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| **JURISDICTION** | **:** | STATE ADMINISTRATIVE TRIBUNAL |
| **CITATION** | **:** | LEGAL PROFESSION COMPLAINTS COMMITTEE and OUD [2018] WASAT 119 (S) |
| **MEMBER** | **:** | JUSTICE J C CURTHOYS (PRESIDENT)<br>MR M ANDERSON (SENIOR SESSIONAL MEMBER)<br>MS K LANG (SENIOR SESSIONAL MEMBER) |
| **HEARD** | **:** | DETERMINED ON THE DOCUMENTS |
| **DELIVERED** | **:** | 22 JANUARY 2019 |
| **FILE NO/S** | **:** | VR 110 of 2017 |
| **BETWEEN** | **:** | LEGAL PROFESSION COMPLAINTS COMMITTEE<br>Applicant<br><br>AND<br><br>NICHOLAS NEIL PETER OUD<br>Respondent |

*Catchwords:*

Penalty - Penalty order - Referral to Full Bench with recommendation that practitioner's name be removed from Roll of Practitioners

*Legislation:*

*Legal Profession Act 2008* (WA), s 402, s 403, s 438, s 438(3)(c), s 439, Pt 13
*State Administrative Tribunal Act 2004* (WA), s 87(1), s 87(2)

*Result:*

Recommendation that practitioner's name be removed from Roll of Practitioners
Respondent's local practising certificate suspended
Respondent pay applicant its costs of proceedings

*Category:* B

**Representation:**

*Counsel:*

| | | |
|---|---|---|
| Applicant | : | Mr P Yovich |
| Respondent | : | Mr RI Viner and Mr DJ Garnsworthy |

*Solicitors:*

| | | |
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| Applicant | : | Francis Burt Chambers |
| Respondent | : | Francis Burt Chambers |

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

A Solicitor v Council of the Law Society of NSW [2004] HCA 1; (2004) 216 CLR 253
Barristers' Board v Darveniza [2000] QCA 253; (2000) 112 A Crim R 438
Barwick v Council of the Law Society of NSW [2004] NSWCA 32
Chamberlain v Law Society of the Australian Capital Territory (1993) 118 ALR 54
Council of the Law Society (NSW) v A Solicitor [2002] NSWCA 62
Craig v The Medical Board of South Australia [2001] SASC 169
Khosa v Legal Profession Complaints Committee [2017] WASCA 192
Law Society of New South Wales v Foreman (1994) 34 NSWLR 408
Law Society of New South Wales v Walsh [1997] NSWCA 185
Legal Practitioners Complaints Committee v Thorpe [2008] WASC 9
Legal Profession Complaints Committee and A Legal Practitioner [2013] WASAT 37 (S)
Legal Profession Complaints Committee and Amsden [2014] WASAT 57 (S)
Legal Profession Complaints Committee and Barber [2015] WASAT 99
Legal Profession Complaints Committee and Bower [2017] WASAT 47

Legal Profession Complaints Committee and in de Braekt [2012] WASAT 58 (S)
Legal Profession Complaints Committee and in de Braekt [2013] WASAT 124
Legal Profession Complaints Committee and Leask [2010] WASAT 133
Legal Profession Complaints Committee and Oud [2018] WASAT 119
Legal Profession Complaints Committee v Brickhill [2013] WASC 369
Legal Profession Complaints Committee v Detata [2012] WASCA 2014
Legal Profession Complaints Committee v Lashansky [2007] WASC 211
Legal Profession Complaints Committee v Love [2014] WASC 389
Legal Profession Complaints Committee v Masten [2011] WASC 71
Legal Profession Complaints Committee v O'Halloran [2013] WASC 430
Legal Profession Complaints Committee v Pepe [2009] WASC 39
Legal Profession Complaints Committee v Segler [2014] WASC 159
Medical Board of Western Australia and Roberman [2005] WASAT 81 (S)
New South Wales Bar Association v Cummins [2001] NSWCA 284; (2001) 52 NSWLR 279
New South Wales Bar Association v Evatt (1968) 117 CLR 177
New South Wales Bar Association v Hamman [1999] NSWCA 404
Paridis v Settlement Agents Supervisory Board [2007] WASCA 97; (2007) 33 WAR 361
Quinn v Law Institute of Victoria [2007] VSCA 122
Re A Practitioner (1984) 36 SASR 590
Re Maraj (a Legal Practitioner) (1995) 15 WAR 12
Smith v New South Wales Bar Association [2014] WASAT 112 (S); [1992] HCA 36; (1992) 176 CLR 256
Stirling v Legal Services Commissioner [2013] VSCA 374
The Council of the Qld Law Society v Wright [2001] QCA 58
Veterinary Practitioners Board of NSW v Johnson [2010] NSWADT 308
Veterinary Surgeons Investigating Committee v Howe (No 2) [2003] NSWADT 159
Victorian Legal Services Commissioner v Hession (Legal Practice) [2016] VCAT 2056
Western Australian Planning Commission v Questdale Holdings Pty Ltd [2016] WASCA 32

## REASONS FOR DECISION OF THE TRIBUNAL:

### *Introduction*

1 In ***Legal Profession Complaints Committee and Oud*** [2018] WASAT 119 (***Oud***) the Tribunal determined that Nicholas Neil Peter Oud behaved in a way that constituted professional misconduct and unsatisfactory professional conduct within the meaning of s 402, s 403 and s 438 of the *Legal Profession Act 2008 (*WA) (LP Act). This decision determines the appropriate penalty.

2 The Tribunal determines that the appropriate professional disciplinary consequence of Mr Oud's professional misconduct and unsatisfactory professional conduct in the circumstances of this case is to make and transmit a report on the finding to the Supreme Court (Full Bench) with a recommendation that Mr Oud's name be removed from the Roll of Practitioners.

3 The Tribunal also determines that Mr Oud's practising certificate should be suspended pending the determination of the Supreme Court (Full Bench).

4 Finally, the Tribunal orders Mr Oud pay costs in terms of the disbursements incurred by the Legal Profession Complaints Committee (Committee) of $53,522.70.

### *The findings against Mr Oud*

5 The Tribunal found that Mr Oud behaved in a way that constitutes professional misconduct and/or unsatisfactory professional conduct for the purposes of the LP Act in six of the grounds as alleged by the Committee as follows:

> **Annexure A**
>
> **Ground 1**
>
> That Nicholas Neil Peter Oud (the practitioner) between 23 March 2016 and 30 March 2016, in connection with acting for Mr Colin Oxlade and/or Dr Peter Fiore, or alternatively Irongrow Corporation Pty Ltd (Irongrow), in respect of a proposed purchase of platinum, engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) in that his conduct fell short, consistently or by a substantial degree, or both, of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner, by disbursing from the firm's trust account $300,000 (CSG loan funds)

which had been received into trust on behalf of Credit Solutions Group Pty Ltd (CSG) for use in connection with the purchase of the platinum, in circumstances where:

(1) the practitioner undertook to CSG not to deal with, transfer, move or use the CSG loan funds without the expressed written consent of Mr David Cacciola on behalf of CSG, and Mr Oxlade (the undertaking);

(2) the practitioner disbursed the CSG loan funds without the expressed written consent of Mr Cacciola, and contrary to purported written consents he had received;

(3) in releasing the CSG loan funds the practitioner acted in reckless disregard or with reckless indifference as to whether he was in breach of his undertaking by doing so.

**Ground 2**

That Nicholas Neil Peter Oud (the practitioner) in March and April 2016 engaged in unsatisfactory professional conduct within the meaning of s 402 and s 438 of the *Legal Profession Act 2008* (WA) in that his conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner by failing to keep his firm's trust records in a way that disclosed the true position in relation to withdrawals from trust of the CSG loan funds, in that the trust records did not accurately record the names of the persons who received the funds and the names or BSB numbers of the bank accounts into which the funds were paid as required by reg 45 of *the Legal Profession Regulations 2009* (WA) and s 228(3)(b) of the Legal Profession Act 2008 (WA).

**Ground 3**

That Nicholas Neil Peter Oud (the practitioner) in March and April 2016 engaged in unsatisfactory professional conduct within the meaning of s 402 and s 438 of the Legal Profession Act 2008 (WA) in that his conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner by failing to deliver to CSG's solicitor Mr Paul Reese the original receipt made out by the practitioner for the receipt of the CSG loan funds into his trust account when requested to do so by Mr Reese by emails sent to the practitioner on 22 March 2016 and 28 April 2016, in breach of reg 41(2) and reg 41(6) of the *Legal Profession Regulations 2009* (WA).

**Ground 4**

That Nicholas Neil Peter Oud (the practitioner) in or about April 2016 engaged in professional misconduct within the meaning of s 403 and

s 438 of *the Legal Profession Act 2008* (WA) in that his conduct would be reasonably regarded as disgraceful and dishonourable by practitioners of good repute and competence and, to a substantial degree, fell short of the standard of professional conduct observed by members of the profession of good repute and competence in responding to an email from Mr Reese requiring the CSG loan funds to be returned from the practitioner's firm's trust account to Mr Reese's trust account, when the practitioner sent a series of emails to Mr Reese on 28 and 29 April 2016 which:

(1) did not disclose the fact that he no longer retained the CSG loan funds in his firm's trust account;

(2) implied that the practitioner did retain the CSG loan funds and was in a position to return the CSG loan funds to Mr Reese's trust account,

and which conveyed the impression that the CSG loan funds were retained in his firm's trust account and were available to be returned to Mr Reese's trust account when, in truth, the practitioner had disbursed the CSG loan funds and was not in a position to effect the return of the CSG loan funds to Mr Reese's trust account, and which impression the practitioner permitted to remain uncorrected in circumstances where the practitioner knew the emails were misleading in a material respect.

**Ground 5**

That Nicholas Neil Peter Oud (the practitioner) on 9 May 2016 engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) in that his conduct would be reasonably regarded as disgraceful and dishonourable by practitioners of good repute and competence and, to a substantial degree, fell short of the standard of professional conduct observed by members of the profession of good repute and competence by conveying an offer from Mr Oxlade to Mr Reese to repay the CSG loan funds that was contingent upon Mr Reese withdrawing a complaint he had made to Legal Profession Complaints Committee against the practitioner in relation to the practitioner's breach of his undertaking with respect to the CSG loan funds.

**Annexure B**

**Ground**

That Nicholas Neil Peter Oud (the practitioner) between 29 March 2016 and 3 April 2016 inclusive, in connection with a creditor's petition in respect of John and Jennifer Warming (Mr & Mrs Warming) filed in the Federal Circuit Court in Adelaide ADG453/2015 (creditor's petition), engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) in that his conduct fell

short, consistently and by a substantial degree, of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence and would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, by preparing and sending:

(1) a letter addressed to the Federal Circuit Court in Adelaide dated 29 March 2016 (the 29 March 2016 letter) that contained the following statements (together, the 29 March 2016 statements):

(a) that the practitioner acts for ICBC Capital Pty Ltd (ICBC), which statement was false and misleading as, in truth, the practitioner did not then and never had acted for ICBC, and ICBC at that time was in liquidation;

(b) that the practitioner is currently holding $300,000.00 cleared funds in his trust account, which statement was false and misleading as, in truth, the practitioner was holding $138,662.80 in his trust account as at 29 March 2016;

(c) that his client was aware of current bankruptcy proceedings against Mr and Mrs Warming listed in the Adelaide Registry, and was prepared to assist the Debtors' position, which statement was false and misleading as, in truth, the practitioner did not and never had acted for ICBC, and he had no instructions to that effect;

(d) that the practitioner had been instructed to release upon settlement of a pending commodity transaction a minimum of $200,000.00 to permit satisfaction of the petition amount, which statement was false and misleading as, in truth, the practitioner did not have any funds in trust at that time which were subject to such instructions;

(2) a letter to solicitors Cowell Clarke dated 3 April 2016, which he knew was intended to be used by Mr Warming in connection with the hearing of the creditor's petition scheduled for 4 April 2016, that referred to the 29 March 2016 letter and contained the following statements (together, the 3 April 2016 statements):

(a) that his reference to ICBC Capital Pty Ltd was a 'cut and paste error', and that he was in fact holding the trust funds (being a reference to the $300,000.00 referred to in the 29 March 2016 letter) on behalf of Irongrow Corporation Pty Ltd /Mr John Buckby, a company unrelated to ICBC, which statement was false and

misleading as, in truth, the practitioner was not at that time holding any trust funds on behalf of Irongrow Corporation Pty Ltd / Mr John Buckby;

(b) that the substance of the 29 March 2016 letter was otherwise correct, which statement was false and misleading as, in truth, the 29 March 2016 statements were all untrue,

in circumstances where, when making the 29 March 2016 statements and the 3 April 2016 statements, the practitioner well knew each of the 29 March 2016 statements and the 3 April 2016 statements was false and misleading and had the potential to mislead the Federal Circuit Court and/or the party which had presented the creditor's petition and/or Mr & Mrs Warming's solicitors, Cowell Clarke.

### *Mr Oud's submissions generally*

6 The Tribunal notes that many of Mr Oud's submissions dated 12 December 2018, in particular paras 2-39 and para 42, were directed to contesting the Tribunal's findings in ***Oud***. Such submissions are inappropriate in submissions in relation to penalty and costs. Submissions in relation to penalty and costs do not permit Mr Oud to contest the findings made by the Tribunal.

7 The Tribunal has not addressed those paragraphs in Mr Oud's submissions other than in so far as they reflect on Mr Oud's lack of remorse.

### *The parties' submissions as to appropriate orders*

8 In its submissions filed on 26 November 2018, the Committee sought the following orders:

1.1 an order, pursuant to s 438(2)(a) and s 438(4)(b) of the *Legal Profession Act 2008* (Act), that the Tribunal make and transmit a report to the Supreme Court (Full Bench) with a recommendation that the name of the respondent (practitioner) be removed from the Roll of Practitioners;

1.2 a consequential order pursuant to s 438(3)(a) of the Act that the practitioner's local practising certificate be suspended pending the determination of the Supreme Court (Full Bench); and

1.3 an order pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act) that the practitioner pay the Committee's costs fixed in the sum of $53,522.70, such costs to be paid to the Legal Practice Board within 30 days or as

otherwise agreed between the practitioner and the Legal Practice Board.

9 In his submissions dated 12 December 2018, Mr Oud submitted in relation to the Committee's submissions on costs and penalty:

> 1.0 … that the recommendation sought is not the only outcome open to the Tribunal. The Tribunal may make the orders having regard to s.441 of the *Legal Profession Act 2008* (WA) either as a single order or in combination with other orders. The first option is a fine not exceeding $25,000 though [the Committee's] submissions do not address that option nor any other options.
>
> 1.1 The section has a wide range of management options several of which were embraced by the Legal Practice Board such as but not limited to only practising as a supervised practitioner, and not operating a trust account.
>
> 1.2 [Mr Oud's] practising certificate is already restricted to supervised practice and there is no reason why that restriction should not continue. [Mr Oud] is not practising law having not yet made arrangements for supervised practise.
>
> 1.3 The costs order sought is effectively an order for indemnity costs relating to counsel fees and is put beyond the scrutiny of the Tribunal. The rate charged by counsel is not shown. The issue of costs is open to negotiation.

## *Legal framework and principles*

10 The purposes of Pt 13 of the LP Act are, relevantly:

> (a) to provide for the discipline of the legal profession in this jurisdiction, in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally; and
>
> (b) to promote and enforce the professional standards, competence and honesty of the legal profession.

11 Sections 438(2) to 438(4) of the LP Act provide:

> (2) If, after it has completed a hearing in relation to a referral under this Part in respect of an Australian legal practitioner, the State Administrative Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal may -
>
> (a) make and transmit a report on the finding to the Supreme Court (full bench); or

(b) make any one or more of the orders specified in section 439, 440 and 441.

(3) If the State Administrative Tribunal transmits a report in respect of a legal practitioner to the Supreme Court (full bench) under subsection (2)(a), the Tribunal may, pending the determination of the Supreme Court (full bench), make the following orders

(a) an order that the Australian legal practitioner's local practising certificate be suspended for a specified period;

(b) an order that specified conditions be imposed on an Australian legal practitioner's local practising certificate restricting the entitlement of an Australian legal practitioner to practise for a specified period.

(4) Where appropriate, a report forwarded under subsection (2)(a) may include either or both of the following -

(a) a record of the evidence taken at the hearing;

(b) a recommendation that the name of the practitioner be removed from the local roll.

12 Section 439 of the LP Act provides:

The State Administrative Tribunal may, under section 438(2)(b), make any one or more of the following orders

(a) an order that the practitioner's local practising certificate be suspended for a specified period or cancelled;

(b) an order that a local practising certificate not be granted to the practitioner before the end of a specified period;

(c) an order that

(i) specified conditions be imposed on the practitioner's practising certificate granted or to be granted under this Act; and

(ii) the conditions be imposed for a specified time; and

(iii) specifies the time (if any) after which the practitioner may apply to the Tribunal for the conditions to be amended or removed;

(d) an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner.

***Disciplinary sanctions - general principles***

13 The jurisdiction of the Tribunal is protective rather than punitive, and such protection runs to both the public and the profession (***Re Maraj (a Legal Practitioner)*** (1995) 15 WAR 12 at 25); ***Legal Profession Complaints Committee v Love*** [2014] WASC 389 (***Love***) at [19]; ***Law Society of New South Wales v Foreman*** (1994) 34 NSWLR 408 (***Foreman***) at 440G-441A-B; ***Legal Profession Complaints Committee and in de Braekt*** [2013] WASAT 124 (***in de Braekt***) at [24]-[26]; ***New South Wales Bar Association v Hamman*** [1999] NSWCA 404 (***Hamman***) at [21] and at [77]).

14 The appropriate sanction is to be considered at the time of the making of the sanction and not by reference to the date of the unprofessional acts (***Legal Profession Complaints Committee and A Legal Practitioner*** [2013] WASAT 37 (S) (***A Legal Practitioner (S)***) at [23]; ***Legal Profession Complaints Committee v Segler*** [2014] WASC 159 (***Segler***) at [7]; ***A Solicitor v Council of the Law Society of NSW*** [2004] HCA 1; (2004) 216 CLR 253 (***A Solicitor [2004] NSW***) at [15]; ***Love*** at [16]).

15 It is the practitioner's conduct that attracts any sanction (***A Legal Practitioner (S)*** at [24]; ***Smith v New South Wales Bar Association*** [2014] WASAT 112 (S); [1992] HCA 36; (1992) 176 CLR 256 at 267-268 and 271-272; ***A Solicitor [2004] NSW***).

16 As the Tribunal explained in ***A Legal Practitioner (S)*** at [24]:

> [I]n determining the appropriate penalty, care needs to be taken that the penalty reflects the matters with which the practitioner is charged and not other conduct including the defence of the action by the practitioner which is ultimately held to be unsuccessful: *Smith v New South Wales Bar Association* [1992] HCA 36; (1992) 176 CLR 256 (*Smith*) at 267 - 268 and 271 - 272[.]
>
> See generally ***Khosa v Legal Profession Complaints Committee*** [2017] WASCA 192 at [188]-[195].

***Twelve matters for consideration***

17 In determining an appropriate sanction, twelve matters may require consideration. Those matters are interrelated and are not mutually exclusive. The list of matters is not exhaustive. The twelve matters are:

1) Any need to protect the public against further misconduct by the practitioner (***Legal Profession Complaints Committee and Amsden*** [2014] WASAT 57 (S) (***Amsden (S)***) at [8]; ***Foreman*** at 440C; ***Hamman*** at [77]).

2) The need to protect the public through general deterrence of other practitioners from similar conduct (***Veterinary Practitioners Board of NSW v Johnson*** [2010] NSWADT 308 (***Johnson***) at [103]; ***Hamman*** at [77]).

3) The need to protect the public and maintain public confidence in the profession by reinforcing high professional standards and denouncing transgressions and thereby articulating the high standards expected of the profession (***Amsden (S)***) at [8]; ***Foreman*** at 444F; and ***Hamman*** at [77] and [79]), such that, even where there may be no need to deter a practitioner from repeating the conduct, the conduct is of such a nature that the Tribunal should give an emphatic indication of its disapproval (***Craig v The Medical Board of South Australia*** [2001] SASC 169 at [64]; ***Johnson*** at [103]).

4) In the case of conduct involving misleading conduct, including dishonesty, whether the public and fellow practitioners can place reliance on the word of the practitioner (***Johnson*** at [109]; ***Foreman*** at 445B - 445G).

5) Whether the practitioner has breached any:

    a) Act;

    b) Regulations;

    c) Guidelines or Code of Conduct, issued by the relevant professional body; and

    d) whether the practitioner has done so knowingly.

6) Whether the practitioner's conduct demonstrated incompetence, and if so, to what level.

7) Whether or not the incident was isolated such that the Tribunal can be satisfied of his or her worthiness or reliability for the future (***Foreman*** at 442E - 442G; ***New South Wales Bar Association v Evatt*** (1968) 117 CLR 177 at 183; ***Council of the Law Society (NSW) v A Solicitor*** [2002] NSWCA 62 at [80]; ***Chamberlain v Law Society of the Australian Capital Territory*** (1993) 118 ALR 54 at 62 and 63).

8) The practitioner's disciplinary history (***Legal Profession Complaints Committee v O'Halloran*** [2013] WASC 430 at [93]);

9) Whether or not the practitioner understands the error of his ways, including an assessment of any remorse and insight (or a lack thereof) shown by the practitioner, since a practitioner who fails to understand the significance and consequences of misconduct is a risk to the community (***Law Society of New South Wales v Walsh*** [1997] NSWCA 185 per Beazley JJA (***Walsh***); ***Legal Profession Complaints Committee v Lashansky*** [2007] WASC 211 (***Lashansky***) at [31]-[52] and (second) at [35]; ***Amsden (S)*** at [8]; ***Foreman*** at 444E; ***Love*** at [9]).

10) The desirability of making available to the public any special skills possessed by the practitioner.

11) The practitioner's personal circumstances at the time of the conduct and at the time of imposing the sanction. However, the weight given to personal circumstances cannot override the fundamental obligation of the Tribunal to provide appropriate protection of the public interest in the honesty and integrity of legal practitioners and in the maintenance of proper standards of legal practice (***Love*** at [59]); ***Paridis v Settlement Agents Supervisory Board*** [2007] WASCA 97; (2007) 33 WAR 361 (***Paridis***) at [30(5)]).

12) The Tribunal may consider any other matters relevant to the practitioner's fitness to practise and other matters which may be regarded as aggravating the conduct or mitigating its seriousness (***A Legal Practitioner (S)***

at [25]). In general, mitigating factors such as no previous misconduct or service to the profession are of considerably less significance than in the criminal process because the jurisdiction is protective not punitive (***Walsh***).

***General matters relating to sanctions***

18 Where there is a choice of sanctions, the Tribunal will choose that sanction which maximises the protection of the public (***Quinn v Law Institute of Victoria*** [2007] VSCA 122 at [31]).

19 The dominant purpose of the disciplinary regulation of the legal profession is the protection of the public by the maintenance of proper standards within the profession. Hence, the impact which an appropriate penalty would have upon a practitioner guilty of misconduct, and personal hardship to a practitioner, are necessarily secondary considerations (see ***Legal Profession Complaints Committee v Detata*** [2012] WASCA 2014 at [47]; ***Legal Profession Complaints Committee v Masten*** [2011] WASC 71 at [29]; and ***Legal Profession Complaints Committee and Leask*** [2010] WASAT 133 at [54]).

20 There are circumstances in which a 'global' approach to sanction, rather than the imposition of separate sanction for each unprofessional act, may be more appropriate in vocational disciplinary proceedings namely, where the facts of the case are so inextricably woven as to make it difficult to meet a clear standard of prescription (***A Legal Practitioner (S)*** at [5]; ***Stirling v Legal Services Commissioner*** [2013] VSCA 374 at [72]-[75]).

21 All of the above matters are to be considered in the context of the Tribunal's findings as to penalty, that is, how serious was the conduct and the agent's explanation for the conduct (***Paridis*** at [30(1)]-[30(2)]).

***Removal from the Roll***

22 The jurisdiction of the Tribunal to remove a practitioner from the Roll is exercised not for the purpose of punishing the practitioner concerned, but for the protection of the public and the reputation and standards of the legal profession: ***Legal Practitioners Complaints Committee v Thorpe*** [2008] WASC 9 at [43].

23 Where an order for removal from the Roll is contemplated, the ultimate question is whether the material demonstrates that the

practitioner is not a fit and proper person to remain a legal practitioner: ***A Solicitor [2004] NSW*** at [15].

24 A practitioner is not a fit and proper person to be a registered practitioner and should be removed from the register where the unprofessional conduct is so serious that the practitioner is permanently or indefinitely unfit to practise (***Veterinary Surgeons Investigating Committee v Howe (No 2)*** [2003] NSWADT 159 at [27]; ***Barristers' Board v Darveniza*** [2000] QCA 253; (2000) 112 A Crim R 438 at [38]; ***Love*** at [17]-[18]; ***A Legal Practitioner (S)*** at [21]-[25]; ***Legal Profession Complaints Committee v Brickhill*** [2013] WASC 369 at [19]-[20] (Thomas JA, McMurdo P and White J agreeing); ***New South Wales Bar Association v Cummins*** [2001] NSWCA 284; (2001) 52 NSWLR 279 at [26]-[28]); ***Love*** at [17]-[18]).

25 Although serious dishonesty is an obvious example of where removal from the Roll is appropriate (***Love*** at [18]), removal is not necessarily confined to circumstances involving findings of dishonesty.

26 In ***Lashansky*** at [36], the Full Court stated:

> … Hope JA observed, [in *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736] the ignorance which the practitioner displayed was not ignorance of some esoteric or difficult corner of the law, but was an ignorance of general principles applicable to common activities of a solicitor (at 741). Hope JA concluded that '[s]uch an unawareness of and lack of care about the most elementary propositions of law concerning the responsibility he had taken on and the standards required of solicitors are themselves sufficient to justify the protection of the public by his removal from the roll' (at 743, Reynolds JA agreeing, and see Hutley JA at 759).

27 The practical effect of an order striking a practitioner off the roll is that if a practitioner wishes to resume practice he/she must persuade the Full Court that he/she is truly reformed and that he/she is a fit and proper person to resume practice.

28 The Tribunal also refers to its decisions in ***Legal Profession Complaints Committee and Barber*** [2015] WASAT 99 at [26]-[27] and ***Legal Profession Complaints Committee and Bower*** [2017] WASAT 47.

### *Suspension*

29 Suspension is a less serious result and differs from removal from the Roll because suspension is for a specified limited period and the

practitioner has a preserved right to resume practice without any further onus upon them to prove that they are a fit and proper person to practice (***A Legal Practitioner (S)*** at [26]; ***Legal Profession Complaints Committee v Pepe*** [2009] WASC 39 at [12]).

30 The proper use of suspension is in cases where the practitioner has fallen below the high standards to be expected of such a practitioner, but not in such a way as to indicate that he/she lacks the qualities of character which are the necessary attributes of a person entrusted with the responsibilities of a practitioner (***A Legal Practitioner (S)*** at [26]; ***Re A Practitioner*** (1984) 36 SASR 590 at 593 per King CJ). That is, suspension is suitable where the Tribunal is satisfied that, upon completion of the period of suspension, the practitioner will be fit to resume practice (***A Legal Practitioner (S)*** at [27]).

31 The practical effect of an order suspending a practitioner's registration is that at the end of the period of suspension, the practitioner is entitled to resume practice without having to prove to the Full Court that he/she is a fit and proper person.

32 Mr Oud submitted:

> General deterrence can be met by options other than striking off. Examples include
>
> - suspension of the right to practise law
> - fines
> - controlled practice orders - allowing practice under controlled supervision[.]

### *The seriousness of Mr Oud's conduct*

33 As the Committee's submissions at paras [2]-[21] and [40] and [42] correctly state:

> Relevant factual findings: dishonesty
>
> 2. The Tribunal's findings and orders are set out in [310] of the [Oud] Reasons. The findings of professional misconduct made by the Tribunal included multiple factual findings of dishonesty. Arguably the most serious are that the practitioner prepared and sent a letter to the Federal Circuit Court in which he knowingly made statements that were false and misleading, intending to do so ([Oud] Reasons at [300]), and that he continued to mislead

the court in relation to the subject matter of that letter ([*Oud*] Reasons at [305]).

3. The Tribunal also found that the practitioner prepared and sent a letter to solicitors Cowell Clarke, which he knew was intended to be used in connection with the proceedings before the Federal Circuit Court, in which he knowingly and intentionally made statements that were false and misleading ([*Oud*] Reasons at [304] - [305]).

4. The Tribunal also found that the practitioner sent a series of emails on 28 and 29 April 2016 to a fellow practitioner, Mr Paul Reese, which he knew were misleading in a material respect, intending to mislead Mr Reese ([*Oud*] Reasons at [197] and [229] - [230]), thereby intentionally breaching his obligation to deal honestly with fellow practitioners ([*Oud*] Reasons at [228]).

5. In addition to making findings as to these matters, which were consistent with the pleaded case of the Committee, the Tribunal found that the practitioner had a financial motive for at least some of his dishonest conduct. The Tribunal found that there was 'absolutely no reason to agree to send the letter other than as a favour to Mr Oxlade, in return for Mr Oxlade paying him $10,000 to him' ([*Oud*] Reasons at [255], and see also [*Oud*] Reasons at [248] - [250]).

6. Finally, the Tribunal found that the practitioner's evidence was deliberately dishonest on at least the following occasions:

    6.1 his evidence that it did not occur to him to send a copy of the authorities (to release funds the subject of his undertaking) to Mr Reese ([*Oud*] Reasons at [194]);

    6.2 his claim that he did not read the entire letter referred to in paragraph 2, which he had cut and pasted, and to which he had made corrections ([*Oud*] Reasons at [265]);

    6.3 his evidence that he only read the first email in an email chain ([*Oud*] Reasons at [276]).

7. Short of finding that the practitioner had lied in his evidence, the Tribunal also found that on other issues he was evasive in his evidence and formal response in the proceedings (for example, see [*Oud*] Reasons at [21], [73], [104], [188], [189] and [192]), or described his evidence on other occasions as 'simply not credible' ([92]), 'fanciful' ([105] - [106]), 'preposterous' ([178] and [265]) or 'ludicrous' ([196]). These findings call into question both the practitioner's honesty and his competence.

8. The Tribunal's findings about the practitioner as a witness may be summarized by the findings that he was 'a totally unsatisfactory and evasive witness ([*Oud*] Reasons at [17]), and that he was a 'deliberately dishonest witness' ([*Oud*] Reasons at [310]). The Tribunal found that the practitioner's dishonest conduct was such that 'no practitioner could have any confidence in his word' ([*Oud*] Reasons at [306]).

Relevant factual findings: other professional misconduct

9. The Tribunal also made a finding that the practitioner acted in reckless disregard or with reckless indifference as to whether he was in breach of an undertaking he made in respect to $300,000 received into his trust account (CSG loan funds), when he disbursed those funds from his firm's trust account and did so without the expressed written consent required and contrary to the terms of the purported written consents he had received ([*Oud*] Reasons at [206] - [212]).

10. The Tribunal rejected as 'fanciful' the practitioner's contention that a payment to an unidentified party could constitute compliance with the terms of his undertaking, and said his evidence was driven by his awareness he had acted contrary to the terms of the undertaking ([*Oud*] Reasons at [105] - [106]).

11. The Tribunal noted that the authorities make it clear the importance of a solicitor's undertaking and that the practitioner knew his undertaking was central to the loan funds transfer occurring. They found that he was wilfully indifferent to the truth of the authorities and his conduct in releasing the funds in the circumstances would be regarded as disgraceful or disreputable by lawyers of good repute (Reasons at [209] - [211]), as well as being conduct that involved a consistent and substantial failure to reach a reasonable standard of competence and diligence ([*Oud*] Reasons at [212](7)).

12. The Tribunal therefore concluded that the practitioner was guilty of professional misconduct in breaching his undertaking.

13. The Tribunal also made a finding that the practitioner sent an email conveying an offer between the parties that was contingent on Mr Reese withdrawing the complaint he had made to the Committee in relation to the practitioner's breach of his undertaking set out above, and that he knew the terms of the email ([*Oud*] Reasons at [203], [205]).

14. The Tribunal found that the practitioner was under no obligation to convey the offer to withdraw the complaint, yet took no steps to advise his clients it was inappropriate, and that it was his

intent to have the complaint withdrawn ([*Oud*] Reasons at [233]).

15. The Tribunal accepted the Committee's contention that this conduct had the tendency to subvert the authority of the Committee, and found that the conduct was professional misconduct ([*Oud*] Reasons at [234]).

Relevant factual findings: unsatisfactory professional conduct

16. The Tribunal made findings of unsatisfactory professional conduct in respect to the practitioner's breach of regs 41(2), 41(6) and 45 of the *Legal Profession Regulations 2009*, in that:

    16.1 he failed to deliver to Mr Reese the original receipt for the deposit of the CSG loan funds into the practitioner's trust account when requested to do so by email on two occasions (Orders – Annexure A Ground 2; [*Oud*] Reasons at [217] - [222], which conduct the Tribunal regarded as 'inexcusable' ([*Oud*] Reasons at [219]); and

    16.2 he failed to keep his trust records in a way that disclosed the true position in relation to withdrawals of the CSG loan funds, in that the trust records did not accurately record the names of the persons who received the funds and the names and BSB numbers of the bank accounts into which the funds were paid (Orders - Annexure A, Ground 3; [*Oud*] Reasons at [213]-[216]).

17. In making these findings the Tribunal found that it was 'inconceivable' that the practitioner could have believed that he was under no obligation to provide a receipt to the person who provided the funds (ie Mr Reese/CSG) and his explanation that he was not under such an obligations was 'preposterous' ([*Oud*] Reasons at [178]).

18. The Tribunal noted that the practitioner's bookkeeper Ms Guthrie, whose evidence the Tribunal accepted, asked for BSB and account numbers for the relevant payments and the practitioner did not provide them.

19. The Tribunal also noted that the responsibility for correct trust account records rests with the practitioner and not his bookkeeper ([*Oud*] Reasons at [137] and [166]). In any event, the trust accounts did not accurately reflect that payments had been made to Ms McKelt ($100,000) and Mr Maiolo ($115,000). The Tribunal found that the practitioner's instructions to his bookkeeper were not a correct record of the

person to whom the payments were made ([Oud] Reasons at [162] - [169]).

20. Finally, the Tribunal also noted that if the trust ledger was accurate and stated to whom payments had been made (instead of stating they had been made to Mr Namah), then it would have been inconsistent with the purported authorities dated 23 March and 29 March 2016 ([Oud] Reasons at [129], [137]).

21. The Tribunal further noted that the practitioner had a financial interest in the funds being deposited in this trust account ([Oud] Reasons at [250]), and in the funds being released, because the release of funds meant that he would be repaid a loan of $20,000 he had made to Dr Peter Fiore ([Oud] Reasons at [126]).

…

40. The importance of legal practitioners performing their undertakings cannot be overstated, for the reasons set out in *Legal Profession Complaints Committee v Detata* [2012] WASCA 214 (Martin CJ, Pullin and Murphy JJA agreeing) at [48] - [54] (Detata). In particular, His Honour said at [53]:

> Further, it is vital for the maintenance of public confidence in the integrity of the legal profession and its practitioners, and for the maintenance of the confidence which practitioners have in dealing with each other, that performance of their undertakings be enforced.

…

42. This case involved repeated and continuing dishonesty, not a mere isolated error of judgment. [Mr Oud] intentionally and seriously misled the Federal Circuit Court, a firm of solicitors involved in proceedings before that Court and a practitioner with whom he was dealing directly in relation to the funds deposited into his trust account. His dishonest conduct was not isolated. He had the opportunity to correct it; instead he repeated it.

## *Analysis of factors*

### Factor 1 Is there a need to protect the public against further misconduct by Mr Oud?

34 Mr Oud's conduct shows that he is unable to command the personal confidence of other practitioners and the courts. Mr Oud's conduct is such that there is a clear need to protect the public against further misconduct by Mr Oud. His conduct was extremely serious and

involved serious dishonesty, both misleading the Court and other practitioners. The fact that his conduct was not isolated emphasises the need to protect the public.

**Factor 2 Is there a need to protect the public through general deterrence of other practitioners?**

35 The integrity of practitioners is an essential part of our legal system. A penalty for Mr Oud's conduct must emphasise to other practitioners the need to be scrupulously honest with fellow practitioners and the courts.

**Factor 3 Is there a need to protect the public by reinforcing high professional standards and denouncing transgressions?**

36 As noted above, the integrity of practitioners is an essential part of our legal system. The need for practitioners to be honest in all circumstances must be emphasised. Any penalty must reflect the seriousness of Mr Oud's conduct.

**Factor 4 Dishonesty**

37 Mr Oud's conduct in misleading the Court and his client was clearly and deliberately dishonest.

38 No reliance can be placed on the word of Mr Oud. His dishonest evidence to the Tribunal only compounded the seriousness of his conduct.

39 The totality of Mr Oud's misconduct and his almost complete lack of acceptance or even appreciation of it, are plainly incompatible with the characteristics of honesty and integrity that are fundamental to the practice of the law. Mr Oud's conduct establishes that he cannot be trusted to deal fairly within the system within which he hopes to continue to practice. It is wholly inconsistent with the privileges and the responsibilities of future legal practice as a legal practitioner.

**Factor 5 Breach of an Act, Regulations, Guidelines or Code of Conduct**

40 Mr Oud breached a number of regulations relating to the maintenance of his trust account. Those breaches, while perhaps the least serious of the findings against Mr Oud, are nevertheless serious: as was said in ***Victorian Legal Services Commissioner v Hession (Legal Practice)*** [2016] VCAT 2056 at [17], 'The profession must

know and be reminded that the trust account is sacrosanct and must be conducted scrupulously and honestly'.

**Factor 6 Incompetence**

41 Mr Oud's explanations for his conduct were, on occasions, bizarre.

42 They involved a convoluted explanation of reading only the excerpts from emails.

43 The Tribunal notes that a very basic requirement of a practitioner's competence is to read the entire document and not selective parts.

44 Further, Mr Oud's explanations of his alleged conflict in relation to both his lawyer's undertaking and providing a receipt, reflect, at best, a serious incompetence.

**Factor 7 Was the incident isolated?**

45 It is apparent that Mr Oud's professional misconduct was not isolated, but repeated over a period of time.

**Factor 8 Mr Oud's disciplinary history**

46 Mr Oud does not have any relevant disciplinary history. However, that is of limited significance in a case such as this, where the fundamental consideration is that Mr Oud has been found, through a calculated course of conduct, to have deliberately and dishonestly misled and deceived the Federal Circuit Court, this Tribunal and his fellow practitioners.

**Factor 9 Whether or not Mr Oud understands the error of his ways, including an assessment of any remorse and insight (or a lack thereof) shown by Mr Oud**

47 It is obvious that Mr Oud has no insight into his conduct whatsoever and the Tribunal has so found (***Oud*** at [17]). Mr Oud has failed to demonstrate any insight or remorse. In his submissions Mr Oud persisted in challenging the findings against him.

48 The practitioner's conduct of the defence and the veracity and candour of his or her testimony will often be the best evidence as to whether the mitigating circumstances are to be accepted: ***Barwick v Council of the Law Society of NSW*** [2004] NSWCA 32 at [108].

49 A practitioner's denial of the charges and the consequent need for the regulator to prosecute the charges to conclusion will deny the practitioner the mitigating benefit of immediate remorse and cooperation: ***The Council of the Qld Law Society v Wright*** [2001] QCA 58 at [43]-[46].

50 Mr Oud continues to downplay the significance of his dishonest conduct and seeks to blame others rather than to frankly acknowledge his conduct.

**Factor 10 Are there any special skills possessed by Mr Oud?**

51 Mr Oud has does not have any special legal skills that are relevant to penalty.

**Factor 11 Mr Oud's personal circumstances**

52 Mr Oud submitted:

> 41.11 Since the limitations imposed by the Legal Practice Board [Mr Oud] has not earnt any income from legal practice. As of 9 September 2018 [Mr Oud] stopped seeing clients and earning income from legal practice.
>
> 41.12 the situation with his daughter is stabilizing as she now attends a new school. Additional documentation has now been supplied to counsel outlining issues relating to [Mr Oud's daughter].
>
> …
>
> 41.12.2 As will be seen the problems facing [Mr Oud] and his wife with [Mr Oud's daughter] date from earlier in 2016[.]
>
> 41.13 School fees are still outstanding as are fees to senior counsel. Counsel has not rendered his fee note. Fees are outstanding to senior counsel.

53 The fact that Mr Oud may have outstanding fees (school fees and counsel fees) is not a factor that carries much weight. These factors might be relevant if the penalty was punitive but the paramount consideration in disciplinary proceedings against legal practitioners is the protection of the public.

54 The only evidence about Mr Oud's other personal circumstances is his own. Mr Oud refers to the stress arising from his daughter and his heavy workload as extenuating factors.

55 The Tribunal does not accept that Mr Oud's daughter's conduct is relevant to his breaches. It is not necessary for the purposes of these reasons to state his daughter's conduct suffice it to say that it related to a relatively minor incident (see Annexures to Mr Oud's submissions).

56 A heavy workload provides no excuse for Mr Oud's conduct. A heavy workload is a normal incident of legal practice. It provides no excuse for a practitioner failing to meet his/her professional obligations. The Tribunal notes that it was not persuaded that Mr Oud had a heavy workload.

**Factor 12 Are there any other matters related to Mr Oud's fitness to practise?**

57 Mr Oud was admitted in 1995 and was the sole principal of his legal practice. He was not acting at the direction of, or under pressure from, any other practitioner. After over 20 years in practice he should have been well aware of his professional obligations.

58 The Tribunal does not accept that publication of the Tribunal's reasons provides an adequate deterrent to Mr Oud's future conduct.

59 The suggestion that lawyers do not make good witnesses is ludicruous.

***Mr Oud's submissions***

60 Mr Oud's submissions did not individually address the 12 factors.

61 Mr Oud submitted that:

> The facts arise out of distinct and unusual circumstances involving a number of individuals to which reference is made in the internet links shown in the appendix to these submissions. The comments made in the internet sites referenced about the individuals named raise questions. It is unlikely that [Mr Oud] will be involved in anything similar
>
> (Oud submissions at para 41.1.)

62 The fact that Mr Oud was dealing with persons who were dishonest misses the point. Mr Oud's decisions to engage in misleading conduct were entirely his own, as the Tribunal's findings make clear. For example, he was well aware that he did not have cleared funds in his account when he wrote to the Federal Magistrates Court stating that he did. That was dishonesty on his own part.

63 Mr Oud submits that the 'key' events were affected by situations which no longer exist or have changed (Oud's submissions at 41.4).

64 The Tribunal does not accept that any of the changes in 'key' events is relevant to Mr Oud's penalty.

65 The evidence clearly establishes that Mr Oud was repeatedly dishonest. That dishonesty persisted in his evidence to the Tribunal. There is nothing in Mr Oud's submissions to suggest that he has gained any insight into his dishonesty.

***Penalty***

66 Given the seriousness of Mr Oud's conduct the Tribunal has concluded that the only appropriate penalty is that the Tribunal make and transmit a report on the findings of professional misconduct to the Supreme Court (Full Bench) with a recommendation that the practitioner's name be removed from the roll of persons admitted to the legal profession under the LP Act,

67 The Tribunal's findings demonstrate that Mr Oud is not a fit and proper person to remain a legal practitioner. His conduct is so serious that the practitioner is permanently or indefinitely unfit to practise.

68 Mr Oud has engaged in seriously dishonest conduct to the Federal Magistrates Court and to fellow practitioners. His conduct is made even worse by the dishonest manner in which he conducted his defence before the Tribunal. He has shown a complete lack of remorse.

69 None of the alternatives suggested by Mr Oud would adequately reflect the seriousness of his conduct and the need to protect the public.

***Global penalty***

70 Given the seriousness of Mr Oud's conduct and that the facts are inextricably linked which has led to the findings of professional misconduct and unsatisfactory professional conduct it is appropriate to impose a global penalty.

71 The Tribunal accepts the Committee's submissions at paras 63-64 that:

> Given the gravity of the dishonesty findings against the practitioner and the close factual relationship to the other misconduct findings, this is a situation in which it is both convenient and preferable to impose a

> global penalty: *Legal Profession Complaints Committee and A Legal Practitioner* [2013] WASAT 37 (S) at [18], [19].
>
> Accordingly, the Committee does not seek the imposition of a separate, additional or lesser penalties with respect to the findings made by the Tribunal, but seeks only the order pursuant to s 438(2)(a) and s 438(4)(b) of the Act, that the Tribunal make and transmit a report to the Supreme Court (Full Bench) with a recommendation that the name of the practitioner be removed from the Roll of Practitioners.

### *Interim suspension*

72 The Tribunal has determined that Mr Oud is not fit to remain on the Roll of Practitioners. Accordingly it is appropriate that he be suspended from practice pursuant to s 438(3)(c) of the LP Act pending the Supreme Court of Western Australia's determination of the question to strike off (***Legal Profession Complaints Committee and in de Braekt*** [2012] WASAT 58 (S) at [49]. It would be inappropriate to allow a dishonest practitioner to remain in practice pending a decision of the Full Bench.

### *Costs*

73 Section 87(1) and s 87(2) of the *State Administrative Tribunal Act 2004* (WA) provide:

> Unless otherwise specified in this Act, the enabling Act, or an order of the Tribunal under this section, parties bear their own costs in a proceeding of the Tribunal.
>
> Unless otherwise specified in the enabling Act, the Tribunal may make an order for the payment by a party of all or any of the costs of another party or of a person required to produce a document or other material on the application of the party under section 35.

74 In ***Western Australian Planning Commission v Questdale Holdings Pty Ltd*** [2016] WASCA 32, Murphy JA (Martin CJ and Corboy J agreeing) stated:

> 46 The effect of s 87(1) of the SAT Act is, relevantly, that each party in proceedings before the Tribunal is to bear its own costs, unless the Tribunal otherwise orders.
>
> …
>
> 51 Section 87(2) is to be construed in the context that the legal rationale for an order for costs is not to punish the person against whom the order is made, but to compensate or reimburse the person in whose favour it is made. That rationale is evident

> in s 87(3) of the SAT Act. Accordingly, even in a statutory context where the presumptive position is that no costs will be ordered, generally speaking, the question is whether, in the particular circumstances of the case, it is fair and reasonable that a party should be reimbursed for the costs it incurred. The onus is on the party seeking an order in its favour.

75 In ***Medical Board of Western Australia and Roberman*** [2005] WASAT 81 (S) (***Roberman (S)***) at [30], the Tribunal stated:

> Section 87(2) gives the Tribunal the discretion to order the payment by a party of all or any of the costs of another party. Where a regulatory authority successfully brings a complaint of conduct which, if proved, justifies disciplinary action by the Tribunal, there will usually be a strong case for the exercise of that discretion in favour of the regulatory body. That is because such bodies perform a function which promotes the public interest, and usually with limited resources. The financial burden of bringing disciplinary action if the body had no capacity to recover some or all of its costs may be such as to provide a disincentive to bring disciplinary action, or when brought, to ensure that the allegations against the practitioner concerned are properly and thoroughly presented. It is in the public interest that such bodies have an expectation that, if the allegations are made out, the offending professional will meet or at least contribute to the costs incurred in bringing the application. The question of an award of costs is, of course, a matter of discretion to be exercised in the circumstances of each case.

76 Although the decision in ***Roberman (S)*** does not limit the discretion of the Tribunal in awarding costs, the public obligations of the Committee to prosecute practitioners who breach the LP Act is an important factor to be considered.

77 A further reason why costs should be ordered is Mr Oud's dishonest evidence in the proceedings. If Mr Oud had shown any insight and given his evidence honestly these proceedings could have been avoided.

### *Mr Oud's submission as to costs*

78 In his supplementary submissions dated 21 December 2018, Mr Oud did not contest the liability to pay the costs of the Committee and the Committee's disbursements were not disputed by him. Mr Oud's dispute related to the fees of senior counsel. However, Mr Oud submitted:

> 2.1 The first point is whether the Committee was justified in briefing senior counsel. That it was appropriate to brief counsel

is not in issue. The issue here is why it was necessary to brief senior counsel. Clearly [the Committee] has the right to brief any counsel it chooses senior or otherwise. But when a third party is paying for the fees of counsel different considerations arise.

2.2 The application was not attended by argument of points of law.

2.3 The leading but not the only authority on briefing senior counsel is *STANLEY v. PHILLIPS* [1966] HCA 24; (1966) 115 CLR 470 though the proposition is put as whether two counsel ought to be briefed. The principles discussed by the Chief Justice in that decision remain good law despite the passage of time. A recent example is *Wiltshire v Amos & Anor* [2018] QSC 224 where at [33]:

2.4 the Court noted The Assessor rules that this instant case satisfies this test as to: - Volume of material; - Nature and extent of cross-examination required; - Complexity of fact or law; - The extent of preparation; and - The involvement of serious imputations of personal reputation or integrity; 'make it reasonably necessary or proper that the services of two counsel be engaged in order that the court may do justice between the parties.'

2.5 Admittedly the focus lies on the use of two counsel but the principle could equally be applied to the briefing of senior counsel. Noting that the number of witnesses before the trial did not require a second counsel. Complexity of law is not apparent. While some complexity of fact is apparent it is not of such a level as to be beyond the competence of experienced counsel.

2.6 Members of the Court of Appeal in *Lighting By Design (Aust) Pty Ltd v Cannington Nominees Pty Ltd* [2008] WASCA 23 (S) address the issue of briefing senior counsel though the coram did not find it necessary to decide the issue. A feature of the comments made by individual members was focus on the complexity of issues faced by counsel. Note the comments of Buss JA at [20]. The general comment about the court being assisted by senior counsel does not apply in the context of the Tribunal without regard to context.

2.7 It must be said that the [Committee] appears to have a practice of briefing senior counsel though the point about briefing senior counsel may not yet have been argued before the Tribunal. The argument now being put is to say that whether the briefing of senior counsel is justified as between party and party needs to be decided on a case by case basis not as a general rule.

2.8 The rate for counsel is set in paragraph six of the schedule to the 2018 Report about costs in SAT at $341 per hour including GST or $3410 per day. The rate for senior counsel $539 per hour or $5390 per day again inclusive of GST.

2.9 Converting the accounts of Mr Yovich SC these results occur:

| Date of account | Hours | SC rate | Counsel rate |
|---|---|---|---|
| 23.11.18 | 5 | 2695.00 | 1705.00 |
| 21.09.18 | 16 | 8624.00 | 5456.00 |
| 21.09.18 | 3 days | 16170.00 | 10230.00 |
| | | 27489 | 17391 |

79 In summary Mr Oud submitted:

3.1 [He] does not oppose orders that he pay the disbursements as claimed nor the fees of senior counsel as fees of counsel.

3.2 [Mr Oud] needs to negotiate terms of payment when his financial situation becomes clearer.

(Oud's supplementary submissions 21 December 2018)

80 The Tribunal is satisfied that it was appropriate to brief Senior Counsel. The allegations made against Mr Oud by the Committee were serious and it was entirely appropriate that the Committee brief Senior Counsel. The Tribunal notes that Mr Oud engaged Senior Counsel to represent him.

81 The Tribunal has considered the Committee's schedule of costs and is satisfied that they are reasonable.

82 Accordingly, Mr Oud should pay the Committee's costs of $53,522.70.

83 The Tribunal's order is that Mr Oud pay the Committee's costs within 30 days of the date of this order. It is a matter between the Committee and Mr Oud as to whether he should be given time to pay.

***Orders***

1. Pursuant to s 438(4)(b) of the *Legal Profession Act 2008* (WA) the Tribunal makes and transmits a report on the findings of professional misconduct and

unsatisfactory professional conduct to the Supreme Court of Western Australia (Full Bench) with a recommendation that the practitioner's name be removed from the roll of persons admitted to the legal profession under the *Legal Profession Act 2008* (WA).

2. Pursuant to s 438(3)(a) of the *Legal Profession Act 2008* (WA), the respondent's local practising certificate is suspended 14 days from the date of this order until the determination of the Supreme Court (Full Bench).

3. Pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA), the respondent must pay to the applicant its costs of the proceeding in terms of disbursements in the amount of $53,522.70 within 30 days of the date of this order.

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

JUSTICE J Curthoys, PRESIDENT

22 JANUARY 2019