pages 442 – 443 and 567.
[154] Response, para 78.1.
[155] Response, para 78.2.
[156] Response, para 78.3.
[157] Response, para 78.4.
[158] Response, para 78.6 – '[o]nly one of Angove Law's files comprised a matter with the prospect of ongoing work.'

'it had only approximately four files, each of which related to clients whose work had been completed or whose matter was not then active'.

291 The evidence also includes, in chronological order, the following in this regard:

(a) Ms Fulham's evidence is that at their meeting of 17 June 2015, the practitioner advised her that Angove had 'around 10 active files';[159]

(b) in his response to the applicant of 4 December 2015 the practitioner said that 'only four clients from Angove Law transferred their files to [LoN]'; [160]

(c) in his response to the LPBWA of 6 May 2016, the practitioner said that 'the only remaining four clients from Angove Law transferred their files to [LoN]';[161]

(d) in his Response (filed December 2019), the practitioner says that he told Ms Fulham at their meeting of 17 June 2015 that Angove Law 'had only 4 remaining clients whose matters were complete and there was little or no billable work-in-progress'.[162]

292 We are satisfied that, when read as a whole, the evidence is to the effect that the only client file/s of any value were transferred from Angove to LoN. That is, although some of the practitioner's written material, specifically his Response of December 2015, might be read as suggesting that less than all of Angove's files were transferred to LoN, when the passages are read together, we are satisfied that the practitioner's use of the word 'only' is not intended to suggest that Angove controlled other files that were not transferred. Rather, the term is used to emphasise the small number of files involved.

293 Accordingly, we are satisfied, and we find, that all of Angove's current files (whether that was one file, four files or more) were transferred to LoN.

294 Despite admitting those matters described in para [288] above, the practitioner denies that LoN was 'derived' from Angove. Specifically, the practitioner denies para 77 of the SFC, which reads as follows:

---

159 Exhibit 8, para 10(b).
160 Exhibit 1, page 257.
161 Exhibit 1, page 614.
162 Response, para 71.10.

> … the practitioner derived a new [ILP] LoN from the existing practice of Angove Law and LoN acquired the assets of Angove Law but did not assume the liabilities of Angove Law, including the debt owing to Mr B[ ] in respect of his outstanding fees. The practitioner derived LoN from Angove Law in an attempt to avoid the liabilities of Angove Law, including the obligation to pay Mr B's[ ] fees.

295 In his Response, the practitioner says that that paragraph:

> … is denied in its entirety as it misrepresents the position of Angove Law in relation to LoN. Other than some library books, furniture, computer equipment and software, all the assets and liabilities of Angove Law remained with Angove Law. In particular, the Applicant fails to disclose that the debts owed to Angove Law by the Douglas' were not transferred to LoN. The debt owed to Angove Law amounted to $135,000 and represented the biggest asset of Angove Law. This was made known to the Applicant during its investigation of the complaint.[163]

296 It is unclear, other than the debt owed by Angove to Mr B and the debts said to have been owed by the Douglases, what assets and liabilities of Angove are said by the practitioner to have 'remained with Angove'.

297 More critically, there isn't any evidence that Angove retained anything else.[164] Indeed, it is difficult to see what else it might have retained in circumstances where it had assumed or acquired control of each of: (1) the place at which the practice was to occur (the premises); (2) the means by which the practice was to be undertaken (the texts, computers and software); (3) the clients to be serviced; and (4) the means of communication with those clients.

298 In those circumstances it doesn't, in our view, matter whether or not some of Angove Law's assets were, or were not, assumed by LoN.

299 The question is whether LoN assumed control of Angove's practice.

300 Given that it assumed or acquired control of the four matters listed above and given that the practitioner, who was Angove's only legal practice director and had ceased practising through Angove and commenced practice through LoN, again as the only legal practice

[163] Response, para 79.
[164] Indeed, other than the bare assertion contained in the Response, there isn't any evidence that Angove retained the Douglas debt.

director, we are satisfied, as we find, that question must be answered 'yes'.

301 We are also satisfied, and we find, that the practitioner knew that each of the representations were false. Given that the conclusion reached concerns the practitioner's state of mind, that conclusion is reached by inference.[165]

302 In our view, the inference flows irresistibly (in that it admits no other realistic possibility)[166] from the following:

(a) the practitioner applied to ASIC to incorporate LoN on (Wednesday) 17 June 2015, being the day on which the deadline for the provision of a payment plan for the payment of Mr B's debts, imposed by his solicitors, expired;[167]

(b) the application for incorporation gave LoN's address for its registered office and principal place of business as the address occupied at that time by Angove;[168]

(c) a trust account in the name 'Law on Newcastle Pty Ltd Law Practice Trust Account' was opened on (Friday) 19 June 2015 which was a matter of which the practitioner was, at least, aware;[169]

(d) the practitioner completed and signed the Form 7 on (Tuesday) 23 June 2015 (only two working days after ASIC registered LoN) and in which LoN is given the same address, the same telephone, and the same fax number as were used by Angove;[170]

(e) on 1 July 2015, LoN commenced providing legal services[171] from the same premises and using the same telephone and fax numbers and through the practitioner (being Angove's sole legal practice director) using Angove's texts, computers and software;[172]

---

[165] ***Khosa v Legal Profession Complaints Committee*** [2017] WASCA 192 at [169] citing ***BHP Billiton Ltd v Dunning*** [2013] NSWCA 421 at [51].
[166] ***Palmer v Dolman*** [2005] NSWCA 361 at [41].
[167] Exhibit 1, pages 223 and 442.
[168] Exhibit 1, page 442.
[169] Exhibit 1, page 569.
[170] Exhibit 1, page 567.
[171] Exhibit 1, page 569.
[172] See above at para 288 as to the admissions made by the practitioner.

(f) on 7 July 2015 Angove Law ceased providing legal services.[173]

303 For those reasons we are satisfied, and we find, that the answers given by the practitioner to Q17 on the Form 7 and Q12 on the Form 9 were false and the practitioner knew they were false when he gave them.

Subground 2(c)

304 Subground 2(c) alleges that the practitioner attempted to avoid the liabilities of Angove, including the obligation to pay 'Mr B's fee', by 'deriving' the new incorporated practice of LoN from Angove's existing practice.

305 In closing, Mr Musikanth SC submitted that to determine this sub-ground we must decide that the practitioner took the steps of closing Angove and establishing LoN ***in order to*** avoid the former's liabilities.[174] The applicant's case is that we should draw such an inference because there is, in effect, no other plausible explanation for the closing of Angove and the opening of LoN.

306 In his Response, the practitioner contends that the allegation that he 'derived' LoN from Angove in order to avoid Angove's liability for Mr B's fees lacks a logical basis because, in any event, he remains personally liable for those fees.

307 There is some strength to that proposition in that the practitioners ethical obligation to pay' Mr B's is a personal one.[175]

308 It is also the case that the debt owed to Mr B by Angove was not erased or obliterated by the fact that Angove no longer provided legal services; Angove itself remained a legal entity.

309 But the actions taken by the practitioner had the effect of removing all assets from Angove save for the debt owed by the client,[176] which by this stage was, clearly, not going to be paid.

310 The effect, therefore, was to render the debt owed by Angove to Mr B, effectively unenforceable and to quarantine the income producing assets from any such action.

[173] Exhibit 1, page 570.
[174] ts 147, 24 March 2023.
[175] see, for example, Conduct Rules, Rules 4 and 26. See also ***Shand v Doyle*** [1997] ANZ ConvR 134 at 135 (Kennedy ACJ) and 136 (Rowland J).
[176] And, perhaps, the debt owed by the Douglases.

311 In that regard we accept the applicant's submission that the debt owed to Mr B by Angove provided a motive for the practitioner to do as he did,[177] particularly in circumstances where, we find, the correspondence from Nova Legal in July 2015 represented an escalation in Mr B's efforts to extract payment for his outstanding fees.

312 In addition, for the reasons that follow, we are satisfied and we find that there is no other reasonable explanation for the actions taken by the practitioner.

313 As described above, on 17 June 2015 the practitioner met with Ms Fulham and Mr Mylotte and advised that he was looking to close Angove in an attempt to rid himself of the Douglases.

314 That explanation was false. The evidence is that the Douglases were no longer involved with Angove as at that date. Indeed, their involvement with Angove appears to have ended by at least November 2014.

315 So much appears from an ASIC search for Angove dated 10 August 2016, which shows that Stephanie Douglas, who was appointed as director and secretary on 1 November 2012, ceased in those positions on 12 May 2014. It also shows her as a former shareholder, the relevant forms for which (i.e. forms evidencing the transfer of shares) were lodged on 25 November 2014. [178]

316 We note that the practitioner elsewhere acknowledged that he and the Douglases had parted company in 2014. In his letter to the Australian Tax Office of 30 July 2014[179] he said that Ms Douglas resigned as a director in April 2014 and had signed a 'Deed of Separation' whereby she also sold her shares to the practitioner. He also said similar things to the applicant in his letter of 15 April 2016,[180] and in his letter to the LPBWA of 6 May 2016.[181]

317 The practitioner's other explanation for his decision to cease Angove's legal practice is that he was concerned to avoid insolvent trading. That explanation is both given in his response to the applicant of 4 December 2015[182] and the Response.[183] In both instances, he says

---

[177] ts 151 – 152, 24 March 2023.
[178] Exhibit 1, pages 586 – 589.
[179] Exhibit 1, page 115.
[180] Exhibit 1, page 396.
[181] Exhibit 1, 611.
[182] Exhibit 1, page 256.
[183] Response, para 71.

that he was concerned to ensure that Angove did not trade while insolvent and that he arranged to meet with Ms Fulham on 17 June 2015 to discuss his obligations. As we have already stated, Ms Fulham's evidence, which we accept, is inconsistent with that account of what occurred.

318 The practitioner has put forward no other explanation for his decision to cease the provision of legal services through Angove and to commence such provision through LoN.

319 In our view, the obvious motive, the close chronological relationship between the solicitor's correspondence demanding payment, the meeting with the LPBWA and the cessation of Angove and the commencement LoN, and the absence of any other plausible explanation, provides a proper basis for the inference to be drawn that the practitioner ceased Angove's practice and commenced LoN's practice in an attempt to avoid liability of Mr B's outstanding fees.

320 That is, we infer, and we find, that the practitioner determined to avoid the debt owed to Mr B by 'deriving' LoN from Angove.

Sub-ground 2(d)

321 By this ground the applicant alleges that the practitioner engaged in the conduct the subject of subgrounds 2(a) and/ or 2(b) as part of his attempt – which is the subject of subground 2(c) – to avoid the obligation to pay Mr B's outstanding fees by deriving LoN from Angove.

322 In closing, Mr Musikanth SC submitted that this subground is satisfied if subgrounds 2(a), (b) and (c) are established.[184]

323 We understand that submission to be that if those three subgrounds are made out, there is no other reasonably possible inference to be drawn but that the practitioner made the false representations as part of his attempt to avoid the obligation to pay Mr B's outstanding fees.

324 For the following reasons, we agree.

325 First, we note that the practitioner has not, in any substantive manner, responded to this allegation in his Response.

[184] ts 152, 24 March 2023.

326 Paragraph 78 of the SFC contains both the allegation that forms the substance of subground 2(c) and the allegation which forms the substance of subground 2(d).

327 In his Response, the practitioner does not distinguish between the two allegations and, rather, simply denies the paragraph 'in its entirety as it represents a situation that did not occur.'[185]

328 Elsewhere, the Response contains material which goes to whether the three representations were false or misleading. It also contains material which denies that he was seeking to derive LoN from Angove. We have dealt with that material (in each case) previously in these reasons. The Response does not, however, separately address the question of whether those representations were made as part of his attempt to avoid Angove's liability to pay Mr B's fees.

329 In the absence of any other explanation, we are left to draw an inference from the facts as previously found.

330 In our view, each of the three false representations (the 17 June 2015 representation, and the representations on the Form 7 and Form 9) had the effect of:

(a) encouraging in the LPBWA a benign view of the practitioner's decision to cease Angove's legal practice and to commence LoN's legal practice;

(b) discouraging further examination by LPBWA of what the practitioner was, in fact, doing and what might have been the purpose of those acts.

331 In light of our previous finding – subground 2(c) – that the practitioner's actions in deriving LoN's practice from Angove's practice was done in order to avoid Angove's liability for Mr B's outstanding fees, it is also relevant to our consideration of this subground that the practitioner must have known that 'deriving' LoN from Angove in order to avoid Angove's liability for Mr B's fees was unethical. Accordingly, we are satisfied, and we find, that the practitioner had an obvious interest in avoiding scrutiny of the steps he was taking to avoid Angove's liability.

332 In our view, in the absence of any other explanation for his actions, we are satisfied, and we find, that there is no other realistic

[185] Response, para 80.

possibility as to why the practitioner made the three false representations.

333 Accordingly, we are satisfied that the only possible inference to be drawn is, and we find that, the practitioner made the false and misleading 17 June 2015 representation, and the false representations on the Form 7 and Form 9, in order to derive LoN from Angove Law and thereby avoid Angove's obligation to pay Mr B's outstanding fees.

Does the Conduct so Found in Ground 2 Constitute Professional Misconduct?

334 The gravamen of Ground Two is dishonesty. Our findings in relation to each of the four sub-grounds involve a finding of dishonesty.

335 For subgrounds 2(a) and 2(b) we found that the practitioner knowingly and falsely – i.e. dishonestly – misrepresented relevant circumstances to LPBWA on three occasions; in the 17 June 2015 meeting and in each of the Form 7 and the Form 9.

336 For subground 2(c) we found that the practitioner 'derived' LoN from Angove in an attempt to avoid Angove's liabilities including those owed to Mr B. In our view it is self-evident that the steps taken – the transfer of Angove's income earning assets to LoN in order to avoid Angove's liability for Mr B's debts – is dishonest.

337 And in relation to subground 2(d) we found that the practitioner knowingly made the false statements the subject of subgrounds 2(a) and (b) as part of the attempt to derive LoN from Angove so as to avoid Angove's obligation to pay Mr B's debts.

338 As we have already said, above, integrity and honesty are essential characteristics expected of a practitioner and the Court and this Tribunal have taken a very serious approach when dealing with dishonesty by a practitioner.[186]

339 In particular, to intentionally mislead anyone is a serious breach of the practitioner's professional duty.[187]

340 In our view, the practitioner engaged in a course of dishonest conduct which was designed to avoid Angove's legal obligation to pay Mr B's outstanding fees.

[186] ***Gandini*** at [36].
[187] ***Vogt*** at [61].

341 As noted above at para 306, the practitioner acknowledged in his Response that he remains ethically liable for Mr B's fees in his personal capacity.

342 That was put by the practitioner as a basis for his contention that no benefit was gained from his deriving LoN from Angove.

343 The obvious answer to that contention is that at no time has the practitioner offered to pay, or enter into an arrangement to pay, Mr B's fees.

344 But that is not the gravamen of Ground 2. Rather, it concerns the deliberate, and dishonest, taking of steps to avoid Angove's legal liability for Mr B's fees and to avoid scrutiny by LPBWA of those actions.

345 Accordingly, we have no hesitation in finding that the conduct the practitioner has, pursuant to our findings in relation to each of the subgrounds and to Ground 2 as a whole, engaged in conduct that, in each case:

(a) fell short by a substantial degree of the standard of professional conduct observed by members of the legal profession of good repute and competence;

(b) would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence; and

(c) justifies a finding that he is not a fit and proper person to engage in legal practice.

346 We are therefore satisfied, and we find, that the practitioner engaged in professional misconduct.

Ground 3

347 Ground 3 alleges that the practitioner failed, without reasonable excuse, to respond to various requests and demands for information and documents from the applicant.

348 There are five subgrounds. Each concerns a different request or demand for information and documents. In some cases the request or demand was never complied with, while in others it was met but that occurred after the expiry of the relevant timeframe.

349 Subgrounds 3(a), (b) and (c) allege a breach of rule 50(3) of the Conduct Rules, subground 3(d) alleges a breach of ss 520(5) and 532(3) of the LP Act and subground 3(e) alleges a breach of rule 50(3) and/or s 531(2) of the LP Act.

350 Rule 50(3) of the Conduct Rules requires that a practitioner must respond to requests from the applicant within a reasonable time but in any event within 14 days or such later time as the applicant allows. Sub-section 520(5) of the LP Act makes it an offence to fail to comply with a summons issued under that section, s 531(2) makes it an offence to, without reasonable excuse, obstruct or mislead an investigator exercising his power under the LP Act, and s 532(3) mandates compliance with a requirement imposed under s 520 'without reasonable excuse'.

351 However, while subground 3(d) is the only subground which explicitly refers to s 532(3) of the LP Act, it is the *chapeau* to Ground 3 as a whole that describes the conduct in question as lacking a reasonable excuse. We are therefore of the view, and we find, that the applicant must demonstrate a lack of a reasonable excuse in each of the subgrounds in order to make out the Ground.

352 Finally, by way of introduction, we note that the practitioner's Response admits, in relation to the allegations forming each of the subgrounds, that he failed to respond to each of the relevant requests within the relevant timeframes. However, in each case he says that he had a 'reasonable excuse' to do so.

Subground 3(a)

353 This subground alleges that the practitioner failed to respond to correspondence from the applicant requesting information and documents dated 31 August 2015, 5 October 2015 and 2 November 2015 until required to do so by summons issued by the applicant to the practitioner.

354 The applicant's letter of 31 August 2015 noted that Mr B's complaint had been provided to the applicant's Investigation Team, briefly described the complaint made by Mr B against the practitioner, attached documents and requested that he make submissions 'about the complaint' including 'facts and explanations' regarding five specified matters, the fifth of which sought copies of Angove's financial information and accounts regarding the proceedings.[188]

[188] Exhibit 1, pages 237 – 239.

355 No response being received, the Applicant wrote on 30 September 2015 and asked the practitioner to respond to its previous letter by 14 October 2015.[189]

356 By letter dated 2 October 2015 the practitioner advised that he had only just received the applicant's letter of 31 August 2015 due to its delivery to a wrong address. He asked for an extension of time to respond to the applicant's letter of 31 August 2015 until 30 October 2015.[190]

357 The applicant approved this extension of time by letter dated 5 October 2015.[191]

358 No response being received, the applicant wrote on 2 November 2015 advising that it had not received any response and granted a further extension of time to respond to its letter of 31 August 2015 until 16 November 2015.[192]

359 On 20 November 2015, having received no response from the practitioner to its correspondence of 2 November 2015, the applicant served a summons on the practitioner (**First Summons**).[193]

360 The practitioner complied with the First Summons by letter dated 4 December 2015, which he sent on 7 December 2015.[194]

361 In his Response, the practitioner admits that the applicant sent each of the letters described and that they contained the request in each case.[195]

362 However, in each case, he denies that, without reasonable excuse, he did not respond to the letter.[196]

363 We do not understand those denials to suggest that he did, in fact, respond to the correspondence or otherwise provide the information and documents sought. In any event, there is no evidence that he did so and the applicant's correspondence of 30 September 2015, 5 October 2015 and 2 November 2015 all state that to those dates the practitioner had not provided what had been requested.

[189] Exhibit 1, page 240.
[190] Exhibit 1, page 241.
[191] Exhibit 1, page 243.
[192] Exhibit 1, page 244.
[193] Exhibit 1, pages 245 – 246.
[194] Exhibit 1, pages 248 – 340.
[195] Response, paras 83, 88, 89 and 92; SFC, paras 80, 82, 83 and 85.
[196] Response, paras 87, 90 and 93; SFC, paras 81, 84 and 86.

364 Rather, we understand the practitioner's denials to be concerned with the allegation that his failure occurred without reasonable excuse.

365 The reasonable excuse apparently relied upon in the Response is that the practitioner was otherwise engaged with other disciplinary proceedings – VR 34 of 2015. That is the extent to which any explanation is given for the failure in his Response.[197]

366 In closing submissions, Mr Beetham, who appeared as junior counsel with Mr Musikanth SC and who addressed us in relation to Ground 3, noted the practitioner's letter to the applicant of 27 September 2016,[198] which he said provided the 'clearest' explanation for the practitioner's failure to respond to the applicant's various requests made of him.[199]

367 As to the second half of 2015 (being the period in which the applicant's request was made by the three letters the subject of this subground), the practitioner's letter of 27 September 2016 raises, by way of apparent explanation, the hearing by the Tribunal of VR 34 of 2015 in August 2015 and, in particular, its determination in September 2015 that the practitioner had engaged in professional misconduct, which he describes as 'devastating'.[200] It also mentions the practitioner's financial difficulties at the time, which went to both the legal practice and his personal situation. It also refers to him 'struggling with what was a new practice' being a reference to LoN.[201]

368 It is to be noted that none of those matters were given by the practitioner as a contemporaneous excuse or explanation for his failure to respond to the request at the time of the non-compliance (i.e. late 2015).

369 Rather, the only explanation given for his delay in responding, was the letter of 2 October 2015, in which practitioner advised that he had only just received the applicant's letter of 31 August 2015.

370 Accepting that at face value as an insurmountable practical hurdle to compliance, and therefore a 'reasonable excuse' for the failure to comply to that point, the question is whether the practitioner's

[197] Response, paras 87, 90 – 91; SFC, paras 81 and 84.
[198] Exhibit 1, pages 525 – 528.
[199] ts 156 – 157, 24 March 2023.
[200] The letter also mentions VR 37 of 2015. VR 34 of 2015 went to hearing on 27 and 28 August 2015 and a decision was handed down on 23 September 2015 – ***Khosa*** at [113]. VR 37 of 2015 was resolved by consent orders made 28 August 2015 without the need for a hearing.
[201] Exhibit 1, page 526.

subsequent failure to respond to the request (which continued until he complied with the First Summons on 7 December 2015) is reasonably excused by his involvement with those other proceedings, his 'struggle' with LoN and the financial difficulties both of LoN and personally.

371 The Tribunal recently addressed the question of reasonable excuse in the context of s 532(3)(a) of the LP Act in ***Lourey [No 2]***.[202] As was noted in those reasons, whether an excuse is reasonable will depend on the circumstances of the individual case and the purpose of the provision which is alleged to have been breached.[203]

372 An alternative view, put by Dawson J in dissent in ***Taikato***,[204] which has been quoted with apparent approval by the Court of Appeal[205] is that a reasonable excuse is one which a reasonable person would accept.

373 In our view, the purpose of Rule 50 of the Conduct Rules is very similar as that of s 520 of the LP Act.[206] It is to ensure that the applicant is provided, promptly, with all documents and information that may be relevant to any concerns or questions about the relevant practitioner's conduct or personal behaviour. In that way it has a broader scope than s 520 which is concerned with summonses issued during an investigation into a complaint.[207]

374 Given that purpose, we are of the view that an excuse that the practitioner is busy with other proceedings, even where the practitioner is the subject of those other proceedings, cannot amount to a reasonable excuse for the failure to comply with a request by the practitioner's regulatory authority to provide information and documents.

375 In our view, a request to provide information to the regulatory authority must take precedence over any other matter associated with professional practice.

376 Such an approach reflects a number of principles. First, it reflects the role of the regulatory authority in the legislative regime, as the regulator of the profession for the protection of the public.

[202] ***Lourey [No 2]***.
[203] ***Lourey [No 2]*** at [177] citing ***Taikato v The Queen*** (1996) 186 CLR 454 (***Taikato***) at [464] (Brennan CJ, Toohey, McHugh and Gummow JJ).
[204] ***Taikato*** at [470].
[205] ***Wilson v McDonald*** [2009] WASCA 39 at [47]. See also, in another statutory context, ***Aurora Construction Materials Pty Ltd v Victorian WorkCover Authority*** [2017] VSC 573 at [79].
[206] ***Lourey [No 2]*** at [181] – [183].
[207] Ibid.

377 Related to the first principle, such an approach also reflects the long-standing general obligation of legal practitioners to assist and inform the regulatory body with its enquiries.[208]

378 It also reflects the fact that for many lawyers, for much of the time, their day to day existence involves work that is demanding of both their time and attention. To allow those demands to operate as a reasonable excuse for the failure to comply with the regulator's requests would compromise the system and, ultimately, the protection of the public.

379 Such an approach is also consistent with authority. As the NSW Civil and Administrative Tribunal said in ***Youssef***:[209]

> Professional responsibility involves recognising how to balance the various duties owed by practitioners including those owed to their clients, to the public and importantly, to their regulatory authority;

380 This Tribunal in ***Chang***, having adopted an extensive passage from a previous Tribunal's decision (***Lee-Steere***[210]), said, in passages that bear considerable similarity to the circumstances in this case:

> In her response to the Committee's facts and contentions, the practitioner says that she was 'under significant stress, was emotionally labile and felt overwhelmed' by having to deal with various personal and professional issues at the time when she received the notification letters and summonses. However, the practitioner did not give any evidence, nor did she present any evidence, to establish any of those matters. …
>
> …
>
> Furthermore, and in any case, we accept the Committee's submission that:
>
>> … in any event, as the authorities make clear, none of those can have primacy over her overriding duty to cooperate with the regulator. [211]

[208] ***Lourey [No 2]*** at [238] – [239]; ***Johns v Law Society of New South Wales*** [1982] 2 NSWLR 1 (***Johns***) at [6]; ***Re Veron; Ex parte Law Society of New South Wales*** [1966] 1 NSWR 511 at [515].
[209] ***Law Society of New South Wales v Youssef*** [2018] NSWCATOD 187 at [58].
[210] ***Legal Profession Complaints Committee and Lee-Steere*** [2010] WASAT 189 (***Lee-Steere***).
[211] ***Chang*** at [179] – [180].

381 We agree with Mr Beetham's submission that the practitioner's explanation given for his failure to comply with the applicant's requests do not rise much beyond the general.[212]

382 In those circumstances, and given the purpose of Rule 50(3) and the associated principles and the above authorities, in our view the explanation given, that he was, in effect, overwhelmed with other matters, does not amount to a reasonable excuse.

383 Neither does it amount to an excuse that would be accepted by a reasonable person, given the obvious purpose of the Rule.

384 Had the circumstances at the time been such as to prevent the practitioner from addressing the request, he could and should have sought an extension of time from the applicant, as he did by his letter of 2 October 2015.

385 His failure to do so, and his prompt satisfaction of the *demand* contained in the summons of 20 November 2015[213] demonstrates that there was nothing in his circumstances at the time which reasonably prevented him from complying with the earlier requests of 5 October 2015 and 2 November 2015 (the letter of 31 August 2015 being misdirected which, we are satisfied, constitutes a reasonable excuse for not complying with it).

386 We are therefore satisfied, and we find, that the practitioner failed, without reasonable excuse, to respond to the applicant's correspondence of 5 October 2015 and 2 November 2015 for the provision of documents and information.

Subground 3(b)

387 This subground alleges that the practitioner failed to respond to correspondence from the applicant requesting information and documents dated 17 February 2016, 23 March 2016 and 13 May 2016.

388 The applicant's letter of 17 February 2016 enclosed a letter from Nova Legal which responded to the practitioner's letter of 4 December 2015. The applicant's letter invited submissions in response to the Nova Legal letter and also requested further information by reference to four matters, including a request for an explanation and evidence that he had

[212] ts 157, 24 March 2023.
[213] The summons required provision of information and documents by 4 December 2015 – Exhibit 1, pages 245 – 246. The practitioner complied on 7 December 2015 – Exhibit 1, page 248.

advised the LPBWA about his outstanding liabilities at his meeting with Ms Fulham and 'how the assets and liabilities of Angove Law were distributed or assigned on cessation of the practice.' It sought a response by 2 March 2016. [214]

389 No response being received, the applicant wrote on 8 March 2016 and asked the practitioner to respond to its previous letter by 16 March 2016.[215]

390 By letter dated 16 March 2016 the practitioner sought an extension of time to respond to the applicant's letter of 17 February 2016 until 21 March 2016.[216]

391 On that date he wrote to the applicant in terms which concerned his straitened financial circumstances and resulting inability to pay the fine imposed in VR 35 of 2015. It did not address the matters raised in the applicant's letter of 17 February 2016.[217]

392 By letter dated 23 March 2016, the applicant wrote to the practitioner, noted that his letter of 21 March 2016 did not respond to the matters raised in its letter of 17 February 2016, noted his obligation to comply with its request and referred to rule 50(3) of the Conduct Rules and requested that he comply by 4pm on 4 April 2016.[218]

393 No response being received, the applicant wrote again on 11 April 2016, set out the above chronology and requested that he comply by 4 pm on 15 April 2016.[219]

394 By letter of 15 April 2016, the practitioner provided responses to each of the 'queries raised in [the applicant's] letter' of 17 February 2016.[220]

395 That letter was sent by the applicant to Mr B,[221] who responded to the applicant on 2 May 2016.[222] The applicant then wrote again to the practitioner on 13 May 2016 raising further matters which arose from the previous correspondence.[223] In so saying, we do not suggest that

[214] Exhibit 1, pages 373 – 374.
[215] Exhibit 1, page 375.
[216] Exhibit 1, page 376.
[217] Exhibit 1, pages 377 – 380.
[218] Exhibit 1, pages 386 – 387.
[219] Exhibit 1, pages 390 – 391.
[220] Exhibit 1, pages 396 – 400.
[221] Exhibit 1, page 401.
[222] Exhibit 1, pages 402 – 409.
[223] Exhibit 1, pages 412 – 414.

the practitioner's letter of 15 April 2016 was incomplete, just that it raised further matters that were the subject of the applicant's subsequent letter.

396 The applicant's letter of 13 May 2016 sought a response by 27 May 2016. No response having been received by that date, a follow up letter was sent on 31 May 2016.[224]

397 The practitioner responded by letter dated 10 June 2016.[225]

398 To repeat, this subground alleges that the practitioner failed, without reasonable excuse, and in breach of Rule 50(3) of the Conduct Rules, to respond to the applicant's letters of 17 February, 23 March and 13 May 2016.

399 On the face of the documents, which the practitioner admits,[226] he:

(a) did not respond to the 17 February 2016 letter, which sought a response by 2 March 2016, until 15 April 2016, despite three follow up letters from the applicant, one of which was the letter of 23 March 2016; and

(b) did not respond to the 13 May 2016 letter, which sought a response by 27 May 2016, until 10 June 2016 despite a follow up letter on 31 May 2016.

400 On that basis, the terms of the Rule are breached – the practitioner did not provide the information sought within the timeframes provided.

401 It is true that he did, ultimately, provide the information sought without the need for a formal summons being issued – in contrast to subground 1(a) – but the Rule is breached by a failure to respond within the relevant timeframe.

402 In his Response, however, the practitioner denies each of the allegations.[227] Each of those denials is a 'bare' denial in that it does no more than deny the relevant paragraph of the SFC. The basis for the denial is, therefore, unclear but we assume, given the practitioner's admission that the correspondence in question was sent and contained the relevant requests, that he does not deny the failure to respond but, rather, he denies that that failure was without reasonable excuse.

[224] Exhibit 1, page 421.
[225] Exhibit 1, pages 423 – 424.
[226] Response, paras 97, 99, 102, 104, 106, 108 and 109; SFC, paras 90, 92, 95, 97, 99, 101 and 102.
[227] Response, paras 98, 103 and 107; SFC, paras 91, 96 and 100.

403 However, given the bare nature of the denial, and the practitioner's failure to attend the hearing and put on evidence, we have little idea as to what excuse the practitioner relies upon for that (admitted) failure.

404 It cannot be, for example, a denial that the timeframes involved were reasonable. In each case the time provided by the applicant for a response was at least 14 days, save for the letter of 23 March 2016 which extended the time for compliance with the 17 February 2016 letter, for which compliance was already overdue. And in any event, there is nothing before us that suggests that the timeframes imposed were unreasonable.

405 Although not explicitly relied upon in the Response, the practitioner's letter of 27 September 2016 (which, as we have stated above, Mr Beetham submitted provides the most complete explanation by the practitioner for his conduct throughout the relevant period) refers, by way of apparent explanation for his failure to comply, to the penalty hearing in VR 34/2015 on 29 February 2016 and the penalty decision in that matter, which was handed down on 16 May 2016.[228] Both those dates are within the relevant spread of dates covered by the subground.

406 In our view, however, and for reasons set out above in relation to subground 1(a), those matters are insufficient to amount to a reasonable excuse. As the Tribunal said in ***Lee-Steere***, 'any pressure of work, no matter how severe, must yield to a request for information from the regulatory body.'[229]

407 In the absence of anything else that might be said to give rise to a reasonable excuse, we find that the practitioner breached Rule 50(3) of the Conduct Rules in that he failed, without reasonable excuse, to respond to the applicant's letters of 17 February 2016, 23 March 2016 and 13 May 2016 within the extended timeframes provided by the applicant.

Subground 3(c)

408 This subground alleges that the practitioner failed to respond to correspondence dated 15 June 2016 from the Applicant which requested information and documents, until he was required to do so by summons dated 27 July 2016.

---

[228] ***Legal Profession Complaints Committee and Khosa*** [2015] WASAT 107 (S) (***Khosa (S)***).
[229] ***Lee-Steere*** at [27].

409 The practitioner admits[230] that by letter dated 15 June 2016 the applicant sought from the practitioner a response in relation to four matters by 30 June 2016.[231]

410 The practitioner also admits that on 30 June 2016 (the day on which a substantive response was required) he wrote seeking a further 10 days to provide a response.[232] By way of explanation, that letter advised that:

> My time has been taken up with the coming into effect of my suspension from practice as of 16 June 2016[233] which was only stayed on 21 June 2016 …, dealing with the disruption to [the] practice for that period of time and liaising with a manager appointed by the [LPBWA].'

411 We note, for reasons that will become apparent, that the disruption referred to is that caused by the suspension and the application for a stay and not the appointment of the manager. Rather, he says only that he has spent time 'liaising' with the manager.

412 On 19 July 2016, the practitioner wrote again and asked for a further extension.[234] No explanation for that further request was given.

413 On 26 July 2016, the applicant wrote to the practitioner, advised that his previous requests for extensions had been received whilst the writer was on leave, and stated that the practitioner should 'ensure that [his] submissions are provided by the end of business today [i.e. 26 July 2016] in accordance with your letter of 19 July 2016.'[235]

414 On 27 July 2016, the applicant wrote to the practitioner, noted that despite being granted an extension of time he had failed to respond to the applicant's request and enclosed a summons pursuant to s 520(1)(a) and (c) of the LP Act to provide the documents and information previously requested.[236]

415 The practitioner provided his response to the summons on 9 August 2016.[237]

---

[230] Response, para 110; SFC, para 103.
[231] Exhibit 1, page 427 – 430.
[232] Exhibit 1, page 448. Response, para 112; SFC, para 105.
[233] As a result of the penalty decision in VR 34 of 2015 – ***Khosa (S)*** at [57].
[234] Exhibit 1, page 449. Response, para 114; SFC, para 107. The date on the letter is 10 June 2016, which is a typographical error; the letter refers to his previous letter of 30 June 2016 and was sent under an email dated 19 July 2016 – see *Applicant's Further Supplementary Book of Documents*, 26 August 2022, pages 8 – 9.
[235] Exhibit 1, page 451.
[236] Exhibit 1, pages 452 – 453. SFC, para 109; Response, para 116.
[237] Exhibit 1, pages 464 – 467. SFC, para 110; Response, para 117.

416 In his Response, the practitioner denies that he failed, without reasonable excuse, to respond to the applicant's requests of 15 June 2016 (to respond by 30 June 2016), 30 June 2016 (to respond by 11 July 2016) and failed to provide the requested documents and information by 26 July 2016, being the extended date of compliance requested in his letter of 19 July 2016.[238]

417 As with the previous subgrounds, we understand that those denials do *not* deny that the applicant's correspondence was sent and nor do they deny that the applicant made the requests alleged. Neither do we understand them to allege that the requests were, in fact, complied with.

418 We also do not understand those denials to assert that any of the time periods imposed by the applicant for the provision of the information was unreasonable.

419 Rather, we understand the practitioner to deny that he had no reasonable excuse for his non-compliance.

420 Specifically, the practitioner alleges that he was unable to provide the requested information and documents as a result of three matters – the suspension on his practicing certificate, the application for a stay of that suspension, and the appointment of a manager of the practice of LoN on 17 June 2016 which, it is said 'caused major disruption' and 'affected [his] ability to … respond to the requests of the Applicant'.[239]

421 In a chronological sense, the suspension and its stay were completed by 21 June 2016 and could not, therefore, impact on the practitioner's ability to respond to any of the applicant's requests other than that of 15 June 2016.

422 But, in any event, the request of 15 June 2016 gave the practitioner until 30 June 2016 to respond. Even in a chronological sense (i.e. without even considering the principles and authority addressed in the previous subgrounds) there would appear to be plenty of time following the grant of the stay to address the request.

423 It could not in any way be reasonably suggested that the suspension and stay might have so occupied the practitioner's attention that he was unable to respond to the applicant's request until 8 August 2015 – seven weeks after the stay was granted.

[238] Response, paras 111, 113 and 115; SFC, paras 104, 106 and 108.
[239] Response, paras 111, 113 and 115. At para 115, the practitioner 'repeats paragraph 116 above'. That is plainly a typographical error. We understand this to refer to either 111 or 113 instead.

424 As to the excuse that the appointment of the manager caused disruption, we note that that occurred on 17 June 2016, two days after the practitioner's certificate was suspended.[240] While we can accept that there would be a degree of disruption immediately following such an appointment, we do not accept (in the absence of anything more than a bare assertion that it is so) that such disruption could possibly still be ongoing in July, let alone August.

425 Further, we note that in his letter of 30 June 2016 the practitioner spoke only of 'liaising' with the manager[241] and in his 19 July 2016 letter he provided no explanation at all for the need for an extension.[242] Indeed, even in his subsequent letter of 27 September 2016 (which is addressed in more detail below) he merely says that since 17 June 2016 he has 'been dealing with the managerial appointment'.[243]

426 But even if there was ongoing disruption, and the reason for it was the suspension/stay and the appointment of a manager, the authorities are clear that a practitioner's obligations must prevail over such disruption to ensure the request is satisfied within the relevant time period. Without repeating it, we rely in this regard on the passages above in relation to subgrounds 3(a) and 3(b).

427 Accordingly, we are satisfied, and we find, the subground made out. That is, we find that the practitioner breached Rule 50(3) of the Conduct Rules in that he failed, without reasonable excuse, to respond to the applicant's letter of 15 June 2016 within the extended timeframes provided by the applicant until required by summons to do so dated 27 July 2016 pursuant to s 520(1) of the Act.

Subground 3(d)

428 This subground alleges that the practitioner failed to respond to a summons issued under s 520(1) of the LP Act dated 12 September 2016, which required the provision of documents and information by 4 pm on 27 September 2016.

429 The practitioner admits[244] that, under cover of a letter dated 12 September 2016, the applicant issued a summons under s 520(1)(a) and (c) of the LP Act which required him to provide documents and

[240] Response, para 113.1.
[241] Exhibit 1, page 448.
[242] Exhibit 1, page 449.
[243] Exhibit 1, page 527.
[244] Response, para 118; SFC, para 111.

information (being the documents and information requested in the applicant's letter of 12 September 2016) by 4 pm on 27 September 2016.[245]

430 The practitioner wrote to the applicant under cover of a letter dated 27 September 2016 in apparent purported compliance with the applicant's letter and summons of 12 September 2016.[246]

431 The applicant alleges that that letter did not, in fact, comply with the request for information and documents and alleges that the practitioner had no reasonable excuse for that failure.[247]

432 The practitioner admits that he sent the letter but otherwise denies the allegation.[248]

433 In order to put the practitioner's case at its highest, we have proceeded on the basis that he denies both that he failed to comply with the request and that that failure lacked a reasonable excuse.

434 Upon review of both documents (i.e. the applicants letter of 12 September 2016 and the practitioner's letter of 27 September 2016) it is clear that the latter does ***not*** provide the information and documents sought by the former:

(a) The applicant sought a copy of the practitioner's costs agreement with the client and any relevant trust authority; the practitioner's letter makes no mention of it;

(b) The applicant sought submissions about, and copies of any documents recording discussions with the client about, the need for, and the amount of, funds to be deposited into trust; the practitioner's letter makes no mention of the issue;

(c) The applicant asked the practitioner to advise when he sent Mr B's invoices to the client and a copy of any correspondence by which that occurred; the practitioner's letter makes no mention of the issue;

(d) The applicant sought a copy of Angove's statement of assets and liabilities as at October 2013 and submissions about it; the practitioner's letter makes no mention of it;

[245] Exhibit 1, pages 485 – 491.
[246] Exhibit 1, pages 525 – 532.
[247] SFC, para 112.
[248] Response, para 119.

(e) The applicant sought a copy of the financial statements of LoN for 2015/16 and submissions about it; the practitioner's letter makes no mention of it;

(f) The applicant sought an update of proceedings brought by the practitioner's mortgagee in relation to his home, the amounts claimed by the mortgagee, the progress of the sale of his home and any related documents; the practitioner's letter makes mention of the commencement of those proceedings in January 2016 and says that he 'managed to raise the funds to pay the arrears owing' but gives nothing more as to how much was claimed or the status of the proceedings. He does provide something of an update as to the sale of his house but is otherwise silent and provides no documents;

(g) The applicant sought an explanation of the practitioner's previous representation in the Form 7 that LoN was not taking over Angove practice; the practitioner's letter says no more than that the applicant 'will be aware that as of June 2015, [he] had to close … Angove Law and started a new practice named [LoN]'. That does not, in any way, provide the requested explanation;

(h) The applicant set out a chronology of its requests for information which are now the subject of subgrounds 3(a) to 3(c) and sought written submissions in that regard and as to whether or not the conduct involved amounted to professional misconduct or unsatisfactory professional conduct; this is the only matter which the practitioner addresses. His letter of 27 September 2016 acknowledged that he should have responded to the requests for information 'with the alacrity that was required' and relies upon the preceding pages of description as to what had occurred as explanation and justification for his failure to do so.

435 Accordingly, we accept the applicant's contention, and we find, that the practitioner's letter of 27 September 2016 failed, in substance, to provide the information sought and documentation requested by the requested date.

436 So much is implicit in the practitioner's letter of 5 October 2016,[249] which responded to the applicant's letter of 28 September 2016. The latter states that the practitioner's letter of the previous day 'fails to

[249] Exhibit 1, pages 538 – 548.

provide most of the information sought'.[250] The practitioner's letter of 5 October 2016 does not provide all of the information sought but provides an explanation for what is missing.

437 The subground does not allege that the practitioner failed to respond to the request at all, merely that he failed to do so by the required deadline and that such failure occurred without reasonable excuse.

438 As we have already noted, we have proceeded on the basis that the practitioner denies that he failed to comply without reasonable excuse.

439 In that regard, we note that the practitioner's letter of 27 September 2016 contains an explanation for the failure to respond 'with alacrity' to the requests for information which are the subject of subgrounds 3(a) – (c).

440 But that explanation does not go to the practitioner's failure to respond to the various other requests contained in the letter of 12 September 2016.

441 Indeed, for the most part, as noted above, the subject matter of those ignored requests are not even touched upon by the terms of the practitioner's letter of 27 September 2016. Rather, the requests are essentially ignored. There is also no explanation for that failure in either the practitioner's letter of 5 October 2016,[251] or his Response.

442 However, even if the matters the subject of the practitioner's explanation for his previous failures to respond might be said to be also relied upon as an excuse for his failure to respond to the summons of 12 September 2016, the matters go no further than those previously addressed – that he was otherwise occupied with his previous disciplinary proceedings, the resulting suspension and its stay, his personal financial difficulties including attempting to sell his home, and seeking to grow LoN while 'dealing with' the appointed manager.

443 For the reasons previously stated those matters do not amount to a reasonable excuse.

444 Finally, we note that the deadline of 28 September 2016 was 14 days after the date of the letter requesting a response. There is

[250] Exhibit 1, pages 533 – 535.

[251] The practitioner's letter of 5 October 2016 contains an apology for his 'oversight' in not previously providing information and documents, but no 'explanation'.

nothing before us to suggest that the deadline was, in any way, unreasonable.

445 For these reasons, we are satisfied, and we find, that the practitioner breached Rule 50(3) of the Conduct Rules by failing, without reasonable excuse, to respond to a summons issued by the applicant to the practitioner pursuant to s 520(1) of the LP Act dated 12 September 2016 for the provision of documents and information by the required deadline.

Subground 3(e)

446 This subground alleges that the practitioner failed, without reasonable excuse, to respond to a request from the applicant for information and documents dated 14 September 2018, by the required deadline of 28 September 2018 or at all.

447 The Applicant admits[252] that, by a letter dated 14 September 2018, the applicant notified him that it was, of its own volition, investigating his conduct in preparing and sending the 29 November Email (which the applicant described as 'the conduct issue') and, for the purposes of that investigation, requested him to provide his 'submissions including such facts, explanations and documents as will enable the [applicant] to give consideration to the conduct issue' and, specifically requested that he provide particular information. [253]

448 No response having been received, the applicant wrote again to the practitioner on 4 October 2018, noted the failure to respond and put the practitioner on notice that, if he failed to comply with the request by 10 October 2018, the applicant would consider whether he had engaged in unsatisfactory professional conduct or professional misconduct by failing to respond to a request for information in breach of Rule 50.[254]

449 On 10 October 2018 the practitioner wrote to the applicant in terms which failed to respond to the request for information.[255] Rather, the practitioner said that he 'require[d]' the applicant's file in relation to 'all matters relating to [him]' before he could respond to the request. He also said that as he was 'not a legal practitioner at this time …

[252] Response, para 120.
[253] Legal Profession Complaints Committee Supplementary Book of Documents filed pursuant to orders made 22 February 2019, dated 3 May 2019 (**Exhibit 2**) pages 2 – 5.
[254] Exhibit 2, pages 8 – 9.
[255] Exhibit 2, page 26.

[he was] not subject to applicable legislation and the [applicant's] jurisdiction is limited'.

450 There was no explanation for the practitioner's request for the applicant's file, which was rejected by the applicant in subsequent correspondence of 11 October 2018. That letter also rejected the practitioner's suggestion that the applicant lacked jurisdiction.[256]

451 That would appear to be the end of the correspondence between the parties in this regard. The letter of 11 October 2018 states that the 'conduct issue' would be considered by the applicant on 16 October 2018 and the applicant referred the matter to the Tribunal on 18 October 2018.

452 The practitioner's Response admits that he sent the letter of 10 October 2018 but denies the balance of paragraph 115 of the SFC which alleges that he failed, without reasonable excuse, to respond to the request.[257]

453 No explanation for the failure is given in the Response. We have inferred that the practitioner's explanation for that failure is that he required the applicant's file in order for him to respond, he asked for the file, the applicant refused to provide him with the file, and he was therefore unable to respond.

454 We reject that explanation for the reasons set out in the applicant's letter of 11 October 2018 which said:

> The conduct issue involves a single email (i.e. the 29 November email), the surrounding facts of which set out in the 14 September 2018 letter are already pleaded in the [applicant's] application in VR 159/2017 and/or are evident from the documents provided by you to the [applicant] during the original investigation … e.g. the Angove Law trust account statement. Accordingly, … there is no reasonable excuse for your ongoing failure to provide your submissions and the requested information/documents.[258]

455 Accordingly, we are satisfied, and we find, that the practitioner failed, without reasonable excuse, to provide the information and documents requested in the applicant's letter of 14 September 2018 by the required deadline of 28 September 2018 or at all.

[256] Exhibit 2, pages 27 – 28.
[257] Response, para 122.
[258] Exhibit 2, pages 27 – 28.

456 The terms of Ground 3(e) allege that that conduct represents a breach of Rule 50(3). Its terms have been set out previously and there can be no doubt that the conduct so found breaches those terms.

457 The terms of Ground 3(e) also allege, as an alternative to, or in addition to, the breach of Rule 50(3), that the conduct represents a breach of s 531(2) of the LP Act. As previously noted, that section provides that a 'person must not, without reasonable excuse, obstruct or mislead an investigator exercising a power under this Act.'

458 The applicant's letter of 14 September 2018 was signed by Mr Pope, whose signature was above his title which included 'Manager – Investigations'. Further, as noted above, the letter identified the 'conduct issue' as one which was the subject of investigation and requested information and documents for that purpose. We are therefore satisfied, and we find, that the letter/request was made by 'an investigator exercising a power under this Act'.

459 We are also satisfied that the practitioner's actions amounted to an obstruction of the exercise of that power.

460 In ***Badran***[259] the Court of Appeal was concerned with whether the appellant's refusal to provide his date of birth to transport officers amounted to an obstruction of them in the pursuit of their duties.

461 It held that it did not. In reaching that view, the Court considered both UK and Australian authority and held that the Australian cases reflect an approach which is:

> … to regard the concept of 'obstruction' or cognate terms as requiring more than a refusal to answer questions where the absence of an answer makes a public officers duty more difficult to perform. Consistently with the ordinary and natural meaning of the verb 'obstruct', something more is required than a failure to provide requested information which, if provided, would assist a public officer in the performance of his or her duty. That is so whether or not other legislation creates an obligation to assist.[260]

462 The distinction drawn is one which, for example, finds the giving of a deliberately wrong answer to a question amounts to an obstruction, while the giving of no answer at all does not.[261]

---

[259] ***Badran v Public Transport Authority of Western Australia*** [2017] WASCA 28 (***Badran***).
[260] ***Badran*** at [46].
[261] ***Arevalo v Fallows*** [1992] WASC 714, discussed in ***Badran*** at [38].

463 In the present case, the practitioner did more than merely refuse to answer the questions asked and provide the information sought; his letter of 28 September 2018 sought actively to distract from the request by seeking a copy of the applicant's files and raising matters of jurisdiction.

464 Accordingly, we are satisfied, and we find, that he obstructed the exercise of the investigator's powers contrary to s 531(2) of the LP Act.

465 In closing, Mr Beetham submitted that this subground represents, 'perhaps the most egregious example' of the practitioner's various failures to respond to requests for information and documents.[262]

466 We agree that the failure to comply, the lack of any attempt to explain the failure and the attempt to distract focus by seeking the applicant's own documents and suggesting that it lacked jurisdiction might be said to elevate the conduct in this subground above those of the others.

467 On the other hand, however, the delay in this case is somewhat less egregious than those of other subgrounds.

468 In the end, it is not necessary to rank the various subgrounds. It is enough to find the allegations made out and to turn to the question whether they amount to professional misconduct or unsatisfactory professional conduct.

Does the conduct so found in Ground 3 constitute professional misconduct?

469 As we have noted in addressing the question of reasonable excuse in the subgrounds above, there is a long-standing general obligation of legal practitioners to assist the relevant regulatory body with its enquiries and there is an equivalent, longstanding view that the failure to do so can amount to professional misconduct.[263]

470 Of course, whether particular conduct constitutes unsatisfactory professional conduct, or professional misconduct, will depend upon all of the facts and circumstances.

471 In the present case, the applicant accepts that, when taken individually, a particular subground might not be such as to warrant a finding that the conduct constitutes professional misconduct.

[262] ts 164, 24 March 2023.
[263] ***Lourey [No 2]*** at [238] – [239]; ***Johns*** at 6; ***Re Veron; Ex parte Law Society of New South Wales*** [1966] NSWR 511 at [515].

472 However, Mr Beetham submitted that we should consider the conduct the subject of Ground 3 as a whole. In that regard he submitted that:

> The failings were repeated, they were sustained, they were not limited in time to a short window here or there, but occurred in 2015, '16 and '18. They occurred against a background where the practitioner must be taken to be aware of his professional obligations, not only by reason of the fact that he was a practitioner, but that they were drawn to his attention in the correspondence from the committee.[264]

473 On that basis, the applicant submitted that the conduct satisfied two senses of professional misconduct: that it fell short by a substantial degree of the standard of professional conduct observed by members of the legal profession of good repute and competence and that it would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence.

474 However, the applicant accepted that as the conduct the subject of Ground 3 did not involve dishonest behaviour ('the element of misleading'), it was not conduct as would justify a finding that the practitioner was not a fit and proper person to engage in legal practice.[265]

475 We agree with both submissions.

476 While the practitioner's letter of 10 October 2018 amounted to obstruction, and was wrong, it was not, in our view, dishonest and there was nothing else in any of the subgrounds to Ground 3 that was dishonest. That finding stands in contrast with the other two grounds. On that basis we do not find that the conduct the subject of Ground 3 satisfies the test under s 403(1)(b) of the LP Act.

477 However, a repeated failure to promptly respond to several requests for information and documents, without reasonable excuse, over a lengthy period of time is, given the principles and authorities detailed above, conduct which falls short by a substantial degree of the standard of professional conduct observed by members of the legal profession of good repute and competence and which would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence and we are therefore satisfied, and we find, that the practitioner engaged in professional misconduct.

[264] ts 166, 24 March 2023.
[265] ts 166 – 167, 24 March 2023.

Orders

478 We will hear from the parties as to the orders which should be made to reflect the findings made in these reasons.

479 We will also hear from the parties as to the programming orders which should be made to facilitate a hearing as to the penalty orders which should be made, under s 438(2) of the LP Act, in light of our finding that the respondent is guilty of professional misconduct, and as to costs.

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

RM
Associate to Deputy President Judge Jackson

5 OCTOBER 2023