QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v Bui* [2018] QCAT 424
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **AN BUI** (respondent)
APPLICATION NO/S:	OCR088-17
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	3 December 2018
HEARING DATE:	3 December 2018
HEARD AT:	Brisbane
DECISION OF:	Justice Daubney, President Assisted by: Dr Margaret Steinberg Mr Scott Anderson
ORDERS:	**1. In respect of charge one:** **(a) There is a finding that the Respondent has committed professional misconduct; and** **(b) It is ordered pursuant to s 456(2)(b) of the *Legal Profession Act* 2007 that the Respondent's practising certificate be cancelled immediately.** **2. In respect of charge two:** **(a) There is a finding that the Respondent has committed professional misconduct;** **(b) The Respondent is ordered to pay a penalty of $2500; and** **3. The Respondent shall pay the Applicant's costs of and incidental to the disciplinary application, such costs to be assessed as if the disciplinary action were a matter brought before the Supreme Court of Queensland.**

CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – where Respondent failed to comply with an undertaking given to the Queensland Law Society – where Respondent failed to respond to a s 443 notice from the Legal Services Commission – whether Respondent has committed professional misconduct or unsatisfactory professional conduct – where Respondent has been found by the Queensland Law Society to not be a fit and proper person to hold an unrestricted practising certificate – where the Respondent has serially not complied with directions of the Tribunal – whether the Respondent's practising certificate should be cancelled
	Legal Profession Act 2007, s 263, s 443, s 456
	Legal Services Commissioner v Wrightway Legal [2015] QCAT 174
APPEARANCES & REPRESENTATION:	
Applicant:	D de Jersey instructed by the Legal Services Commission
Respondent:	Self-represented

REASONS FOR DECISION

[1] This disciplinary application brought by the Legal Services Commissioner ('LSC') arises as a result of the Queensland Law Society's ('QLS') Trust Account investigation of a law practice formerly undertaken by the Respondent, An Bui. That investigation was undertaken pursuant to s 263 of the *Legal Profession Act* 2007 ('LPA'). An ensuing investigation by the QLS was undertaken as a consequence of a referral from the Applicant, the LSC.

[2] The Respondent now faces two charges. Charge one is that he failed to honour an undertaking. Charge two is that he breached s 443(2) of the LPA; the particulars of that, in brief, are that he failed to respond to a written notice issued by the Commission pursuant to s 443(1) of the LPA.

[3] The Respondent is an Australian legal practitioner. At the time of the investigations he was a sole practitioner practising under the name or style "Benson Lawyers". On 24 November 2014 the QLS commenced an investigation into that practice as a follow up to an investigation that had been conducted in April 2013. The investigation revealed, among other things, that the law practice, which was required to complete Business Activity Statements on a quarterly basis, had not in fact lodged or paid funds to the Australian Taxation Office since July 2013. The QLS investigation was completed on 5 December 2014. On 3 February 2015, the trust account investigator provided a report to the Council of the QLS outlining the findings from the investigation. That report was also provided to the Respondent.

[4] On 16 March 2015, the Respondent wrote to the QLS, advising that he was seeing his accountant in relation to his tax obligations and that he was fully aware of his obligations to the Australian Taxation Office. The manager of trust account investigations at the QLS then wrote to the Respondent on 23 April 2015 and advised that the investigation report and the Respondent's response were considered at the QLS's professional conduct meeting of 22 April 2015 and that the committee had resolved, amongst other things, that the Respondent's law practice provide to the QLS the details of the ATO repayment plan and that he provide an undertaking that his law practice would provide a report to the QLS by the first day of each month as to its progress against the ATO repayment plan. That report was to be checked and attested to by the law practice accountant at the time.

[5] On 12 May 2015, the QLS manager of trust account investigations wrote to the Respondent noting that no response had been received. On 27 May 2015 the QLS trust account investigations manager again wrote to the Respondent noting that a response had not been received. On 15 June 2015 the QLS trust account investigations manager wrote again to the Respondent noting that there had still been no response and seeking details of the ATO repayment plan and the undertaking that the Respondent's law practice provide a report to the QLS by the first day of each month as to its progress against the ATO repayment plan, with the report to be checked and attested to by the law practice's accountant. The QLS manager sought the Respondent's immediate attention to the matter.

[6] On 18 June 2015, the Respondent sent an email to the QLS manager in which he advised that he was still waiting for the ATO to finalise their assessment and that once a repayment plan was finalised he would send it to the QLS. He also gave an undertaking to provide a report to the QLS by the first day of each month as to the progress of the repayment plan. I interpolate to emphasise that that undertaking was given in writing by email on 18 June 2015, nearly three and a-half years ago.

[7] In any event, the Respondent did not provide the information to the QLS and on 20 July 2015, the QLS trust account investigation manager again wrote to the Respondent seeking the outstanding information. On 21 July 2015 the Respondent sent an email to the QLS advising that he was seeing his accountant. The Respondent said that his accountant had advised that he should have all the information within the next two weeks and the Respondent sought an extension of time to 3 August 2015.

[8] The information was not provided by the Respondent by 3 August 2015. Subsequently, the QLS trust account investigations manager repeatedly sought the first report and details of the ATO repayment plan from the Respondent. That occurred in correspondence on 5 August, 19 August and 28 September 2015. The Respondent did not provide the information, even in response to those repeated requests. Then on 29 October 2015 the Applicant wrote to the Respondent, noting that the Respondent had not provided an adequate explanation of his conduct to the QLS. The Applicant requested a full explanation from the Respondent by 25 November 2015.

[9] On 23 December 2015, due to the Respondent's failure to respond to the letter of 29 October 2015, the Applicant issued a notice pursuant to s 443(1)(a)(i) of the LPA. The due date for a response to that s 443 notice was 29 January 2016. The Respondent did not comply with the notice and failed to provide a response to the Applicant either

within the specified timeframe of 29 January 2016, or indeed at all. In fact, even up to today's date, the Respondent has not provided a response to that s 443 notice.

[10] On 27 November 2015 the QLS had written to the Respondent requesting the monthly progress reports for October and November 2015. The Respondent did not provide those reports. Then on 16 December 2015 the QLS again requested the outstanding reports be provided by 18 December 2015. They were not provided. On 11 January, 3 February and 8 March 2016, the QLS wrote to the Respondent advising that the matter would be referred to the executive committee due to the Respondent's continued breaches of the undertaking that he had given.

[11] On 31 March 2016, the Respondent provided a copy of a repayment plan with the ATO, some bank statements and an integrated client account from the ATO.

[12] All of the background that I have just recited is set out in a statement of agreed facts which was filed on 10 October 2017. It remains only to be noted that the Respondent has still, up to today's date, failed to comply with the undertaking he gave to the QLS as long ago as 18 June 2015.

[13] As I have already observed, the first charge brought by the Applicant is that the Respondent failed to honour an undertaking. The only information that the Respondent has provided was the repayment plan and associated documents which he gave over on 31 March 2016. Beyond that, the Respondent has been conspicuous by his failure to abide by the promise he gave to the QLS almost three and a half years ago.

[14] In relation to charge two, it is quite clear on the material before the Tribunal that the Respondent failed to comply with a written notice issued by the Applicant pursuant to s 443 of the LPA. Section 443 confers on, relevantly, the Applicant, various powers for the purposes of undertaking investigations under the LPA. The fundamental power to require a practitioner to provide an explanation of matters which are under investigation not only accords with fundamental principles of natural justice and appropriate investigative procedure, it is an essential tool in the investigative armoury of a regulator such as the Applicant. The system only works if people respond to inquiries that are made. It is a serious matter for a practitioner to ignore a notice given under s 443 for the provision of information. It exhibits a fundamental lack of appreciation of the responsibilities which practitioners owe to the profession in general and evinces a lack of understanding of the role of the regulator in ensuring probity within the ranks of the profession.

[15] A failure to respond to a s 443 request for information is a serious matter and a practitioner who ignores a s 443 notice could expect to have serious consequences visited upon them for that failure. There is no doubt that the Respondent has failed to respond to the s 443 notice given in this case.

[16] In the circumstances, it is necessary to properly characterise the conduct engaged in by the practitioner in respect of each of these charges. On any view, the breach of undertaking is the more serious of the two charges. That is not to suggest that the failure to respond to a request for information is not a serious matter but as I have had occasion to say previously, a failure to abide by an undertaking strikes at the heart of a solicitor's call to practice. A solicitor's word is his or her bond and a person in legal

practice who fails to live up to their word commits a grave infraction of the minimum standards of probity which the community can expect of members of the legal profession. That is a long winded way of saying that the privilege of being a member of the legal profession carries with it the responsibility of being a trustworthy person. If a solicitor breaks their promise, as the Respondent did in this case and continues to do in this case, one can legitimately ask what confidence the rest of the profession and the public at large can have in the probity of that person as a legal practitioner.

[17] There are many cases in which the courts and the various legal practice tribunals have commented on the importance of observing undertakings. It is sufficient to note the observations of this Tribunal in *Legal Services Commissioner v Wrightway Legal*,[1] where the Tribunal said, at [26]:

> The ability to rely upon a legal practitioner's undertaking is of utmost importance. It is central to dealings with practitioners. Because of its importance, noncompliance with the clear terms of an undertaking involves a substantial failure to reach or maintain a reasonable standard of competence and diligence and so amounts to professional misconduct as that term is described in s 419 of the Legal Profession Act.

[18] It is true that there is some authority for the proposition that in particular circumstances a breach of an undertaking may be regarded under the lesser category of unsatisfactory professional conduct. This, however, is not such a case. The present case is a clear example of a long standing and patent breach of one of the most fundamental aspects of the privilege to engage in legal practice. The Tribunal has no hesitation in holding that charge one has been proved and that the respondent is guilty of professional misconduct.

[19] In relation to charge two I have already referred to the importance of s 443 and equally, the importance of solicitors understanding the need to respond to notices under s 443. It is notable that even to this date, the Respondent has still not responded to the s 443 notice that was given to him. It has been noted previously in this Tribunal that solicitors need to understand that correspondence to them from either or both of the LSC or the QLS is a serious business and demands response. Solicitors cannot simply think that matters are going to go away and leave them alone; they will not. The Respondent's conduct in the present case strikes at the heart of his professionalism and, in the view of the Tribunal, demonstrates a clear disregard of his obligations under the LPA. In those circumstances the Tribunal is satisfied that charge two is made out and finds that the appropriate characterisation in respect to the conduct referred to in charge two is that of professional misconduct.

[20] Having found the Respondent guilty of both charges and characterised each of those charges as professional misconduct, one turns then to the serious question of sanction. At the outset, the Tribunal notes that the object of imposing a sanction in disciplinary proceedings is not punitive but rather is to be protective of the public. There is ample authority for that proposition.

[21] Mr An Bui has regrettably demonstrated a repeated disregard for the processes of the Applicant, the processes of the QLS and, indeed, the processes of this Tribunal. It is unnecessary for me to rehearse the lamentable history of this matter before the

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1 [2015] QCAT 174.

Tribunal, with the Respondent's serial non-compliance with directions made by the Tribunal for the purposes of the orderly progression of the matter. He is not to be punished for that, but I refer to that as indicative of his general approach to these very serious matters.

[22] As I noted a few minutes ago, these things will not go away and leave him alone if he chooses to ignore them. It is objectively a matter of concern that even today Mr Bui was unable to provide the Tribunal with any explanation for his failure to comply with the undertaking. It is of even greater concern that in the course of submissions today, Mr Bui admitted that it is only of relatively recent times that he came to an understanding of what an undertaking is and the seriousness of giving an undertaking and just as importantly, the serious consequences of breaching an undertaking. How it is that Mr Bui was able to be admitted to practice when he had such a lamentable lack of insight in to one of the most basic components of legal professionalism is beyond me. Be that as it may, he has now, for three and a half years or the best part of three and a half years, evinced a complete disregard for the seriousness of the undertaking that he gave to the QLS.

[23] Mr An Bui made some attempts, at the urging of the QLS, to engage in some re-education and for that he is to be recognised. He enrolled in the ethics course conducted by the QLS in March 2018 and also was required to complete the trust accounting course conducted by the QLS in 2018. I should note that the requirements that he complete those courses were contained in special conditions attached to the restricted employee practising certificate which was issued to him by the QLS after the executive committee of the council of the QLS had found, on 2 November 2017, that he was not a fit and proper person to continue to hold an unrestricted practising certificate.

[24] I also note in passing that the special conditions attached to his restricted practising certificate reflected the undertaking for him to provide information and note that not only has he comprehensively breached the undertaking he gave to the QLS, he appears prima facie to have breached the first condition of the special conditions attaching to his restricted employee practising certificate. In any event, Mr Bui attended both the ethics course and the trust account course but failed both of them. He informed the Tribunal today that he was proposing to re-enrol in both of those courses.

[25] I say again that the purpose of imposing an appropriate sanction is for the protection of the public. It is not to impose a punishment on the practitioner. In this case, however, the Tribunal cannot ignore the seriousness of the circumstance of the Respondent's conduct by egregiously failing to observe an undertaking that he gave to the QLS for the provision of information.

[26] In all the circumstances, the Tribunal considers that Mr Bui's current state is that it is not in the interests of the general public that he presently have a licence to practice law. I have already referred to the fact that his ongoing breach of an undertaking demonstrates a lack of ability for other practitioners or the public to have trust in him and his trustworthiness as a solicitor. Mr Bui has had every conceivable opportunity to put material before the Tribunal to explain his breach of undertaking, but he has not done so. And as I said before, even today, he was unable to provide the Tribunal with any sort of explanation for that.

[27] At the last minute he informed the Tribunal that he would attend to observing the undertaking tomorrow. That, unfortunately, is too little too late in terms of persuading this Tribunal that Mr Bui is currently a fit and proper person to engage in legal practice. It is quite clear that Mr Bui requires to undertake some considerable remedial activities if he is to practice law again and to all practical intents and purposes, the QLS is the body which is best qualified to assess whether his remediation is such as to permit him to be issued with any form of practising certificate in the future.

[28] The protection of the public however, demands that Mr Bui's practising certificate be immediately cancelled and the Tribunal will be so directing. That will be the order that attaches in respect of charge one. In respect of charge two, it should not be thought that ignoring appropriate and proper inquiries from the LSC is any way acceptable. The view of the Tribunal is that a message needs to be sent to the Respondent, to the profession and the public at large, that a failure to observe the obligations under the LPA will be treated seriously by the Tribunal. There will be a pecuniary penalty order attaching to charge two in the sum of $2,500.

[29] The Applicant seeks its costs of and incidental to the disciplinary proceeding. The Respondent does not oppose an order for costs. It is quite clear that costs should follow the event in accordance with the relevant provisions of the LPA.

[30] The decision of the Tribunal is therefore as follows:

1. In respect of charge one:

   (a) There is a finding that the Respondent has committed professional misconduct, and it is ordered pursuant to s 456(2)(b) of the *Legal Profession Act* 2007 that the Respondent's practising certificate be cancelled immediately.

2. In respect of charge two:

   (b) There is a finding that the respondent has committed professional misconduct

   (c) The Respondent is ordered to pay a penalty of $2,500.

3. The Respondent shall pay the Applicant's costs of and incidental to the disciplinary application, such costs to be assessed as if the disciplinary application were a matter brought before the Supreme Court of Queensland.