JURISDICTION	:	STATE ADMINISTRATIVE TRIBUNAL
STREAM	:	VOCATIONAL REGULATION
ACT	:	LEGAL PROFESSION ACT 2008 (WA)
CITATION	:	LEGAL PROFESSION COMPLAINTS COMMITTEE and O'HALLORAN [2011] WASAT 95
MEMBER	:	JUSTICE J A CHANEY (PRESIDENT) JUDGE R MACKNAY QC (SUPPLEMENTARY DEPUTY PRESIDENT) MS K KEMP (SESSIONAL MEMBER)
HEARD	:	28, 29, 30 AND 31 MARCH 2011 1 APRIL 2011 AND 4 APRIL 2011
DELIVERED	:	28 JUNE 2011
FILE NO/S	:	VR 35 of 2009 VR 36 of 2009 VR 37 of 2009 VR 38 of 2009 VR 39 of 2009
BETWEEN	:	LEGAL PROFESSION COMPLAINTS COMMITTEE Applicant AND PAUL JOHN O'HALLORAN Respondent

Catchwords:

Legal practitioners - Allegations of professional misconduct - Failures to pay employee superannuation - Entry into costs agreements - Whether contrary to

legislative restrictions on legal costs - Whether charges grossly excessive - Failure to provide itemised account - Delay

Legislation:

Legal Practice Act 2003 (WA), s 230, s 231(3)
Legal Practitioners (Effect on Costs of a New Tax System) (Goods and Services) Determination 2080
Legal Practitioners (Supreme Court) (Contentious Business) Determination 1996
Legal Practitioners (Supreme Court) (Contentious Business) Determination 1999
Legal Practitioners (Supreme Court) (Contentious Business) Determination 2002
Legal Practitioners (Supreme Court) (Contentious Business) Determination 2004
Legal Practitioners Act 1893 (WA), s 34A, s 34A(b), s 58W, s 58W(5), s 65, s 75
Legal Profession Act 2008 (WA), s 402, s 403, s 607, s 607(4)(b), s 622
Mortor Vehicle (Third Party Insurance) Act 1943, s 27A, s 27A(2), s 27A(3)
Superannuation Guarantee (Administration) Act 1992 (Cth), s 33, s 33(1)
Workers Compensation and Rehabilitation Act 1981 (WA), s 84ZL

Result:

Findings of professional misconduct and unsatisfactory professional conduct made

Category: B

Representation:

Counsel:

Applicant	:	Ms PE Cahill SC and Mr JM Healy
Respondent	:	Mr GMG McIntyre SC

Solicitors:

Applicant	:	Law Complaints Officer
Respondent	:	Smyth & Thomas

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

Challen v Paul O'Halloran & Associates [2008] WASC 169
Council of the Law Society (NSW) v Koffel [2010] NSWADT 149
D'Alessandro and D'Angelo v Bouloudas (1994) 10 WAR 191
Law Society of New South Wales v Bouzanis [2006] NSWADT 55
Law Society of New South Wales v Vosnakis [2007] NSWADT 42
Legal Practitioners Complaints Committee and Pillay [2006] WASAT 309
Mijatovic v Legal Practitioners Complaints Committee [2008] WASCA 115
New South Wales Bar Association v Cummins (2001) 52 NSWLR 279
New South Wales Bar Association v Somosi [2001] NSWCA 285
New South Wales Bar Association v Stevens [2003] NSWCA 261
New South Wales Bar Association v Young [2003] NSWCA 228

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 The Legal Profession Complaints Committee made a number of allegations of professional misconduct against a practitioner, Mr Paul O'Halloran. One of the allegations concerned failure to comply with obligations in relation to employee superannuation. The others concerned entry into costs agreements contrary to applicable legislation, excessive charging and sundry other matters.

2 The Practitioner admitted the failures in relation to superannuation but sought to explain that they occurred by reason of failures in his administrative systems or changes in administrative personnel. The Tribunal concluded that, although the initial failures might be overlooked on that basis, the scale of ongoing failures could not be justified, and amounted to professional misconduct.

3 In relation to the costs matters, the Tribunal considered the terms of the costs agreements that were the subject of complaint. It concluded that the entry into costs agreements in those terms contravened the statutory provisions applicable to work of the relevant type. It also concluded that the charges raised by Mr O'Halloran were grossly excessive and included charges which were improperly made.

4 Finally, the Tribunal found a number of the sundry other allegations made against Mr O'Hallorgan were established.

5 The proceedings against Mr O'Halloran were adjourned to a directions hearing to program the determination of the question of penalty.

Introduction

6 The Legal Profession Complaints Committee (Complaints Committee) brought five separate applications for disciplinary action against a solicitor, Mr Paul O'Halloran. Four of the matters concerned issues related to costs, although one of those also included allegations of undue delay. The fifth matter concerned allegations of failures by the practitioner to comply with his fiscal obligations arising from the requirements of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGA Act) as it applied at the relevant time.

7 The practitioner denied any unprofessional conduct.

8 Because of the substantial overlap of issues in relation to the four matters concerning costs, those matters were heard together with a direction that evidence in each matter was, to the extent relevant, evidence in all other matters. Although the matter concerning superannuation (VR 35 of 2009) involved allegations of a different character, the parties were content for that matter to be dealt with at the same hearing.

The applicable legislation

9 The conduct the subject of the various applications spanned a period from 1999 through to 2007. During that time, the legislation regulating the legal profession twice changed. Up until 1 January 2004, the *Legal Practitioners Act 1893* (WA) (1893 Act) applied. Thereafter, the *Legal Practice Act 2003* (WA) (2003 Act) applied. The 2003 Act was repealed by the *Legal Profession Act 2008* (WA) (2008 Act) which commenced operation on 1 March 2009, after all of the alleged conduct by the practitioner in relation to these proceedings had occurred.

10 In ***Mijatovic v Legal Practitioners Complaints Committee*** [2008] WASCA 115, Beech AJA (with whom the other members of the Court agreed) explained the transitional position applicable under the 2003 Act as follows at [161]:

> (a) The new Disciplinary Tribunal had (and, consequently, the State Administrative Tribunal has) jurisdiction under s 185 of the 2003 Act in respect of conduct occurring before or after 1 January 2004.
>
> (b) In exercising that jurisdiction, the Tribunal must act consistently with the presumption against interpreting statutes as retrospectively altering substantive rights and obligations.
>
> (c) In so acting, the Tribunal could deal with conduct occurring prior to 1 January 2004 as unsatisfactory conduct only if it were conduct of a species which rendered the practitioner liable to sanction under the 1893 Act (ie, illegal conduct, unprofessional conduct, or undue delay or neglect in the practice of the law) and then impose sanctions only to the extent permitted under the 1893 Act.

11 Each of these applications was commenced on 26 February 2009, before the date of the commencement of the 2008 Act. The application of the 2008 Act to conduct occurring, and disciplinary actions taken, before 1 March 2009, is dealt with in s 607 and s 622 of the 2008 Act. The effect of those provisions was summarised by the Full Bench of the Supreme Court in ***Legal Practitioners Complaints Committee v Camp*** [2010] WASC 188 at [6] - [7] where the Court said:

> The overall effect of these provisions may be summarised as follows:
>
> (a) disciplinary proceedings commenced under the 1893 Act or the 2003 Act against a practitioner are continued under the 2008 Act, s 607(2) - *Legal Practitioners Complaints Committee v Segler* [2009] WASAT 205 [30];
>
> (b) the rights and entitlements of the practitioner and of the applicant arising from a reference commenced under the 1893 Act or the 2003 Act are continued under the 2008 Act - s 607(2); and *Segler* [30]; and
>
> (c) in the event of any inconsistency between the rights and entitlements of the practitioner or of the applicant in relation to the
>
> references under the 1893 Act or the 2003 Act, and the provisions in the 2008 Act, the provisions of the 2008 Act prevail - s 607(2)(b) and s 607(3).
>
> In short, the effect of s 607 and s 622(2) of the 2008 Act is to treat the findings made against the respondent by the SAT which established contraventions of the 1893 Act or the 2003 Act as constituting contraventions of the 2008 Act. The 2008 Act therefore recognises the validity of findings made against a practitioner under the 1893 Act or the 2003 Act by treating them as constituting a contravention of the 2008 Act itself and, subject to its terms, directing that further proceedings relating to those matters shall be dealt with and regulated by the 2008 Act.

12 The Complaints Committee's position, which was not contested by the practitioner, was that the practitioner's liability under the 2008 Act is coextensive with his liability under the relevant Act in force at the time the conduct was engaged in. Accordingly, the Complaints Committee sought, and the Tribunal made, a direction pursuant to s 607(4)(b) that the applications be dealt with under the provisions of the 2008 Act. It may well be that the effect of s 607 and s 622 of the 2008 Act renders it unnecessary to exercise a discretion under s 607(4)(b) but we do not need to deal with that question.

VR 35 of 2009 -The superannuation matter

The allegations

13 The Complaints Committee alleges that, on twenty one occasions, Mr O'Halloran failed to make, or to cause to be made, the required superannuation contributions in relation to certain specified employees. In the alternative, it alleges that he failed to lodge, or cause to be lodged, superannuation guarantee statements in relation to those contributions as required by s 33 of the *Superannuation Guarantee (Administration) Act*

1992 (Cth) (SGAA). Full particulars of the alleged failures are set out in a table below (at [15]).

14 To understand the allegations in relation to the non-payment of superannuation, it is necessary to outline the requirements of the relevant legislation. Those requirements were not in issue in the proceedings, and were helpfully set out in the Complaints Committee's submissions in VR 35 of 2009 at [6] - [13] which read as follows:

> 6. Under the SGAA and the Superannuation Guarantee Charge Act 1992 (Cth) (**SGCA**), as then in force, from 1 July 2003 until 13 December 2005, the employer's obligations concerning contributing to an employee's superannuation were as set out in paragraphs 7 to 12 below.
>
> 7. In respect of each quarter ending on the following dates an employer was obliged to contribute a specified amount to an employee's superannuation fund by at least the following dates:
>
> | Quarter ended | Last date contributions due |
> |---|---|
> | 30 September | 28 October in the next quarter |
> | 31 December | 28 January in the next quarter |
> | 31 March | 28 April in the next quarter |
> | 30 June | 28 July in the next quarter |
>
> 8. Where an employer failed to contribute to an employee's superannuation fund in respect of any quarter by the date set out in paragraph 7 above then:
>
> (a) that employer had a superannuation guarantee shortfall in respect of that quarter; and
>
> (b) such a superannuation guarantee shortfall was calculated in accordance with section 17 of the SGAA.
>
> 9. Pursuant to subsection 33(1) of the SGAA, an employer who had a superannuation guarantee shortfall for a quarter had to lodge a superannuation guarantee statement with the Commissioner of Taxation:
>
> (a) for a quarter beginning on 1 January, by 14 May in the next quarter;
>
> (b) for a quarter beginning on 1 April, by 14 August in the next quarter;

(c) for a quarter beginning on 1 July, by 14 November in the next quarter;

(d) for a quarter beginning on 1 October, by 14 February in the next quarter.

10. Where there was such a superannuation guarantee shortfall:

(a) a charge in that amount was imposed on the employer pursuant to sections 5 and 6 of the SGCA; and

(b) that charge was payable by the employer pursuant to section 16 of the SGAA.

11. The superannuation guarantee charge payable by the employer was payable on the lodging of such a superannuation guarantee statement.

12. Where the employer failed to lodge a superannuation guarantee statement as required by the SGAA, the Commissioner of Taxation had to issue a default assessment of the employer's superannuation guarantee shortfall for that quarter under section 36 of the SGAA, before the employer would be liable to pay the superannuation guarantee charge in respect of the superannuation guarantee shortfall.

Legislation - 14 December 2005 onwards

13. Under the SGAA and the SGCA, as then in force, from 14 December 2005 onwards, relevantly an employer's obligations concerning contributing to an employee's superannuation were the same as set out in paragraphs 7 to 12 above, except that pursuant to subsection 33(1) of the SGAA an employer who had a superannuation guarantee shortfall for a quarter had to lodge a superannuation guarantee statement with the Commissioner for Taxation:

(a) for a quarter ending on 31 March, by 28 May in the next quarter;

(b) for a quarter ending on 30 June, by 28 August in the next quarter;

(c) for a quarter ending on 30 September, by 28 November in the next quarter;

(d) for a quarter ending on 31 December, by 28 February in the next quarter.

15 The failures by the practitioner to meet the obligations either to pay superannuation contributions in relation to the specific employees, or to

provide a superannuation guarantee statement in fault of those payments, were conveniently identified in a table to the Complaints Committee's submissions. Save for the practitioner's denial in relation to the third complaint concerning a Ms T Mola, the practitioner admitted the breaches set out in that table. The Complaints Committee did not press the third complaint concerning Ms Mola. The breaches are summarised as follows:

SUMMARY OF BREACHES

No.	Individual	Alleged Breach	Due Date	Actual Date	Amount*	Days Late	Note
1	**Radich**	Super contributions Quarter 4 2003	28.01.04	20.02.04	$182.68	22	
		Superannuation Guarantee Statement	16.02.04	Never			
2	**Fort**	Super contributions Quarter 4 2003	28.01.04	20.02.04	$216.69	22	
		Superannuation Guarantee Statement	16.02.04	Never			
3.	**Mola**	Not pursued					
4	**Watson**	Super contributions Quarter 1 2005	28.04.05	19.08.05	$215.22	112	
		Super contributions Quarter 2 2005	28.07.05	19.08.05	$84.63	21	
		Superannuation Guarantee Statement	16.05.05 & 15.08.05	Never			
5	**Violaris**	Super contributions Quarter 3 2005	28.10.04	14.12.05	$423.90	46	
		Superannuation Guarantee Statement	14.11.05	Never			

6	**McNab**	Super contributions Quarter 3 2005	28.10.05	14.12.05	$407.74	46	
		Superannuation Guarantee Statement	14.11.05	Never			
7	**V Fubbs**	Super contributions Quarter 3 2005	28.10.05	14.12.05	$360.90	46	
		Superannuation Guarantee Statement	14.11.05	Never			
8	**Claire Gibbs**	Super contributions Quarter 1 2006	28.04.06	02.06.06	$341.12	34	
		Superannuation Guarantee Statement	29.05.06	Never			
9	**Cherry Gibbs**	Super contributions Quarter 4 2005	28.01.06	02.06.06	$689.31	124	
		Super contributions Quarter 1 2006	28.04.06	02.06.06	$995.67	34	
		Superannuation Guarantee Statements	28.02.06 & 29.05.06	Never			
10	**K Fubbs**	Super contributions Quarter 4 2005	28.01.06	02.06.06	$244.24	124	
		Super contributions Quarter 1 2006	28.04.06	02.06.06	$384.68	34	
		Superannuation Guarantee Statement	28.02.06 & 29.05.06	Never			
11	**Byers**	Super contributions Quarter 4 2005	28.01.06	02.06.06	$626.65	124	
		Super contributions Quarter 1 2006	28.04.06	02.06.06	$854.64	34	
		Superannuation Guarantee Statement	28.02.06 & 29.05.06	Never	$626.65		

12	**Parrela**	Super contributions Quarter 4 2005	28.01.06	02.06.06	$561.09	124	
		Super contributions Quarter 1 2006	28.04.06	02.06.06	$812.59	34	
		Superannuation Guarantee Statement	28.02.06 & 29.05.06	Never			
13	**Schmidt**	Super contributions Quarter 4 2005	28.01.06	02.06.06	$376.01	124	B
		Super contributions Quarter 1 2006	28.04.06	02.06.06	$774.54	34	B
		Superannuation Guarantee Statement	28.02.06 & 29.05.06	Never			
14	**Creek (nee Staszewski)**	Super contributions Quarter 4 2005	28.01.06	02.06.06	$657.99	124	
		Super contributions Quarter 1 2006	28.04.06	02.06.06	$1,233.90	34	
		Superannuation Guarantee Statement	28.02.06 & 29.05.06	Never			
15	**Romeo (nee Figliomeni)**	Super contributions Quarter 1 2006	28.04.06	06.06.06	$446.74	38	
		Superannuation Guarantee Statement	29.05.06	Never			
16	**Martin**	Super contributions Quarter 3 2005	28.10.05	22.06.06	$176.93	236	
		Super contributions Quarter 4 2005	28.01.06	22.06.06	$884.63	144	
		Super contributions Quarter 1 2006	28.04.06	22.06.06	$1,377.24	54	
		Superannuation Guarantee Statement	14.11.05 & 28.02.06 & 29.05.06	Never			

17	**Parrella, Byers, K Fubbs, Romeo, Lam, Holland, Dueckershoff, Martin, Read**	Super contributions Quarter 3 2006	28.10.06	Unknown	$5,603.80		
		Superannuation Guarantee Statement	28.11.06	08.02.08			
18	**Parella, Staszewski, Byers, K Fubbs, Lam, Holland, Bradford, Dang, Willcock, Bennett, Kang, Martin, Read, Taylor**	Super contributions Quarter 4 2006	28.01.07	Unknown	$8,104.85		
		Superannuation Guarantee Statement	28.02.07	08.02.08			
19	**Parella, Byers, K Fubbs, Dang, Bennet, Kang, Ebert, Staszewski, Terrill, Worroll**	Super contributions Quarter 1 2007	28.04.07	Unknown	$4,837.07		
		Superannuation Guarantee Statement	28.05.07	08.02.08			
20	**Parella, Paik, Claude**	Super contributions Quarter 2 2007	28.07.07	Unknown	$2,115.61		
		Superannuation Guarantee Statement	28.08.07	08.02.08			
21	**Parrella, VA Fubbs, Ebert, Byers, K Fubbs, Staszewski, Worroll Claude**	Super contributions Quarter 3 2007	28.10.07	Unknown	$5,483.28		
		Superannuation Guarantee Statement	28.11.07	08.02.08			

Notes:

* These amounts are taken from the Legal Practitioners Complaints Committee grounds.

B - Mr O'Halloran contends that this payment was made on 6 June 2006.

16 The context of the failures to pay superannuation in relation to Mr O'Halloran's practice was illustrated in a further table contained in the Complaints Committee's submissions. That table, which is set out below, shows the number of employees in respect of whom payments were not made in time, as against the total number of employees of the practice.

Quarter*	**No. of Employees in Practice**	**No. of Employees in Practice who had Unpaid Super**	**Percentage of Employees in Practice who had Unpaid Super on Due Date of Payment of that Quarter**
2003 Quarter 4 (Complaints 1 & 2)	14	1	7%
2004 Quarter 4 (Complaint 3)	8	1	13%
2005 Quarter 1 (Complaints 4)	12	1	8%
2005 Quarter 2 (Complaints 4)	10	1	10%
2005 Quarter 3 (Complaints 5, 6, 7, 16)	11	3	27%
2005 Quarter 4 (Complaints 9, 10, 11, 12, 13, 14, 16)	12	5	42%
2006 Quarter 1 (Complaints 8, 10, 11, 12, 13, 14, 15, 16)	9	6	67%
2006 Quarter 3 (Complaints 12, 13, 17)	10	9	90%
2006 Quarter 4 (Complaint 18)	15	12	80%
2007 Quarter 1 (Complaint 19)	12	10	83%
2007 Quarter 2 (Complaint 20)	11	3	27%
2007 Quarter 3 (Complaint 21)	10	8	80%

* Note: in the above table the Quarter refers to the end date of the quarter in which the employee was employed by the practice pursuant to which the obligation to pay superannuation arose (i.e. typically, the quarter prior to the quarter in which the breach occurred).

The practitioner's response

17 The practitioner summarised his answer to the superannuation allegations in para 1.3 of his response filed 10 January 2011, the truth of which he attested to when he gave his evidence. That paragraph read:

> By way of explanation as to the circumstances in which the failure to comply with the *Superannuation Guarantee Act 1992* (Cth) arose and contention, the Practitioner says -
>
> (a) the Practitioner was working part time in his practice from 2002 to November 2006, which includes the relevant period, for a number of reasons including:
>
> (i) the illness of his parents, who were living in the United Kingdom, resulting in the death of both his parents in August/September 2005;
>
> (ii) the Practitioner's requirement to travel overseas to attend to affairs connected with the illness and death of his parents;
>
> (iii) the Practitioner was engaged in a political campaign to assist injured workers.
>
> (b) the Practitioner delegated tasks such as the payment of superannuation contributions to his bookkeeper at the time, who was employed by him for the period from 2001 to 9 June 2006, whom he reasonably believed, based on the evidence she had provided in the course of recruiting her, to be an experienced bookkeeper familiar with the legal requirements of the tasks delegated to her;
>
> (c) the Practitioner was not made aware by his bookkeeper that the relevant superannuation contributions had not been made on time;
>
> (d) the Practitioner was, therefore, unaware that the guarantee statements had to be lodged with the ATO;
>
> (e) from hindsight the Practitioner is able to speculate that a possible explanation for the non-compliance by the book-keeper with the statutory requirements was the book-keeper's lack of knowledge or understanding of the strictness of the statutory time limits imposed by the law in relation to the payment of superannuation contributions, a lack of knowledge or understanding which was not known to the Practitioner;
>
> (f) the Practitioner did substantially comply with the superannuation obligations, after some delay on his part and/or on the part of his bookkeeper at the time;

> (g) the prejudice to the employee was insufficient so as to constitute unprofessional conduct on the part of the Practitioner;
>
> (h) the conduct or extent of any neglect by the Practitioner was, in all the circumstances, insufficient to constitute unsatisfactory conduct or unprofessional conduct.

18 In Mr O'Halloran's witness statement in relation to the superannuation matter he elaborated on the matters raised in para 1.3 of his response. In relation to the question of delegation of responsibility for staff superannuation, Mr O'Halloran said at para 11 of his statement:

> The following senior practitioners and bookkeepers were assigned to deal with staff superannuation during the following periods:
>
> (a) Paul Haynes (Senior Practitioner) and Linda Gibbs (Bookkeeper) during the period of approximately 5 years to June 2006;
>
> (b) Paul Haynes and Jodie Lam (Bookkeeper) between the period June 2006 and August 2006;
>
> (c) Andrew Read and Jodie Lam between August 2006 and November 2006;
>
> (d) Paul O'Halloran and Anna Willcock (trainer bookkeeper) between November and December 2006;
>
> (e) Paul O'Halloran and Sally Kang (bookkeeper) between December 2006 and 7 March 2007;
>
> (f) Paul O'Halloran and Andrea Creek (Bookkeeper) between 7 March 2007 and 12 December 2007;
>
> (g) Paul O'Halloran and Cherise Ebert between December 2007 and 18 June 2008;
>
> (h) Paul O'Halloran and Katie Fubbs (Bookkeeper) between June 2008 and now;
>
> (i) Paul O'Halloran, Katie Fubbs and Rosemary Mascarenas from 3 September 2008 to current.

19 Mr O'Halloran said that, on a couple of occasions, Ms Linda Gibbs raised with him the issue of superannuation not being paid on time and that he responded by directing her to ensure that superannuation was to be paid promptly and kept up to date. He said that after Ms Gibbs left his employment in mid 2006, he had difficulty in obtaining a competent replacement bookkeeper. Mr O'Halloran said that when he engaged Ms Creek, who had previously worked for him, in March 2007, Ms Creek

established that superannuation had not been paid on time and reported that fact to him. He said that Ms Creek was then charged with the task of urgently bringing the staff superannuation up to date and liaising with the Australian Taxation Office (ATO) for that purpose. Ms Creek became pregnant and was unable to complete the task and a senior staff member, Ms Ebert, was assigned the duty of bringing superannuation up to date. Mr O'Halloran said that 'During this audit period the Australian Taxation Office instructed me not to pay any superannuation until their audit had been completed so as not to frustrate their enquires, which took some months'. He said that after the ATO audited the superannuation files, it was revealed that there was approximately $32,000 in superannuation outstanding. That liability was subsequently paid over a period of some months, pursuant to an arrangement made with the ATO. He said that since that time, he has paid all his superannuation in a timely way.

Findings in relation to the superannuation allegation

20 The Complaints Committee submits that, on its face, an analysis of the practitioner's failure to comply with his superannuation obligations evidences a serious abrogation of fiscal responsibilities sufficient to warrant characterisation as unprofessional conduct. In making that submission, the Complaints Committee accepts a conclusion reached in the New South Wales Administrative Disputes Tribunal in ***Council of the Law Society (NSW) v Koffel*** [2010] NSWADT 149 (***Koffel***) at [48] where it was said:

> … [T]he mere fact of a failure to pay superannuation guarantee contributions on time does not, of itself, constitute professional misconduct. It is the circumstances surrounding the failure, the consequences of the failure, and the actions subsequently taken by the solicitor, that determine whether the conduct constitutes professional misconduct.

21 We agree with that approach to the characterisation of the conduct. In order to apply that approach, it is necessary to consider the evidence as to the circumstances of the breaches, and in particular Mr O'Halloran's evidence on this issue.

22 We did not find Mr O'Halloran's evidence, either in its written form, or orally at the hearing, to be reliable. His evidence was replete with speculation and inconsistencies. By way of example, in his response in VR 35, which he swore to be true, he proffered 'likely explanations' and gave an account of what were 'probably' the events which occurred. To be fair, the response recited that more detailed explanations or recollections

were not possible given the passage of time. That acknowledgement undermines, however, the weight which we are prepared to give to Mr O'Halloran's speculations as to what might have brought about the breaches of his obligations to pay superannuation.

23 Mr O'Halloran's oral evidence in relation to his failure to pay superannuation was at times inconsistent with the position set out in his response. At times it was also inconsistent with the evidence of other witnesses. For example, he maintained that, at different times, each of Mr Haynes and Ms Fubbs undertook responsibility to deal with staff superannuation. Both Mr Haynes and Ms Fubbs gave evidence at the hearing. When asked about their involvement with superannuation, each denied any responsibility in relation to it, save that Mr Haynes said that from time to time, being a signatory to the practice's general account, he signed cheques paying superannuation.

24 As mentioned above, Mr O'Halloran said that, during the period of the audit by the ATO, the ATO instructed him 'not to pay any superannuation until their audit had been completed so as not to frustrate their enquiries, which took some months'.

25 When requested by the Complaints Committee to produce documents to support those assertions, Mr O'Halloran produced a letter dated 23 January 2008 from the ATO to him, marked to the attention of Ms Ebert, which referred to a telephone conversation on 22 January 2008 concerning unpaid superannuation for the period between 1 July 2006 and 30 September 2007. In that letter, the ATO said:

> Please note that if you have missed the due dates for payment, any superannuation guarantee shortfall should be paid directly to the tax office as part of the SGC. DO NOT make these payments to a superannuation fund after the cut off dates as these will not be counted in reducing your liability for the relevant periods.

26 The suggestion by Mr O'Halloran that the failure to pay superannuation after Ms Creek discovered that superannuation payments had not been made (which would appear to have been some time after 7 March 2007) was because of a directive by the ATO, does not accord with the documentary evidence which suggests that a directive more or less to that effect was not made until 23 January 2008. By then there had been continued substantial failures to pay superannuation throughout 2007, and nothing appears to have been done about the breaches of superannuation obligations dating back to the last quarter of 2005.

27 It can be noted that the advice in the ATO letter of 23 January 2008 was not that superannuation contributions should not be paid as they fall due, but rather that payments not paid by the due dates in the past should be made directly to the tax office rather than individual employee superannuation funds.

28 We also note that the suggestion that non-compliance was brought about by a directive of the ATO was not relied upon in Mr O'Halloran's response to the complaints which was filed in January 2011. We find therefore that the failure during 2007 to comply with the SGA Act did not result from any directive by the ATO. Mr O'Halloran's evidence in that respect illustrates a tendency to seize upon anything which he considered might excuse his conduct, and demonstrates the unreliability of his evidence generally.

29 It is common ground that Mr O'Halloran failed to make the payments referred to in the table above, and in that manner breached his obligations under the SGA Act. The case put against the practitioner is that there was systemic failure on his part to comply with his fiscal requirements, or that he abrogated those responsibilities. There is no evidence which is capable of supporting a conclusion that Mr O'Halloran deliberately set about avoiding payment of superannuation. The evidence does suggest, and we find, that he failed to give adequate attention to the question of compliance with his superannuation obligations.

30 Unlike some of the cases to which we were referred concerning solicitiors' failures to pay superannuation obligations, there is no suggestion in the evidence in this case that Mr O'Halloran was unable to meet his financial obligations.

31 Ultimately, he paid the full amount of his obligations, albeit by an arrangement with the ATO for payment over a period of some months.

32 We accept that the involvement of the ATO was brought about after Mr O'Halloran's bookkeeper contacted the ATO at his request, a proposition not challenged in cross-examination.

33 On the other hand, there is no cogent evidence of any contact with the ATO prior to Ms Ebert's telephone conversation with the ATO on 22 January 2008. We do not accept Mr O'Halloran's evidence that Ms Creek had earlier notified the ATO of the breaches. If she had, it might be expected that the ATO would have taken action to arrange an audit much earlier. There is no explanation as to why, if Ms Creek had

been in contact with the ATO during 2007, payments were not then made as they fell due.

34 The finding that, at least in January 2008, Mr O'Halloran caused contact to be made with the ATO, suggests that the breaches of the SGA Act did not occur by reason of a positive intention on Mr O'Halloran's part to avoid his fiscal responsibilities. Rather, they occurred due to his failure adequately to address compliance with the superannuation obligations, and to put in place an adequate system to ensure compliance.

35 Mr O'Halloran's evidence is that, on at least two or three occasions during the period that Ms Gibbs was his bookkeeper (up until June 2006) she drew his attention to the issue of failure to pay superannuation on time. His response, he said, was to make it clear that superannuation must be paid promptly and kept up to date. The table above shows that significant non-compliance began to occur from the third quarter of 2005 onwards. Having been alerted to non-compliance by Ms Gibbs, Mr O'Halloran should have been vigilant to ensure that the non-compliance ceased, and that payments were left up to date. We find that Mr O'Halloran responded inadequately to the advice that payments had not been made on time.

Do the failures amount to professional misconduct?

36 In ***Legal Practitioners Complaints Committee and Pillay*** [2006] WASAT 309, the Tribunal reviewed a number of decisions concerning legal practitioners who had failed to lodge taxation returns. Reference was made to ***New South Wales Bar Association v Cummins*** (2001) 52 NSWLR 279 (***Cummins***), a case involving a failure by a barrister to lodge tax returns or pay tax for 38 years. In that case, Spigelman CJ said, at [66] that the preparation and filing of tax returns is closely related to the earning of income, and therefore, the link between the practitioner's failure and his profession was 'sufficiently close' to justify a finding of professional misconduct. That link is clearly present in Mr O'Halloran's failure to meet the superannuation obligations arising from his practice.

37 Reference was also made to the decisions in ***New South Wales Bar Association v Somosi*** [2001] NSWCA 285 and ***New South Wales Bar Association v Young*** [2003] NSWCA 228 where the New South Wales Court of Appeal found that the legal practitioners concerned were not fit and proper persons to remain on the roll of legal practitioners. In the latter, Meagher JA observed and held, at [9]:

> … [T]he essential facts of the case … are, quite simply, that for years and years Mr Young failed to file income tax returns when he knew he should have. Deliberately to ignore one's obligations in this manner bespeaks a lack of integrity, particularly if one is not ignorant of the consequence, and a lack of integrity justifies removal of Mr Young's name from the roll. …

38 A similar conclusion was reached in ***New South Wales Bar Association v Stevens*** [2003] NSWCA 261

39 These cases, of course, involved egregious and wilful conduct by the practitioners concerned. They dealt mainly with the question of whether the practitioners were fit and proper to remain on the roll of practitioners, rather than characterisation of the conduct. The cases recognise, however, that non-compliance with statutory taxation obligations, particularly where the obligations arise in the context of legal practice, may sound in disciplinary action.

40 The question of non-payment of superannuation has been dealt with in a number of cases in the Administrative Decisions Tribunal of New South Wales.

41 In ***Law Society of New South Wales v Bouzanis*** [2006] NSWADT 55, the Tribunal considered a failure by a solicitor to pay employee superannuation between March 2000 and March 2004. The employee had ceased employment in August 2003. The solicitor made payment of the outstanding superannuation in March 2004, but only after receiving correspondence from the solicitors for the employee and the intervention of the Law Society of New South Wales. The definition of professional misconduct under the relevant NSW legislation was substantially the same as the definition of professional misconduct in s 403 of the 2008 Act. The Tribunal concluded that the failure by the solicitor to make superannuation payments until correspondence was received from solicitors representing the employee, represented a sufficiently serious abrogation of his fiscal responsibility in the practice of law to warrant a finding of professional misconduct (at [18]).

42 In ***Law Society of New South Wales v Vosnakis*** [2007] NSWADT 42, the Tribunal concluded that a failure by a solicitor to pay superannuation entitlements between August 1996 and April 2004 (except for the 1997/98 year) in relation to one employee, and over a nine year period in respect of another employee, amounted to professional misconduct.

43 The decision in ***Koffel*** involved a solicitor whose practice encountered financial difficulties as a result of the collapse of a major corporate client. The solicitor's practice was placed in administration in July 2007. Its creditors were the ATO for PAYG tax and superannuation charges, and another external creditor. A deed of company arrangement was entered, in which the solicitor gave a personal guarantee to pay the creditors. The personal guarantees by the solicitor were effectively based on trust, since the solicitor was unable to offer any security for his undertakings. The solicitor made significant payments to the administrator so that, by the date of the hearing, all outstanding payments of superannuation had been made. The superannuation liability under the deed amounted to $123,998.97. It was accepted that the solicitor was aware that the superannuation payments were outstanding, but had not paid them because he had inadequate funds to do so, and was seeking to trade out of the financial difficulty caused by the failure by the firm's principal client to pay its fees.

44 The Tribunal in ***Koffel*** noted the distinction between the facts before it, and the facts in the decision in ***Cummins*** to which it had been referred. It noted that the solicitor had acknowledged that he had responsibility to make sure all superannuation guarantee payments were made, and did not set out to avoid those obligations. At [42] the Tribunal concluded:

> It cannot be said in the case now before the Tribunal that the conduct of the solicitor Koffel involved 'a sufficient serious abrogation of his fiscal responsibilities in the practice of law' or 'a systematic failure to comply with Revenue responsibilities'. Rather, the opposite. The solicitor's evidence, which was clear and unchallenged, was that once the matter had been drawn to his attention he did what he believed he could reasonably do in all the financial circumstances to meet his revenue responsibilities, thus demonstrating conduct in a professional (and personal) sense a committment [sic] to pay the outstanding debts including the superannuation payments. Certainly, the solicitor, as principal solicitor, should have kept a more careful eye on his office/general account, his income and expenditure and his statutory obligations, especially in circumstances where there was a substantial decline in income. However, when the issue of outstanding superannuation came to his attention he directed his mind to it and dealt with it. The Tribunal concludes that the solicitor's conduct was that he accepted his fiscal/revenue responsibilities.

45 The Tribunal dismissed the application against Mr Koffel on the basis that the practitioner had done all he reasonably could do to ultimately discharge his statutory obligations to pay the superannuation levies in respect of his employees.

46 Mr O'Halloran's failure to pay superannuation was in the nature of omission and inadequate oversight and systems, rather than wilful abrogation of his responsibilities. The difficulty for Mr O'Halloran is the extended period of time over which there was substantial non-compliance, that is, from mid 2005 until September 2007. Although Mr O'Halloran professes to have been unaware of the level of non-compliance, his evidence is that from time to time non-compliance was drawn to his attention. He failed then to have sufficient regard to his obligations.

47 Complaints 1 (Radich), 2 (Fort) and 4 (Watson) involve failures in relation to one employee in the relevant quarter and involve relatively short delays before payment was made. We would not consider that those delays, which were most likely initially the responsibility of a bookkeeper, should be treated as unprofessional conduct on Mr O'Halloran's part.

48 In the third quarter of 2005, there were four delayed payments out of a total complement of 11 employees. Payment in respect of three of those employees was made 46 days after the due date. From that point on the position worsened significantly. Given that payments the subject of complaint 5 (Violaris), 6 (McNab) and 7 (V Fubbs) were made within 46 days, and represented the beginning of the problems emerging in relation to the non-payment of superannuation, it is reasonable to conclude that those non-payments did not demonstrate an indifference to Mr O'Halloran's taxation obligations. They represent however, the emergence of a problem that required careful attention. In those circumstances, unprofessional conduct is not, in our view, demonstrated in relation to complaints 5, 6 and 7.

49 The position changed thereafter, however. Having remedied the failures in quarter 3 2005, Mr O'Halloran should have been vigilant to ensure that no further non-compliance occurred. He was not, and the position deteriorated to the point where up to 90% of employees' superannuation was not paid. Against a background of earlier problems with timely payment, the extent of failures after that time demonstrates, in our view, an indifference to his taxation and superannuation obligations. The failures had assumed substantial proportions, and we find the failures in relation to complaints 8 through to 21 do amount to professional misconduct.

VR 37 of 2009 - Pizzata

The Pizzata costs agreement

50 The complaints against Mr O'Halloran concerning his client, Ms Elizabeth Pizatta, substantially arise from the entry into a costs agreement, and the charges made under that costs agreement in relation to representation on claims for damages arising out of two motor vehicle accidents in which Ms Pizatta was involved.

51 The costs agreement signed by Ms Pizatta on 1 April 1999 read as follows:

> I confirm that I have agreed to the following terms and conditions upon which PAUL O'HALLORAN will act for me in this or any other matter:
>
> (a) $270 per hour for all time spent on my file including interviews, court appearance, incoming and outgoing telephone calls, perusing documents, drawing documents, travelling and waiting time, file reviews, conferences, etc.;
>
> (b) Minimum charge of one tenth of an hour for time spent on the above matters and clerical for non-professional time;
>
> (c) Minimum charge of two tenths of an hour per page (or part thereof) for outgoing correspondence, court documents, statements, proof etc;
>
> (d) $130.00 per hour for all clerical and non-professional time spent for such things as collating and photocopying, outside deliveries and attendances; incoming and outgoing telephone conversations, messages, file notes, etc. (but excluding the making of appointments for me to see Paul O'Halloran or his staff).
>
> (e) 5% increase in charge rate per annum;
>
> (f) 5% interest on unpaid fees per annum;
>
> (g) 15% interest per annum on outlays incurred by Paul O'Halloran.
>
> (h) I am responsible for payment of medical, Barrister and other expenses necessarily incurred and I shall fully and promptly pay Paul O'Halloran for such expenses upon demand, whether or not I win my case.
>
> (i) Paul O'Halloran is authorised to deduct monies from his Trust Account for fees and disbursements at any time;
>
> (j) I confirm that you have advised me that I may seek independent legal advice before signing this agreement.

(k) I confirm that Paul O'Halloran also reserves the right to charge me pursuant to the provisions of the Fourth Schedule of the Supreme Court Rules (as amended from time to time) in lieu of the above rates.

52 Instructions were initially taken to represent Ms Pizatta in relation to her claim for damages arising from a motor vehicle accident on 31 January 1999. That claim proceeded through to a listing for trial, and the matter was set down to be heard for three days commencing 1 May 2002. However, shortly prior to the trial, Ms Pizzata was involved in a second accident. For that reason, the trial dates in relation to the first accident were vacated.

53 Eventually, Ms Pizzata's claims were settled for an amount of $50,000 plus costs to be taxed if not agreed. The costs were subsequently taxed on a party/party basis and allowed at $11,089.31 inclusive of disbursements.

54 Mr O'Halloran rendered fees to Ms Pizzata in the total amount of $36,271.55 made up as follows:

a) $27,368.16 for professional fees (excluding GST);

b) $2,384.51 being GST on professional fees;

c) $2,495.20 for disbursements (including GST);

d) 3,051.82 being fee increases and interest on unpaid fees;

e) $971.86 for interest on disbursements.

The complaints relating to Pizzata

55 Against that general background, the Complaints Committee makes the following complaints against Mr O'Halloran in relation to Ms Pizzata:

COMPLAINT A

The practitioner, PAUL JOHN O'HALLORAN, was guilty of unsatisfactory conduct by unprofessional conduct in that on or about 1 April 1999, he entered into a written agreement with Elizabeth Pizzata, a client, (the 'Pizzata Costs Agreement') which purported to allow him to charge Ms Pizzata above that allowed by the *Motor Vehicle (Third Party Insurance) Act 1943* (WA) (the MV (TPI) Act) and, the *Legal Practitioners (Supreme Court) Contentious Business Determination 1996* (the '*Legal Practitioners Determination 1996*'), - for legal costs the subject of that Act and Determination and/or the terms of which were

unreasonable. In particular, the Pizzata Costs Agreement purported to allow the practitioner to charge Ms Pizzata:

(i) for secretarial or administrative work: see clauses (b) and, or, (d) of the Pizzata Costs Agreement;

(ii) unreasonable minimum charges for certain tasks irrespective of the time taken to perform the task: see clauses (b) and (c) of the Pizzata Costs Agreement;

(iii) a 5% increase in 'charge rate' per annum;

(iv) 5% interest on unpaid fees per annum: see clause (f) of the Pizzata Costs Agreement; and

(v) 15% interest per annum on outlays incurred by the practitioner, being an amount in excess of that allowed pursuant to section 75 of the Legal Practitioners Act 1893: see clause (g) of the Pizzata Costs Agreement;

(vi) pursuant to the provisions of the 'Fourth Schedule of the Supreme Court Rules': see Clause (k) of the Pizzata Costs Agreement.

COMPLAINT B

The practitioner was guilty of unsatisfactory conduct by unprofessional conduct on or about each of 29 October 2003, 20 January 2004 and 3 February 2004 by charging Ms Pizzata fees for representation arising out of two motor vehicle accidents, or causing her to be charged the fees, and receiving payments in respect of the same, where the fees:

(i) were grossly excessive; and, or

(ii) included charges which were not properly able to be charged.

COMPLAINT C

The practitioner was guilty of unsatisfactory conduct by unprofessional conduct in that, on various dates in 2001, 2002 and 2003, he applied trust moneys which he held for the benefit of Ms Pizzata towards disbursements without complying with section 34A(b) of the *Legal Practitioners Act 1893* (WA) (the '*LPA 1983*')

56 A fourth complaint of acting without instructions from Ms Pizzata in relation to costs was not pursued by the Complaints Committee.

The practitioner's response

57 Mr O'Halloran denies that the Pizzata costs agreement allowed him to receive any greater reward than was provided for in the relevant determinations. He says that the charge for 'clerical and non-professional time' allowed for in the Pizzata costs agreement at cl (b) and cl (d) did not allow, and was not interpreted as allowing, charges for purely secretarial or administrative work forming part of the practitioner's overheads, but rather allowed for charging for fees involved in the pursuit of the client's matter. He contends that his method of charging by reference to specified minimums was a reasonable approach to charging of time spent and was consistent with professional standards. He further contends that the charging of interest on unpaid fees and outlays does not represent a reward for work undertaken but rather 'as an imposition of interest payable on money due and owing'. He contends that those charges are not matters addressed by s 27A(2) of the *Motor Vehicle (Third Part Insurance) Act 1943* (WA) (MV (TPI) Act).

The MV (TPI) Act - s 27A

58 At the relevant time, s 27A(2) of the MV (TPI) Act provided:

> An agreement is not to be made for a legal practitioner to receive, for appearing for or acting on behalf of a person in an action to which this section applies, any greater reward than is provided for by a determination in force under section 58W of the Legal Practitioners Act 1983.

59 Section 27A(3) provided that an agreement made contrary to the section is void and any money paid under such an agreement is recoverable by the person who has paid it.

60 Section 58W of the 1893 Act provides that the Legal Cost Committee may make determinations regulating the remuneration of practitioners in respect of, amongst other things, contentious business carried out by them for the purposes of proceedings before the District Court, or before a review officer or compensation magistrates court within the meaning of the *Workers Compensation and Rehabilitation Act 1981* (WA) (WCR Act).

61 On 1 April 1999, when Mr O'Halloran's retainer from Ms Pizzata commenced, the applicable cost determination under s 58W of the 1893 Act was the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 1996* (1996 Determination). That Determination

provided for a maximum hourly rate for a senior practitioner of $270, and a maximum hourly rate for a clerk/paralegal of $130.

62 On 1 July 1999 the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 1999* (1999 Determination) came into effect. The hourly rates for a senior practitioner and a clerk/paralegal remained unchanged from those permitted by the 1996 Determination.

63 From 15 September 2000 until 31 March 2002, *the Legal Practitioners (Effect on Costs of a New Tax System) (Goods and Services Tax) Determination 2008* was in effect. That permitted a practitioner, whose charges were limited by specified earlier determinations (including the 1999 Determination), to add on to their charges an amount 'no more than is necessary to offset the consequences' of the introduction of the GST.

64 From 1 April 2002 until 30 June 2004, the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2002* applied. The rate chargeable by a senior practitioner inclusive of GST became $313 per hour, and for a clerk or paralegal, $151 per hour.

65 From 1 July 2004, the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2004* came into force. That Determination permitted a senior practitioner to charge an hourly rate inclusive of GST, of $341, and a clerk or paralegal, an hourly rate of $165 inclusive of GST.

The practitioner's system of charging

66 Central to the consideration of the complaint by Ms Pizzata, as well as the other complaints concerning charges, is the operation of the costs agreement and the unusual system for charging undertaken in Mr O'Halloran's practice. It is necessary to outline that system of charging.

67 Work in progress (WIP) on each matter was recorded on a computerised system which could be viewed and printed in a document described as a 'matter pre-billing guide' (WIP record). As can be observed, clause (b) of the Pizzata costs agreement provided for a minimum charge of 1/10 of an hour for time spent on the matters referred to in clause (a). Clause (c) provided for a minimum charge of 2/10 of an hour per page (or part thereof) for 'outgoing correspondence, court documents, statements, proof etc'. The firm's practice was that upon receipt of a document, such as a letter, an entry of not less than 1/10 of an

hour was recorded as WIP. It is not clear precisely who caused that entry to be made in each case. It is apparent that Mr O'Halloran, and Mr Haynes, a senior solicitor working with Mr O'Halloran at the relevant time, maintained time sheets. It would appear that, on some occasions, they would open incoming correspondence, and then either record their time for perusal of that correspondence, or cause a member of the administrative staff to record that time. On other occasions, it would appear that administrative or clerical staff who may open the mail might make a time entry for perusal. Mr O'Halloran explained that the firm's practice was that each incoming document would have a time for reading or perusal recorded on the basis that time spent reading that document would only ever be recorded once, notwithstanding that it may be necessary during the life of the file, for a practitioner or paralegal to reread the particular document from time to time. The time shown on the WIP records was not, therefore, necessarily a reflection of the time actually spent reading the document on the day it was received, but was an estimate of a reasonable charge having regard to the possibility that the document may be perused a number of times during the life of the file.

68 A similar approach was taken in respect to outgoing correspondence, provision for which was made in clause (c) of the costs agreement. That clause provided for a charge of a minimum of 2/10 of an hour for each page of outgoing correspondence or other documents. It appears that the entry into the WIP records of outgoing correspondence was undertaken by administrative staff based upon the length of the particular item of correspondence. That charge, Mr O'Halloran explained, was designed to cover the professional time in preparation of the particular document and amending and settling drafts. In the case of documents prepared by a clerk, Mr O'Halloran said that either he or Mr Haynes would go through documents drafted by clerks, make amendments and cross-check against the file, have the document retyped and then review it again. Mr O'Halloran said that the charge of 2/10 of an hour per page was intended to be a genuine pre-estimate of the time spent.

69 Mr O'Halloran acknowledged that in some cases, the full one or two unit charge for ingoing or outgoing correspondence should not have been made for very simple and short documents, but contended that, by a system of 'swings and merry-go-rounds' the overall charges to clients were not unreasonable.

70 In addition to the mechanical recording of time for incoming or outgoing correspondence, it is apparent that the solicitors and clerks within the firm maintained their own time sheets recording time spent on

attendances on the client or at conferences or attending to matters on the file. The identification of precise work done by individuals from the WIP records is made difficult by the fact that the reference code 'POH' was both Mr O'Halloran's reference in relation to work which he undertook, but was also used as the 'generic entry for the firm'. Thus, work shown in the WIP records under Mr O'Halloran's name did not, in fact, in many cases refer to work with which he had any personal involvement. Mr O'Halloran explained that the policy at the time was that the perusal and drawing of more standard form documents were charged in the 'generic' name of the firm rather than the practitioner with conduct of the file.

Complaint A (i) Secretarial or administrative work

71 It was not in dispute that, in applying the relevant costs determination, a practitioner is not entitled to include any charge at an hourly rate for merely clerical, secretarial or administrative work carried out by a clerk, which properly formed part of the overheads of the practitioner's practice - see ***D'Alessandro and D'Angelo v Bouloudas*** (1994) 10 WAR 191 (***Bouloudas***) at 220. The Complaints Committee argues that clause (d) of the Pizzata costs agreement permits the charging for purely secretarial or administrative work, and is thus a charge not permissible under the relevant determinations. The Complaints Committee also contends that clause (b) fails to distinguish between secretarial or administrative work on the one hand, and paralegal work on the other.

72 Mr O'Halloran acknowledged that clause (d) of the Pizatta costs agreement did reserve to him the ability to charge for purely clerical tasks, such as collating and photocopying. He said, however, that the form of costs agreement had been prepared prior to the ***Bouloudas*** decision, but had not been amended to take account of that decision. Notwithstanding that, Mr O'Halloran said that, as a matter of fact, charges for purely clerical tasks were not made under the agreement.

73 The prohibition in s 27A of the MV (TPI) Act is against the making of an agreement to receive greater reward than is provided for in the relevant determination. To the extent that the Pizzata costs agreement permitted the recovery of remuneration not recoverable under the relevant determinations, the agreement contravened s 27A. In his closing submissions, counsel for Mr O'Halloran conceded that Mr O'Halloran had recorded some work, in arriving at the rewards sought, which included some amounts referable to clerical work. That acknowledgment was

rightly made. At least some work of a purely administrative nature, such as file notes or telephone calls made by clerical or administrative staff within Mr O'Halloran's office, were recorded as chargeable and were included in the charges raised. The Pizzata costs agreement permitted those costs to be made.

74 We find that by entering the Pizzata costs agreement containing clause (b) and clause (d), Mr O'Halloran acted in breach of s 27A of the MV (TPI) Act.

(ii) Unreasonable minimum charges

75 The second aspect in respect of which the Complaints Committee alleges that Mr O'Halloran agreed to charges beyond those permitted by the relevant determination, or were unreasonable, were the minimum charges provided for in clause (b) and clause (c) of the Pizzata costs agreement. At the outset of the hearing, counsel for the Complaints Committee advised that the complaint in relation to clause (b) was not simply charging by reference to six minute units. The Complaints Committee acknowledged that there is a standard practice within the legal profession of charging by reference to six minute units. The Complaints Committee's objection is that the effect of applying a minimum charge of 1/10 of an hour for any activity regardless of the time actually spent on that activity has the effect of enabling recovery at an hourly rate in excess of the rate permitted by the relevant determination. The Complaints Committee submitted, however, that there is no general practice within the profession of charging a minimum of 2/10 of an hour per page for correspondence and that the charges on that basis were themselves unreasonable, and had the effect of increasing the effective hourly charge rate beyond the maximum permissible under the relevant determination.

76 Mr O'Halloran's response on this issue was that the setting of a minimum charge of 2/10 of an hour per page (or part thereof), for outgoing correspondence, court documents, statements and proof is not unreasonable when accounting for the fact that it includes professional time taken in considering the content of the document, dictating or otherwise drafting the documents, checking the document in its engrossed form, correcting any errors in typing, checking any amended form of the document, signing it and authorising its dispatch.

77 In his witness statement regarding Pizatta, Mr O'Halloran said:

> At the time of rendering the work it was the practice adopted by my firm to have some standardised charges which were usually two units of six minutes time for drawing each page of the letters in general terms, which was thought to benefit the client and be an accurate time of all time spent in composing those letters, dictating those letters, typing those letters, reading the initial draft, re-drafting and amending the draft letter, re-reading the settled draft, checking the final form of the letter and signing the same. All this takes time and is not separately charged for in our office, but forms part of the charge even though that usually is less than the totality of all the time actually spent dealing with the separate components of a letter.

78 In his oral evidence at the hearing, Mr O'Halloran said that, in relation to incoming correspondence, his practice was to charge one unit of time for the first two pages, and two units of time if the letter was three, four or five pages. It is difficult to reconcile that evidence with the WIP record. That is partly because of a difficulty in matching the WIP records with the contents of the client files so as to identify the documents referred to in the WIP records. It is apparent that the minimum charge of one unit was regularly applied in relation to reading incoming correspondence and documents. A random review of documents on file reveals that there are a large number of very short letters for which the standard one unit charge for reading was applied. Reading those letters takes a matter of seconds. By way of an extreme example, on 7 February 2002, the charge of one unit of time for a senior solicitor was charged for reading an invoice from a psychiatrist. The invoice comprised one line. On 7 March 2002, the WIP records show a charge of one unit for reading a letter from the other party's solicitor. That would appear to be a letter dated 6 March 2002 which reads:

> We refer to a telephone discussion between Barbara and Fay Parrella on 5 March 2003.
>
> We confirm an informal conference has now been arranged for Wednesday 26 March 2003 at 2.30 pm to be held at your offices.
>
> We look forward to seeing you then.

79 There are numerous examples of correspondence of that nature on the client files. A charge of a unit of senior solicitor's time in relation to correspondence of that nature, repeated many times over the life of the file must inevitably have lead to a remuneration at an hourly rate greater than that permitted by the relevant determinations. The same effect arises from the minimum charge of two units per page for outgoing documents. A random selection of documents from the file demonstrates that the provision for a minimum charge resulted in excessive charges for

correspondence on a regular basis. By way of example, the WIP records record four units of senior solicitor time on 26 November 2002 for writing a letter to Dr Ismail asking for a report. The records show a further record on the same day, of four units of senior solicitor time writing a letter to Dr Mendelson seeking a report. Apart from short introductory paragraphs, the letters, which are approximately one and a half pages in length, are identical. The letters list the matters to be covered in the report. They are standard requests, and the letter appears to be, in substance, a standard letter. Even allowing for consideration of the file for the purpose of deciding to whom the letter should be addressed, and tailoring the introductory paragraphs, it is not possible to justify a charge for 48 minutes of time to generate, settle and dispatch those letters.

80 A further example is a letter on the Pizzata file to Dr Harper dated 17 July 2002. That letter encloses a cheque as prepayment for a medical report fee. It consists of two sentences. For that, a charge of two units of senior practitioner time, that is $56.90, was recorded in the WIP record.

81 The examples of brief routine correspondence attracting charges of that nature are common in the file. The files demonstrate that the provision in the agreement which permitted the charging of two units of time per page for correspondence inevitably led to a charge at an effective hourly rate significantly in excess of the permissible hourly rate under the relevant determination. Because of their capacity to significantly inflate the overall hourly charges beyond those permitted by the relevant determination, and given their cumulative effect on the overall charges to the client, the minimum two unit charge per page in relation to outgoing correspondence was, in our view, unreasonable.

(iii) 5% increase in charge rate per annum

82 A 5% increase in charge rate per annum was provided for in clause (e) of the Pizzata costs agreement. That was so notwithstanding that the hourly rates specified in the agreement represented the maximum hourly rates permissible under the 1996 Determination. That Determination had come into force on 1 February 1997, and had thus applied for over two years during which the maximum hourly rate remained unchanged. An increase of 5% per annum on the maximum hourly rate chargeable under the Determination was clearly impermissible unless a new determination raising the hourly rate came into effect. As it happened, the 1999 Determination left rates at the same level with no increase.

83 It follows that the agreement permitting Mr O'Halloran to charge a 5% increase per annum on his hourly rate amounted to an agreement to receive remuneration in excess of that permitted by the relevant determination. It thus amounted to a breach of s 27A of the MV (TPI) Act.

84 When Mr O'Halloran rendered his principal account to Ms Pizzata on 27 October 2003, he included an amount of $3,051.82 which was described as follows:

> Plus fee increases and interest on unpaid fees as per costs
>
> agreement being 5% per annum being $6,766.18
>
> but say as reduced $3, 051.82

85 Mr O'Halloran acknowledged that the clause permitting a 5% increase in hourly rates had the potential to result in a charge in excess of that permitted under the relevant determination. He said, however, that he never intended it to have that operation. It may be that Mr O'Halloran did not put his mind to the consequences of applying an increase to the hourly rate recorded, but he nevertheless brought to account an increase in his charges in reliance upon clauses (e) and (f) of his costs agreement. Although the precise calculation of the amount eventually charged is not clear, given that WIP was recorded at the maximum permissible hourly rate, the additional charges necessarily caused Mr O'Halloran's account to exceed that which was permissible under the relevant determination.

(iv) 5% interest on unpaid fees per annum

86 The Pizatta costs agreement permitted Mr O'Halloran to charge '5% interest on unpaid fees per annum' (clause (f)). That provision constituted part of the basis upon which the sum of $3,051.82 was added to the account rendered on 27 October 2003. Clearly, that 'interest' component did not relate to outstanding invoices, but was based on a calculation of interest on unbilled time. Mr O'Halloran explained his understanding of the costs agreement as being that 'it entitled me to charge 5% interest at the conclusion of the matter in lieu of invoicing on a periodical basis and accruing an interest entitlement in that way'. In his response to the Pizzata allegations at para A(f), Mr O'Halloran said:

> clause (f) of the costs agreement is reasonably to be interpreted as having the meaning of authorising the practitioner to make a calculation at the end of each year of time spent by his practice on behalf of the client at the

> hourly rate agreed and to add 5% per annum to that amount for so long as it remained unpaid, as an amount agreed to be due and owing.

87 In his response to the Complaints Committee's contentions, Mr O'Halloran contended that:

> Interest charged per annum on 'unbilled time' or unpaid fees as contained in clause (f) of the Pizzata Cost Agreement is not a matter within the subject matter of a determination of the remuneration of legal practitioners, as the term 'remuneration' as defined by s 58W of the *Legal Practitioners Act 1893* or s 210 of the Legal Practice Act 2003, but a matter relating to money due and owing and so may be a matter for agreement between the practitioner and the client.

88 That submission by the practitioner overlooks the fact that no money is due and owing by a client to a legal practitioner until such time as the practitioner renders an account (s 65: 1893 Act; s 230: 2003 Act). Until an account is rendered, the client has no knowledge of the amount to be charged, and thus no opportunity to pay fees so as to avoid interest running. Given the client's ignorance of this amount, it cannot be said, as Mr O'Halloran said in para A(f) of his response, that his unbilled time was 'an amount agreed to be due and owing'.

89 The requirement to pay interest, effectively on an unbilled time, was, in substance, a method by which the hourly rate ultimately charged to the client for services performed sometime earlier, was increased. Where, as in the Pizzata case, the hourly rate specified in the costs agreement represented the maximum permissible under the costs determination, the provision enabling interest to be charged on unbilled time had the effect of permitting charges in excess of the amount permissible under the relevant determinations.

(v) 15% interest per annum on outlays

90 The Pizatta costs agreement provided for 15% per annum on disbursements incurred by Mr O'Halloran. The applicable costs determinations did not provide for the charging of interest in any amount on outlays incurred by a practitioner. However, s 75 of the 1893 Act provided that:

> A practitioner shall be entitled to charge interest on all moneys disbursed in connection with litigious or other business, at the rate from time to time allowed on judgment debts.

91 At the relevant time the amount chargeable on judgment debts was 6%.

92 The Complaints Committee assert that a charge of 15% per annum in interest on outlays was not permitted by the relevant determinations, or was unreasonable.

93 Mr O'Halloran contends that interest on outlays is not a matter within the subject matter of the relevant determinations of remuneration, as the term 'remuneration' does not include payments relating to money due and owing and thus may be a matter for agreement between the practitioner and the client. Mr O'Halloran further contends that the charge was not prohibited by s 75 of the 1893 Act.

94 We do not accept the practitioner's contention. Section 58W of the 1893 Act enables the Legal Costs Committee to make determinations regulating the remuneration of practitioners. By s 58W(5) 'remuneration' is defined to include 'the reimbursement of expenses properly incurred in the course of, or in connection with, business carried out by a practitioner for a client'. Section 27A of the MV (TIP) Act prohibits an agreement for a legal practitioner to receive 'any greater reward than is provided for by a determination in force under s 58W' of the 1893 Act in relation to actions for damages arising from motor vehicle accidents. It may be that s 75 of the 1893 Act provided a separate statutory entitlement to interest at the rate allowed on judgment debts to be charged in relation to disbursements. To the extent, however, that the practitioner entered into an agreement to pay interest at a higher rate than provided for in the statutory entitlement under s 75 of 1893 Act, it was an agreement for greater reward than was permitted under the relevant determination, and was not justified by s 75 of the 1893 Act.

95 The practitioner, in his oral evidence, suggested that the rate of 15% approximated the rate of interest which he incurred in relation to his overdraft at the relevant time, and thus asserted that the provision did no more than enable him to recover his true out of pocket expenses. That may be so, but that does not mean that the practitioner was entitled to make that charge. If he chose to carry outgoings in relation to the client's matter, he had a statutory entitlement to charge interest at a specified rate, but otherwise any interest costs he incurred comprised an overhead of his business not recoverable from the client.

(vi) Charges pursuant to the Fourth Schedule of the Supreme Court rules

96 This aspect of Complaint A was not pursued by the Complaints Committee and need not be dealt with further.

Did entry into the Pizzata costs agreement constitute unprofessional conduct?

97 At the time of entry into the Pizzata costs agreement, the 1893 Act rendered a legal practitioner liable to disciplinary action where the practitioner had been guilty of, amongst other things, unprofessional conduct. The first allegation in relation to the Pizzata matter is that the practitioner was guilty of 'unsatisfactory conduct by unprofessional conduct'. The expression 'unsatisfactory conduct' comes from the 2003 Act. Unsatisfactory conduct was defined under the 2003 Act to include unprofessional conduct.

98 Unprofessional conduct, used in both the 1893 Act and the 2003 Act, had the meaning explained in ***Kyle v Legal Practitioners Complaints Committee*** [1999] 21 WAR 56 at [72] where Parker J described unprofessional conduct as:

> [C]onduct 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.

99 The 2008 Act introduced the expressions 'unsatisfactory professional conduct' and 'professional misconduct'. Those terms are defined in s 402 and s 403 of the 2008 Act. 'Unsatisfactory professional conduct' is defined to include:

> 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.

100 'Professional misconduct' includes, relevantly, unsatisfactorily professional conduct where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence or diligence. Undoubtedly, conduct which met the description of unprofessional conduct under the 1893 Act or the 2003 Act constitutes either unsatisfactory professional conduct or professional misconduct for the purposes of the 2008 Act.

101 The proper approach to characterisation of Mr O'Halloran's conduct in relation to the entry into the Pizzata costs agreement in 1999 is to ascertain whether that conduct amounted to unprofessional conduct for the purposes of the 1893 Act and, if so, to then ascribe a character of either

unsatisfactory professional conduct or professional misconduct based upon the degree to which the conduct departed from the appropriate standards.

102 We have concluded that the Pizzata costs agreement offended s 27A of the MV (TPI) Act in four respects, being those identified in paras (i) to (iv) of Complaint A. We have also concluded that the minimum charges provided for in cl (c) of the Pizzata costs agreement permitted unreasonable charges to be made.

103 It does not necessarily follow that the making of a costs agreement which is construed to offend the MV (TPI) Act or to permit unreasonable charges to be made, or indeed the making of charges under such an agreement, constitutes unprofessional conduct. In ***D'Alessandro v Legal Committee*** (1995) 15 WAR 198 at [209 - 210] (***D'Alessandro***) Ipp J (with whom Pidgeon and Frankland JJ agreed) said:

> The standards applied under the court's duty to monitor the taxation of bills of costs and costs agreements, and the court's duty to supervise the disciplining of legal practitioners are not necessarily the same and do not serve identical purposes. A fee that a solicitor may seek to charge by way of a bill of costs may, upon taxation, be found to be unreasonable and therefore subject to appropriate reduction. It does not, however, necessarily follow that the fees so charged by the bill of costs are so excessive as to constitute a breach of ethics. The test for determining whether excessive or unreasonable overcharging constitutes professional misconduct would generally be more stringent than that which is applied when determining whether the amount claimed under a bill of costs or under a s 59(1) costs agreement should be reduced, or whether the costs agreement should be cancelled. What is lawful may not necessarily be ethical, and, indeed, what is unethical, may not necessarily be unlawful.

104 Whether or not the entry into the agreement constitutes conduct 'unbefitting a solicitor', it is 'a question of degree and dependent upon the facts of the individual case', in ***Re Veron; Ex parte Law Society (NSW)*** (1966) 84 WN (Pt 1) (NSW) 136 at [144].

105 Section 27A of the MV (TPI) Act was inserted by an amendment in 1994. It had thus been in place for five years prior to the entry into the Pizzata costs agreement. Mr O'Halloran's practice consisted substantially of claims for personal injuries, no doubt principally arising from motor vehicle accidents and work injuries. He was well aware of the statutory limitation on costs.

106 Mr O'Halloran said that he believed, in 1999, and indeed still believes, that the Pizzata costs agreement did not offend s 27A of the

MV (TPI) Act. The hourly rate specified in clause (a) of the Pizzata costs agreement was an hourly rate permitted (albeit the maximum) under the relevant determination. The charge by 1/10ths of an hour was, he says, and the Complaints Committee accepts, a common method of charging within the legal profession. The provisions in clauses (f) and (g) were considered by him to be permissible methods of recovering his cost of, in effect, extending credit to the client through the course of the matter. In those circumstances, entry into an agreement containing those provisions might fall short of unprofessional conduct, albeit that we have concluded that clauses (f) and (g) were not permissible.

107 In our view, however, clauses (c) and (e) and clause (d), insofar as it permitted recovery for purely administrative tasks, cannot be so easily explained or justified. Given the nature of the practice, and, as the files demonstrate, the extensive amount of routine correspondence, clause (c), in particular, has an obvious capacity to enable recovery of costs at an effective hourly rate well in excess of the maximum permissible rate under the determination. That situation was aggravated by the capacity to add a 5% per annum increase in charge rates. The entry into those aspects of the agreement so clearly enabled recovery of costs in excess of the appropriate determination that they cannot be justified. We have found the charge under clause (c) to be unreasonable. The entry into the agreement containing those terms, in breach of the statutory limitation on costs, fell short of the standard of professional conduct observed by members of the profession of good repute and competence, and did so to a substantial degree. In our view, Complaint A is made out, and the practitioner is guilty of professional misconduct in the manner alleged in Complaint A.

Complaint B - charging a grossly excessive amount or improper charges

The expert evidence

108 As already noted, Ms Pizzata's claim in relation to both accidents was ultimately settled for an amount of $50,000 plus costs to be taxed if not agreed. Fees charged to Ms Pizzata in total amounted to $36,271.55. Costs were taxed on a party/party basis and allowed at $11,089.31. It can immediately be seen that the total costs are disproportionate to the amount recovered. Mr O'Halloran contends that Ms Pizzata's claim was worth substantially more than the figure for which she settled, so the costs seem more disproportionate than they would if measured against the value of her claim.

109 In all of the matters concerning complaints about excessive charges, each of the Complaints Committee and Mr O'Halloran engaged legal costs experts to review the files for the purpose of assessing reasonable charges. In relation to each costs matter, the Complaints Committee relied on the evidence of Mr Stewart Forbes. In relation to the Pizzata matter, Mr O'Halloran relied upon the opinions of Mr David Lang, and Mr Marco Tedeschi.

110 Before moving to the evidence of the experts, it is necessary to recount the events surrounding the taxation of costs.

111 The major bill was sent to Ms Pizzata with a letter dated 29 October 2003. Mr O'Halloran caused the sum of $34,899 to be paid from his trust account from the monies held on behalf of Ms Pizzata to pay his account.

112 On 24 November 2003, Mr O'Halloran instructed Ms Maria-Louisa Coulson, a barrister specialising in legal costs matters, to prepare a party-party bill of costs on Ms Pizzata's behalf. Ms Coulson prepared a bill which provided for a total of $19,864.56. That bill included an allowance for $300 for counsel attending a pre-trial conference, and included allowances for drawing a bill of costs at $600 and attending on taxation of $800. Ms Coulson forwarded the bill to Mr O'Halloran by letter dated 15 December 2003. In that letter Ms Coulson described the bill as 'drawn rather generously' and said she anticipated some reduction being made at taxation. She suggested that a copy of the bill be served on the other party as a draft for discussion purposes.

113 The bill was forwarded to the solicitors for the defendant for the purposes of negotiation. An offer was received from the defendant in the sum of $12,015.20, being $10,000 for costs and $2,015.20 towards disbursements.

114 On 20 January 2004, the practitioner rendered a further account to Ms Pizzata in the sum of $1,093.10. A further account for $279.43 was sent on 3 February 2004.

115 The defendant's offer of $12,015 was repeated on 10 February 2004, and Ms Coulson advised that the offer was worth considering, and that an offer of $10,000 to $15,000 would be worth negotiating. On 9 March 2004 Ms Coulson advised that, if the matter proceeded to taxation, she thought that Ms Pizzata would be awarded about $12,000 plus disbursements.

116 Eventually, on 17 May 2004, the bill of costs was taxed in the District Court. The taxing officer allowed the bill in the sum of $11,089.31 (inclusive of GST), being $8769.31 for professional fees and $2,320 for disbursements. The amount allowed at taxation for professional fees included $901.05 for work by an independent counsel, and $7,868 in relation to the practitioner's professional fees. Ultimately, Ms Pizzata received a cheque for $9,549.31, being the amount of the taxed costs paid by the defendant, less $1,540 paid to counsel in relation to the work on taxation.

117 In summary, therefore, it can be seen that of the $36,271.55 charged to Ms Pizzata by Mr O'Halloran, she recovered $11,089.31.

Mr Forbes' opinion

118 Mr Forbes approached the question of assessment of the reasonable costs for work done on the Pizzata file by reference to a review of the file itself. He then made an assessment of the work done on the file, as revealed by the documents contained on it, applying the particular costs determination applicable at the time each item of work was done. Mr Forbes paid no regard to the Pizzata costs agreement in his assessment of the reasonable costs. That was because he took the view that the Pizzata costs agreement was either void, or at least fairly certain to be set aside on application. He also did not pay any regard to the WIP record except to the extent that he used information from it to make allowances for attendances at conferences with the client. Mr Forbes approached his assessment by accepting the amount assessed by the taxing officer for party/party costs, and then identifying the work done on the file of a solicitor/client nature which would be chargeable over and above the party/party costs. He prepared a schedule of the solicitor/client costs by reviewing the file and estimating the amount of time which should reasonably be allowed for the items of work which he found to be chargeable on a solicitor/client basis. He concluded that the solicitor/client costs would be in the range of $1,800 to $2,200, and settled upon $2,000 as a reasonable estimate.

119 Mr Forbes therefore concluded that a reasonable sum for the costs to be charged by the practitioner to Ms Pizzata was most probably $10,769.56.

Mr Lang's opinion

120 Mr Lang's approach to the assessment of reasonable costs differed from Mr Forbes. He had regard to the method of charging prescribed in

the costs agreement, and to the WIP records which he treated as evidence of the work done and time taken. He too had regard to the file and sought to reconcile the WIP records with the file contents. On that basis, he assessed the reasonable costs at $21,130 in respect to the practitioner's charges not including disbursements.

Mr Tedeschi's opinion'

121 Mr Tedeschi is a barrister with considerable litigation experience. He does not specialise in the area of legal costs, and acknowledged that he had not attended a taxation since becoming an independent barrister in 2005, and probably had not attended a taxation in the five years leading up to that time. He said that he had probably done a couple of dozen taxations in his 32 years of practice.

122 Mr Tedeschi made a detailed analysis of the Pizzata client files. He said that he went through the files on three occasions for the purpose of drawing a draft bill of costs. He had regard to both the WIP records and to an 'audit of unbilled time' prepared by Mr O'Halloran. That audit was prepared by Mr O'Halloran by going through the files identifying work which he identified from the file but which had not been recorded on the WIP records. In preparing his 'audit of unbilled time', Mr O'Halloran applied the terms of the Pizzata costs agreement to quantify the value of the work done.

123 Mr Tedeschi said that he considered the work to be of some complexity involving, as it did, two motor vehicle accidents. He noted that in the decision in ***Bowen Buchbinder Vilensky v Banning and Gardner*** (Full Court, SCWA, Library No 960325, 20 June 1996), the Supreme Court, in considering a costs agreement, allowed billing in one-tenth of an hour, and thus considered the basis of charging in the costs agreement to be permissible.

124 Mr Tedeschi took the view that the taxing officer had unreasonably disallowed work undertaken, and his assessment of 'getting up for hearing' was $16,629.50.

125 Mr Tedeschi's conclusion was that the reasonable legal fees including counsel fees to Mr Marshall and Ms Coulson, together with disbursements, was $31,409.26. Removing counsel fees from the assessment, Mr Tedeschi considered the reasonable legal fees payable to the practitioner were $26,540.89 plus GST and disbursements of $2,268.37 plus GST. He assessed the time records on the basis that they were accurate, and determined that, after removing errors to the value of

$2,309.07, the billable time on the WIP records was $25,049.09. To that, he added $7,939 of billable time based on the practitioner's unbilled time audit so that, he concluded, the total billable time was $32,988.09. This was in excess of the amount of professional time billed by Mr O'Halloran.

Consideration of expert opinions

126 Mr Forbes and Mr Lang conferred in advance of the hearing and prepared a joint report. Essentially they maintained the positions reflected in their original opinions. They acknowledged that a significant reason for the disparity between them was their different approach to reliance upon the WIP records and the different weight which each gave to the party/party taxation. Both Mr Forbes and Mr Lang agreed that the case was a 'straightforward or fairly ordinary or run of the mill personal injury claim', and that Ms Pizzata was not a demanding client.

127 Similarly, Mr Tedeschi and Mr Forbes prepared a joint statement following their conferral prior to hearing. They too essentially maintained their respective positions, and agreed that their differences arose from a fundamentally different approach to the validity of the costs agreement and the consequences and effect of the taxation of the party-party bill of costs.

128 In his witness statement, Mr Lang commented upon Mr Tedeschi's draft bill of costs, and expressed the view that he would not have allowed some of the items in the amounts suggested by Mr Tedeschi, and in particular would have suggested a substantial reduction to Mr Tedeschi's getting up case for trial item. Mr Lang's view was that he would discount Mr Tedeschi's total costs by $7,498.50 to the sum of $21,642.39.

129 In ***D'Alessandro*** Ipp J said [at 214]:

> The inquiry into what amounts grossly excessive or unreasonable costs would ordinarily involve, first, a determination of what, in the particular circumstances, would be a reasonable sum to charge. The resolution of that question would often turn on multiple factors, including the amount at which the costs in question was or would likely be taxed, the difficulty of the case, the novelty or complexity of the legal issues presented, the experience of the practitioner, the quality of his or her work, the amount of time spent by the practitioner on the matter, the responsibility involved, the amount or value of the subject matter in issue, and any costs agreement that might have been entered into.

130 A fundamental difference between the approach of the experts was as to the weight to be given to the taxed amount of the party/party costs. In ***D'Alessandro*** [at 220 - 221] Ipp J noted that the Tribunal below had

regarded the amount at which the costs were taxed as the standard by which the reasonableness of the amount in fact charged is to be measured. His Honour said that 'while the taxed amount is not necessarily the sole factor to be taken into account (and I have above adverted to the various factors which are relevant in this regard) the Tribunal was entitled to rely upon the taxed amount as the appropriate standard to determine, by reference thereto, that the amount in fact charged was grossly excessive.'

131 The evidence of both Mr Forbes and Mr Lang was that a range of outcomes is to be expected from taxation depending upon the particular approach of the taxing master. We accept that that is the case. We do not accept, however, that the outcome of the taxation should be completely ignored. It is, in our view, an appropriate starting point from which one then examines the arguments as to why some greater charge should be considered reasonable.

132 In this case, the significant difference in assessment between Mr Forbes, and both Mr Lang and Mr Tedeschi, was the extent of reliance on the WIP records. For reasons that we have touched upon above, we do not consider the WIP records to be a reliable guide to assessment of work done, or more particularly time spent, on the items recorded.

133 What is clear is that entries were made in the WIP records routinely without regard to actual time spent upon the task recorded. As we have already noted, entries for time spent on outgoing correspondence had the potential to, and in many cases did, significantly overstate the actual time spent. The same is true in relation to incoming correspondence which was charged at a minimum of one unit.

134 Mr O'Halloran's evidence was that a record of one unit reflected any amount of time up to six minutes. If a task took seven minutes, then it would be rounded to two units. The practitioner in his submissions, and Mr Tedeschi in his report, relied upon the decision in ***Bowen Buchbinder Vilensky v Banning & Anor*** (unreported, WASC, Library No 960325C, 20 June 1996) as support for the proposition that charging by reference to six minute units was a permissible method of charging. That submission is correct to the extent that the court found that a method of charging by six minute units was permissible. That finding, however, was made in the context of an acceptance of the correctness of the approach of the Magistrate who had dealt with the matter at first instance. In explaining the Magistrate's approach, Ipp J said at [6 - 7]:

> I turn now to the effect of the appellant charging on a 6 minute unit basis rather than an hourly charge. According to the evidence of Mr Lim,

> although, generally, he measured and recorded his time in accordance with 6 minute units, he would round off the last unit in any batch of units in respect of which he charged. For example, if he worked for 7 minutes on a matter, he would charge only one unit. However, if he worked 10 minutes he would record that he had spent two units of 6 minutes on the matter. This meant that it was possible that in any instance where only one unit was recorded a full 6 minutes might not have been spent. Further, if more than one unit was recorded the possibility existed that the last unit in the batch of units so recorded did not constitute a full 6 minute unit. The learned Magistrate dealt with this by holding that the appellant could not obtain a judgment based on a charge for any single unit reflected on the computer print-out, or for any charge for the last unit of any batch of units in respect of which charges were made. By doing this the learned Magistrate ensured that allowance was made only for charges in respect of units where a full 6 minutes was worked.

135 Ipp J observed that the Magistrate had ensured that no charge would be allowed for any 'upgraded unit' and had regard only to work actually done. It was that approach which was approved. The approach by both Mr Lang and Mr Tedeschi to the WIP records involves an acceptance that the time recorded in relation to each item was actually spent. In our view, that approach is flawed for the reasons we have previously outlined, and because of Mr O'Halloran's practice of rounding up to the nearest six minute in every case.

136 The same observation can be made in relation to Mr O'Halloran's 'unbilled time audit'. That 'audit' costed work on the same basis as provided for in the Pizzata costs agreement. That approach therefore undoubtedly overestimated the reasonable charges for work assumed to have been done for the purposes of the unbilled time audit.

137 Both Mr Lang and Mr Tedeschi relied upon the provisions of the Pizzata costs agreement and the WIP records to reach their estimates of reasonable costs. Notwithstanding that, there was a significant disparity between their estimates, no doubt partly because of Mr Tedeschi's reliance upon the unbilled time audit done by Mr O'Halloran. A further reason for the difference may well be Mr Lang's greater experience in relation to legal costs, and taxation of costs in particular. Whilst accepting that Mr Tedeschi has done a conscientious and thoroughly detailed analysis of the materials, we do not consider that his opinion as to the proper assessment of reasonable costs is as reliable as that of Mr Lang or of Mr Forbes.

138 Once it is accepted that, by reason of reliance upon the minimum charges provided in the costs agreement and the unreliable WIP records,

Mr Lang's estimate of reasonable costs is over-stated, it becomes clear that the amount charged to Ms Pizzata was very significantly above any reasonable charge. Mr Lang's estimate of $21,130, even before it is reduced, is significantly lower than the figure of in excess of $33,000 (exclusive of disbursements) charged by Mr O'Halloran to Ms Pizzata. Once the necessary reductions to Mr Lang's estimate are made, the disparity between what was charged and what was reasonable becomes even greater.

139 We consider that the reasonable costs properly chargeable to Ms Pizzata are in the vicinity of Mr Forbes' estimate of reasonable costs. It may be that, had Mr Forbes had additional information from the practitioner about some of the work which he had disallowed, his estimate may have been higher. Even allowing for that, however, the disparity between the charges made and a likely figure that would be arrived at is so great that, in our view, the charges made to Ms Pizzata were grossly excessive.

140 The extent of the disparity is such as, in our view, to amount to unprofessional conduct, or, in terms of the 2008 Act, professional misconduct.

141 One of the factors identified by Ipp J in ***D'Alessandro*** to be considered in the inquiry as to whether costs were grossly excessive or unreasonable is the amount or value of the subject matter in issue. Ms Pizzata eventually settled both her claims for a total of $50,000 damages. On the face of it, charges in excess of $36,000 in respect to a claim for $50,000 are disproportionate. Mr O'Halloran contends, however, that Ms Pizzata settled for $50,000 contrary to the advice of counsel. The practitioner contends that he ought not be required to reduce his proper costs on the basis of proportionality simply because the client chose not to pursue the full value of her claim.

142 In October 2001, Mr Marshall, the counsel briefed by Mr O'Halloran, reported that the defendant proposed to file an offer of $21,700. He advised that a claim of $100,000 had been put to the defendant, but recommended settlement at a lower level, suggesting the sum of $21,700 was inadequate, but that the sum of $40,000 to $50,000 would be more appropriate.

143 Mr O'Halloran's evidence was that he thought Ms Pizzata's claim in relation to both accidents was worth in excess of $150,000. We do not accept that evidence. No basis for that assessment was disclosed.

Ultimately, the settlement which was achieved involved the payment of damages of $35,000 in respect of the first accident and $15,000 in respect of the second accident. It is reasonable to assume therefore that the claim in respect of the second accident was worth less than the claim in relation to the first accident. Given Mr Marshall's advice in October 2001 as to the value of the damages in the first accident, it is very difficult to see how the value of the claim could conceivably be in excess of $150,000.

144 Mr Haynes, the solicitor employed by Mr O'Halloran's firm, appears to have had the principal dealings with Ms Pizzata in relation to settlement. A file note dated 22 September 2003 records that Mr Haynes attended an informal conference at which settlement was discussed on that day, and a point was reached where 'a final offer set in stone of $50,000 was made'. The file note records 'this is higher than [Mr Haynes] expected in the negotiations in any event.'

145 A further file note records that on 24 September 2003 Mr Haynes met with Ms Pizzata to discuss settlement. He apparently went through the various deductions from any settlement amount and records that:

> Advising Ms Pizzata that on the figures, if she settles the case, our account will be reduced to enable her to receive $10,000. We will hold $2,000 of that, however, towards the costs of taxation.

146 The file note records that Mr Haynes advised Ms Pizzata how the taxation would proceed, and records that his advice was the he would hope to recover between $10,000 and $15,000 as taxed costs, but that the firm 'cannot be bound by this.'

147 In subsequent written advice dated 3 October 2003, Mr Haynes advised Ms Pizzata of the various deductions to be made from the settlement figure of $50,000, and advised that she would receive the sum of $3,000 after deduction of a Health Insurance Commission payment of $5,000 from the $8,000 calculated at the conference on 24 September 2003. The net result was that Ms Pizzata would receive a cheque for $3,000, hopefully recover a large proportion of the $5,000 being sent to the Health Insurance Commission, and then receive whatever amount was allowed by way of costs on taxation, subject to the deduction in costs in dealing with the taxation.

148 Nowhere in Mr Haynes' notes in his discussions with Ms Pizzata in relation to settlement, or otherwise in correspondence, is there reference to a view that claims were worth in total $150,000.

149 A charge of legal costs in excess of $36,000 to recover damages of $50,000 is disproportionate. Even if some greater amount might have been recovered had Ms Pizzata gone to trial, it is difficult to conclude that the amount charged would have been proportionate to any ultimate award of damages. This conclusion reinforces our view that the charges made to Ms Pizzata were grossly excessive.

Improper charges

150 Apart from the allegation of grossly excessive charges, the Complaints Committee alleges that the fees charged to Ms Pizzata included charges which were not properly able to be charged. The improper charges alleged fell into three categories. The first category was charges for work which was purely administrative in nature; the second category was work which was of no benefit to the client; and the third category was duplication of charges.

151 The work said to be purely administrative was contained in Table B of particulars to para 70 of the application provided by the Complaints Committee. A large number of the items in dispute in that table consist of phone calls by clerical staff to medical practitioners in relation to their availability for trial. In our view, the practitioner was entitled to raise a charge to the client in respect to that work. The problem with the charges raised was that they were based upon the minimum one unit charge for each telephone call, and had the result of inflating the charges beyond the maximum allowable hourly rate for a clerk, in the way described earlier in these reasons. The objection to the charges is on that basis, not on the basis of raising a charge for the clerical work, which was clearly part of the preparation of the matter for the hearing.

152 In relation to duplication, Mr O'Halloran admitted some duplication, but contended it had occurred by reason of oversight. The total amount of duplication asserted by the Complaints Committee was $1,002.18. Of that, $413.70 of duplicated charges were admitted by the practitioner, and the balance was not admitted. It is not necessary for us to go through each item which was not admitted to resolve the issue of whether or not it was duplicated. It is sufficient that an overcharge of $413.70 at least resulted from duplicated charges. The method by which the WIP records were compiled was inevitably prone to error of this type occurring. It was incumbent upon the practitioner to carefully review the charges to avoid the client being charged twice for the same work. It is clear that he did not do so. An overcharge of $400 is not insignificant to a client, particularly a client of limited means as Ms Pizzata was.

153 The third category of alleged improper charges were matters contained in Table F to the particulars in para 74 of the Pizzata application which were said to be work to no benefit of the client. The basis upon which the particular items are said to be of no benefit to the client were outlined in that table. Without dealing with each item separately, we consider that the Complaints Committee's assertions in relation to each item have substantial merit. Again, the raising of these charges resulted from the manner in which the WIP records were compiled, namely, the practice of automatically recording events which occurred by reference to minimum time periods without any assessment as to whether the particular work was chargeable, and without any proper assessment at the time of billing as to whether or not unbillable items were included within the WIP record.

154 In our view, the extent of the improper charges was such as to amount to a substantial failure to meet the standards expected of a legal practitioner. The grossly excessive charge to Ms Pizzata, including as it did, charges which were improperly made, constitutes professional misconduct.

Complaint C – non-compliance with s 34A(b) of the 1893 Act

155 Section 34A of the 1893 Act provided:

> **The application of trust moneys to the payment of costs, etc.**
>
> A practitioner may apply trust moneys towards the payment of the costs and disbursements charged against the person for whose use or benefit the moneys are held by or under the control of the practitioner if -
>
> (a) that is authorised by the client under the terms on which the moneys are so held under the control of that practitioner; and
>
> (b) a practitioner within 14 days thereafter causes to be served upon that person a bill of costs in respect of those costs and disbursements showing that trust moneys have been applied by the practitioner towards the payment of those costs and disbursements.

156 It is not in issue that the practitioner caused the following sums to be paid to the following payees out of funds he held on trust for Ms Pizzata:

Date	Amount	Payee
27.7.01	$200	Dr Mendelson [sic]

4.9.01	$300	Mr Harper
8.3.02	$385	Mr Proud
17.7.02	$440	Mr Harper
2.5.03	$385	Mr Proud

157 Nor is it in issue that Mr O'Halloran did not serve on Ms Pizzata a bill of costs showing the payment out of those trust monies within 14 days or at all.

158 The Pizzata client file reveals that on 20 June 2001, a clerk from the practitioner's office telephoned Ms Pizzata and 'requested if she was able to contribute to an outstanding invoice from Dr Mendelsohn totalling $200.'

159 In a letter dated 11 July 2001 to Ms Pizzata, Mr O'Halloran referred to an attendance on Ms Pizzata on 5 July 2001, advising of arrangements made to see certain doctors, and confirmed that Ms Pizzata would 'send in $500 on account of costs and disbursements.'

160 It is apparent that that $500 was used for the payments to Dr Mendelsohn (26 July 2001) and Mr Harper (4 September 2001).

161 Funds from which a payment was made to Dr Proud on 8 March 2002 were deposited into the practitioner's trust account on 16 October 2001. The reason for the payment was described as 'part payment of Dr Proud a/c'. The actual payment was therefore made some 4 1/2 months after receipt of the funds into trust.

162 A request for funds to pay Dr Harper's account of $440 was made by letter to Ms Pizzata dated 8 March 2002. On 16 July 2002, a payment of $450 by Ms Pizzata was made into the trust account. The trust account entry showed the reason for payment as being 'payment of Harper a/c'. Dr Harper was paid the sum of $440 the following day.

163 On 19 December 2002, Mr O'Halloran's firm wrote to Ms Pizzata enclosing an invoice from Dr Mendelsohn totalling $385, and requesting funds for payment of that invoice as soon as possible. On 10 January 2003, Ms Pizzata provided $385 which was placed into trust, with the deposit reason being 'payment of Dr Mendelsohn a/c'. On 13 January 2003, Mr O'Halloran's firm sent a trust cheque to

Dr Mendelsohn for $385. On 16 January 2003, Mr O'Halloran wrote to the solicitor for the defendant enclosing Dr Mendelsohn's invoice and a receipt for its payment, seeking reimbursement of the sum of $385. The trust records show that on 1 May 2003, the sum of $385 was received by Mr O'Halloran from the defendant and was paid into trust, with the reason for the payment being described as 'pay Dr Mendelsohn a/c'.

164 The following day, the remaining trust balance of $385, being the funds provided by the defendant, were used to pay Dr Proud's report fee on 2 May 2003.

165 Ms Pizzata had been asked by letter dated 28 March 2003 to provide a cheque for $385 payable to Dr Proud. On 17 April 2003 she was provided with an invoice from Dr Proud for $385. The file does not reveal whether Ms Pizzata was eventually told that the refund of the money that had been paid to Dr Mendelsohn had been used to pay Dr Proud's account.

166 The practitioner's response to the allegation of non-compliance with s 34A of the 1893 Act was that he did not understand that, where a client provided funds for a specific purpose of meeting an identified disbursement, s 34A had any operation. That was an inaccurate understanding of the requirements of s 34A.

167 It is clear that Ms Pizzata was asked from time to time for sums of money in order to meet the costs of medical reports. It can be taken that, when she provided those funds, she expected them to be paid from trust for those purposes. It can be noted, however, that two of the payments were made some considerable time after receipt of the funds into trust. The object of s 34A is to enable clients to remain fully informed as to the application of trust monies. The client is entitled to know that the funds provided have been utilised for the designated purpose, and should have been told when that occurred. In the case of the payment of $385 by Ms Pizzata on 10 January 2003, the ultimate application of those funds was not the payment of the account for which they had been provided, namely payment of Dr Mendelsohn's account, because the cost of that report was recovered from the defendant. Thus a different liability was met from the funds provided by Ms Pizzata. In our view, s 34A required Mr O'Halloran to provide a bill of costs showing that the trust monies had been applied towards payment of the particular disbursements. It is no answer to say that the funds were applied for the purpose for which the client intended the funds to be put.

168 There is of course no suggestion of any inappropriate use of trust funds by Mr O'Halloran. He clearly applied the funds for the purpose for which they had been deposited in his trust account (save for the recovery of Dr Mendelsohn's fee from the defendant). Nevertheless, we consider that the requirement to promptly account for expenditure from a trust account was such a basic and well known requirement, that the failure to meet that requirement on five separate occasions falls below the standard of practice expected of practitioners of good repute and competence. We consider that that conduct amounted to unprofessional conduct. For the purposes of the 2008 Act, we would characterise the conduct as unsatisfactory professional conduct rather than professional misconduct.

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The D'Agui costs agreement

169 The complaints against Mr O'Halloran concerning his client, Mr Antonio D'Agui, also arise from the entry into a costs agreement, and the charges made in relation to claims for compensation and damages arising from an accident which befell Mr D'Agui at work. In addition, there is a complaint of undue delay and neglect by the practitioner in delivering up his file at the termination of his retainer.

170 Mr D'Agui instructed Mr O'Halloran to act on his behalf in late January 2004. Mr D'Agui had suffered injuries in a workplace accident on 1 July 2002, and had originally been represented by another firm of solicitors, E N Stamatiou & Co in relation to the accident.

171 On 28 January 2004, Mr D'Agui signed a costs agreement with Paul O'Halloran & Associates. The costs agreement was similar, but not identical, to that entered with Ms Pizatta. The costs agreement with Mr D'Agui (D'Agui costs agreement) read as follows:

> I confirm that I have agreed to the following terms and conditions upon which PAUL O'HALLORAN & ASSOCIATES will act for me in this or any other matter:
>
> (a) $284.55 per hour (or pursuant to the Fourth Schedule of the Supreme Court Rules) for all time spent on my file by Senior Practitioners, including interviews, court appearances, incoming and outgoing telephone calls, perusing documents, drawing documents, travelling and waiting time, file reviews, file notes, conferences, etc.;

(b) $190.00 per hour (or pursuant to the Fourth Schedule of the Supreme Court Rules) for all time spent on my file by Junior Practitioners;

(c) Minimum charge of one tenth of an hour for all legal and clerical time spent;

(d) Minimum charge of two tenths of an hour per page (or part thereof) for outgoing correspondence, Court documents, statements, proofs, etc. and thereafter at the rate of $284.55 per hour (or pursuant to the Fourth Schedule of the Supreme Court Rules);

(e) $137.28 per hour for all clerical and non-professional time spent on such things as collating and photocopying, outside deliveries and attendances; incoming and outgoing telephone conversations, messages, file notes, etc.[;]

(f) 5% interest per annum (or part thereof) on unbilled time;

(g) 10% interest per annum (or part thereof) on outlays incurred by Paul O'Halloran & Associates;

(h) Paul O'Halloran & Associates are authorised at their own discretion to brief [c]ounsel to prepare court documents, provide opinions, appear at [c]ourt and generally give independent advice from time to time;

(i) I shall be ultimately responsible for the payment of all legal fees, medical, [b]arrister and other expenses necessarily incurred on my behalf and I shall fully and promptly pay Paul O'Halloran & Associates for such expenses upon demand, whether or not I win my case. In the event that the above expenses, or my legal fees due to Paul O'Halloran, are not paid on account of costs and disbursements when requested, or not reimbursed by me upon demand by Paul O'Halloran & Associates, I acknowledge Paul O'Halloran & Associates' right to withdraw from my case and cease work on my file without further notice.

(j) Paul O'Halloran & Associates are authorised to deduct monies from my [t]rust account for fees and disbursements at any time;

(k) I agree that Paul O'Halloran & Associates reserve the right to charge pursuant to the Fourth Schedule of the Supreme Court Rules (as amended from time to time) in lieu of the above rates;

(l) I acknowledge that 10% GST is chargeable on legal fees and disbursements.

172 At the time Mr O'Halloran took instructions from Mr D'Agui, an application, known as a Form 22 application, was on foot in the

Conciliation and Review Directorate of WorkCover seeking an assessment of a degree of disability not less than 16% in relation to Mr D'Agui's injuries. That assessment was necessary in order to satisfy a gateway for the commencement of a claim for damages at common law in the District Court. In December 2003, the Form 22 application was proceeding to a review in WorkCover by way of written submissions with the matter to be dealt with on the papers.

173 Mr O'Halloran formed the view that it would be more favourable to Mr D'Agui to have an oral hearing in relation to his Form 22 application rather than have it determined on the papers. In February 2004, Mr O'Halloran's firm applied to have the Form 22 application listed for hearing.

174 In May 2004, the workers compensation insurer made an application to reduce Mr D'Agui's weekly compensation payments and a conciliation conference was held at Workcover.

175 WorkCover eventually granted Mr D'Agui's application to relist his Form 22 application by way of formal review hearing. The workers compensation insurer appealed from that decision and eventually, in 2004, that appeal was abandoned by the insurer.

176 On 9 November 2004, O'Halloran & Associates lodged a Form 1 application with WorkCover, being an application to determine liability under the WCR Act. That application proceeded to a conciliation conference on 13 December 2004, and a preliminary review hearing on 18 March 2005. Matters proceeded to an informal settlement conference in August 2005, but no agreement was reached. On 29 September 2005, Mr D'Agui terminated Paul O'Halloran & Associates retainer. At that time, Mr D'Agui provided the practitioner with an irrevocable undertaking to pay Mr O'Halloran's reasonable costs, and requested that the practitioner release his file to his new solicitor. What subsequently transpired in relation to the release of the file will be dealt with below in relation to the complaint of undue delay or neglect.

177 In total, Mr O'Halloran rendered fees to Mr D'Agui in a total amount of $38,427.41 being made up on $35,179.13 for professional fees (including GST) and $3,249.75 for disbursements (including GST).

The complaints relating to D'Agui

178 The Complaints Committee makes the following complaints against Mr O'Halloran in relation to Mr D'Agui:

COMPLAINT A

THAT the practitioner, PAUL JOHN O'HALLORAN, ('the practitioner') was guilty of unsatisfactory conduct by unprofessional conduct in that on or about 28 January 2004 he entered into a written agreement with a client, Antonio (Tony) D'Agui, (the 'D'Agui Costs Agreement') which purported to allow him to charge Mr D'Agui above that allowed by the *Workers' Compensation and Rehabilitation Act 1981* ('the Workers Compensation Act') and the Legal Practitioners (Conciliation Review proceedings and Magistrates Court) Determination 2003 (the 'Determination') for legal costs the subject of the Determination and/or the terms of which were unreasonable. In particular, the D'Agui Costs Agreement purported to allow the practitioner to charge Mr D'Agui:

(a) at the rate of $284.55 (plus GST) per hour for all time spent by a senior practitioner, $190 (plus GST) per hour for all time spent by a junior practitioner, and $137.28 (plus GST) per hour for certain time spent by clerks and secretaries: see clauses (a), (b), (e) of the D'Agui Costs Agreement;

(b) pursuant to the 'Fourth Schedule of the Supreme Court Rules': see Clause (k) of the D'Agui Costs Agreement;

(c) for secretarial or administrative work: see Clause (e) of the D'Agui Costs Agreement;

(d) unreasonable minimum charges for certain tasks irrespective of the time taken to perform the task: see Clause (d) of the D'Agui Costs Agreement; and

(e) 5% interest per annum on unbilled time: see Clause (f) of the D'Agui Costs Agreement;

(f) interest on moneys disbursed in connection with the matter at a rate of 10% per annum, being an amount in excess of that allowed pursuant to section 246 of the *Legal Practice Act 2003*: see Clause (g) of the D'Agui Costs Agreement.

COMPLAINT B

That the practitioner was guilty of unsatisfactory conduct by unprofessional conduct by charging Mr D'Agui fees on about each of 4 February 2004, 20 February 2004, 31 March 2004, 11 November 2004, 1 December 2004 and 25 November 2004 for representation arising out of an accident, or causing him to be charged fees, where the fees:

(a) were grossly excessive; and, or

(b) included charges which were not properly able to be charged.

COMPLAINT C

> That the practitioner was guilty of unsatisfactory conduct by unprofessional conduct, undue delay and, or neglect in the course of the practice of the law between on or about 29 September 2005 and 3 November 2006 in unreasonably failing or refusing to deliver up to the client upon termination of his retainer, the practitioner's file in the matter;
>
> **COMPLAINT D**
>
> THAT the practitioner was guilty of unsatisfactory conduct by unprofessional conduct in making no, or no adequate, attempt to comply with, or otherwise address, a direction made by Registrar Rimmer of the Supreme Court on 23 June 2006 to serve Mr D'Agui with an itemised bill of costs by 4 August 2006.

Complaint A - Entry into the D'Agui costs agreement

Section 84ZL of the WCR Act

179 Because the D'Agui matter involved a claim in respect to injuries arising out of a workplace accident, the claim was required to be dealt with in accordance with the WCR Act.

180 In January 2004 when the D'Agui costs agreement was entered into, s 84ZL of the WCR Act dealt with the question of costs in relation to review proceedings. Section 84ZL provided:

> **Costs**
>
> (1) Each party to the proceedings bears the party's own costs unless the review officer orders otherwise.
>
> (2) An agreement is not to be made for a legal practitioner or other person to receive, for appearing for or acting on behalf of a person in the proceedings, any greater reward than is provided for -
>
> (a) in the case of a legal practitioner, by a determination in force under section 58W of the *Legal Practitioners Act 1983;* or
>
> (b) in the case of any other person, by the regulations.
>
> (3) An agreement made contrary to this section is void.

181 The *Legal Practitioners (Workers' Compensation) (Conciliation Proceedings, Review Proceedings and Compensation Magistrate's Court) Determination 2003,* (Workers' Compensation Determination) made by the Legal Costs Committee under s 58W of the 1893 Act came into operation on 1 March 2003. As its name suggests, the determination applied to contentious business carried out by practitioners in or for the

purposes of proceedings before a conciliation officer, a review officer, or a Compensation Magistrate's Court within the meaning of the WCR Act. The determination provided a maximum hourly charge rate for a senior practitioner of $250 per hour, a junior practitioner of $175 per hour, and a clerk or paralegal of $75 per hour. The determination provided for maximum amounts to be charged in relation to various items of work in those jurisdictions. In respect of each jurisdiction, there was a provision for 'complex matters' which permitted a practitioner to charge remuneration which was 'reasonable in the circumstances' if the matter is 'unusually complex'.

The practitioner's response

182 The practitioner's response in relation to the allegations concerning entry into the costs agreement substantially reflected his response in relation to the Pizzata costs agreement.

183 In its statement of contentions, the Complaints Committee asserted that there were no novel or complex legal issues in the dispute in relation to Mr D'Agui's claim. Mr O'Halloran denied that contention. He contended that Mr D'Agui's case 'manifestly involved unusual complexity for numerous reasons'. Those reasons included:

(a) Mr D'Agui's common law case was strenuously opposed and involved 'a claim that was potentially worth in excess of $500,000';

(b) Mr D'Agui was alleging not less than 10 separate permanent disabilities including his left thigh, left knee, left elbow, left shoulder, left hip, right hip, back, right leg, psychiatric disability and loss of sexual function, as part of his common law claim;

(c) The insurance company had accepted liability only for a limited version of Mr D'Agui's claimed injuries;

(d) Had Mr D'Agui's claim been determined at less that 16%, Mr D'Agui would have been restricted in his entitlement to damages, and the former solicitors had failed to obtain medical evidence in relation to all of Mr D'Agui's injuries;

(e) The firm was required to act urgently in relation to the Form 22 application, obtain leave to submit a fresh

Form 1 application relating to the additional injuries, obtain medical evidence that was more complicated by reason of Mr D'Agui's complex injury management experiences and ongoing medical issues;

(f) It was necessary to deal with the insurer's application to reduce weekly payments of compensation resulting in a number of different applications being on foot at one time;

(g) Mr D'Agui was a very difficult, litigious and highly demanding client and engaged in extensive communications with Mr O'Halloran's firm beyond which were necessary;

(h) During the life of his claim, Mr D'Agui instructed not less than five different law firms;

(i) The case was vigorously defended by the insurance company at every turn;

(j) Not less than six different arbitrators/conciliation officers handled the various applications brought by and against Mr D'Agui at WorkCover during the period of the practitioner's retainer;

(k) Mr D'Agui suffered further injuries in September 2005 requiring further medical assessments to disentangle the fresh injury from the original injury;

(l) Prior to and after the practitioner's retainer, there were not less than eight entirely separate applications/appeals dealing with entirely different subject matters, five of which occurred during the time that the practitioner was retained.

184 An immediate observation can be made about those contentions by the practitioner. That is, that s 84ZL proscribed the making of an agreement which provided for greater rewards than provided for in the relevant determination. The Complaints Committee's Complaint A in relation to Mr D'Agui is that an agreement was made contrary to that section. The conduct must, therefore, be judged at the time it took place. There is no dispute that, on the basis of the hourly rate alone, the D'Agui costs agreement provided for recovery at a rate which exceeded that

permissible under the Workers' Compensation Determination. The vast bulk of the matters which are said to give rise to the complexity of Mr D'Agui's case could not have been known, or even reasonably anticipated, at the time instructions were taken and the D'Agui costs agreement was signed. To the extent that Mr O'Halloran seeks to justify the entry into the agreement, insofar as it related to work within the scope of the Workers' Compensation Scale, on the basis of complexity, he can only properly rely on matters known to him at the time of entry into the agreement.

The hourly rates

185 The hourly rates provided for in the D'Agui costs agreement exceeded those permissible under the Workers' Compensation Determination. At the time instructions were taken, it was clear that there were existing proceedings within the Conciliation and Review Directorate, and that work would be required in relation to those proceedings before action could be commenced for damages at common law in the District Court, if that became necessary or appropriate. The rates prescribed in the D'Agui costs agreement were the maximum rates then allowable under the *Legal Practitioner's (Supreme Court) (Contentious Business) Determination 2002* which then governed contentious business in the District Court. The very substantial difference in hourly rates applicable to clerks and paralegals under the two scales is particularly significant given the extensive use of clerks and paralegals in Mr O'Halloran's practice.

186 There was no distinction between different work to be done in relation to Mr D'Agui's affairs. The provision for complex matters under the Workers' Compensation Scale permitted reasonable charges to be made where 'any matter … prescribed under (the numbered items) of this schedule is unusually complex'. That permits, in appropriate circumstances, a charge beyond the scale in relation to the particular work the subject of a particular item. It does not, in our view, permit a general uplift to the hourly charge rate with respect to any work done on a matter, regardless of its complexity. For example, in the Conciliation Proceedings Costs Scale, Item 3 deals with 'Attendance at conciliation conference by a practitioner, clerk or paralegal' and specifies an hourly rate. Even where a matter is generally complex, it may well be that an attendance at a particular conference may be quite uncomplicated. In that event, a charge at a rate in excess of the prescribed maximum could not be justified.

187 In our view, it would have been open for a practitioner, consistent with the requirements of s 84ZL, to make an agreement which enabled the charging of an hourly rate in excess of the maximum for unusually complex aspects of work done for a particular client. Section 84ZL did not, however, permit an agreement to be made for an hourly charge in excess of the maximum for all work done on the matter, regardless of whether or not that work was of a routine nature.

188 It follows that the hourly rate provided for in the D'Agui costs agreement exceeded that permitted under the Workers' Compensation Determination, and in that way offended s 84ZL of the WCR Act.

Fourth Schedule of the Supreme Court Rules

189 As with the Pizzata matter, the Complaints Committee did not pursue this aspect of its allegation.

Secretarial or administrative work

190 Clause (e) of the D'Agui costs agreement in substance is the same as clause (d) of the Pizzata costs agreement. Section 84ZL of the WCR Act, like s 27A of the MV (TPI) Act precludes the recovery of charges for purely administrative work. The observations made in relation to secretarial and administrative work in relation to the Pizzata matter apply equally to the D'Agui matter.

191 Accordingly, we find that, by entering the D'Agui costs agreement, Mr O'Halloran acted in breach of s 84ZL of the WCR Act.

Unreasonable minimum charges

192 Likewise, the provisions of clause (c) and (d) of the D'Agui costs agreement reflected the provisions of clause (b) and (c) of the Pizzata costs agreement. Mr O'Halloran's system of charging, which is described above, applied to the work done in relation to Mr D'Agui's matter. As in the Pizzata matter, there are numerous examples of where the charging on the basis of a minimum charge by reference to tenths of an hour provided for an effective recovery rate well in excess of the permissible hourly charges under the relevant scales.

193 For the reasons explained in relation to the allegation of unreasonable minimum charges in the Pizzata matter, we find that the provisions of clause (c) and (d) of the D'Agui costs agreement both breached the requirements of s 84ZL of the WCR Act, and were unreasonable.

Five per cent interest per annum on unbilled time

194 Clause (f) of the D'Agui costs agreement was expressed slightly differently from clause (f) of the Pizzata costs agreement. The D'Agui costs agreement refers to interest 'on unbilled time', where the Pizzata costs agreement referred to interest 'on unpaid fees'. As discussed above, however, the provision of the Pizzata costs agreement was construed by Mr O'Halloran, and indeed applied by him, as permitting interest charges to be raised on unbilled time. The substance of the two provisions, at least as they were construed and applied by Mr O'Halloran, is the same.

195 It should be noted that Mr O'Halloran did not, in fact, render any charges to Mr D'Agui based upon clause (f) of the D'Agui costs agreement. Nevertheless, for the reasons discussed in relation to the Pizzata matter, entry into an agreement in terms which included clause (f) of the D'Agui costs agreement constituted a breach to s 84ZL.

Interest on disbursements

196 This allegation was not pursued by the Complaints Committee at the hearing.

Did entry into the D'Agui costs agreement constitute unprofessional conduct?

197 The entry into the D'Agui costs agreement breached s 84ZL of the WCR Act by allowing charges at an hourly rate in excess of the permitted rate, by permitting recovery of costs for secretarial work of a purely administrative nature, by permitting unreasonable minimum charges to be made, and by providing for a charging of interest on unbilled time. The D'Agui costs agreement also contained a feature not present in the Pizzata costs agreement, that is, a base hourly rate in excess of the Workers Compensation Determination. As we concluded in relation to the Pizzata costs agreement, the entry into the D'Agui costs agreement amounted to professional misconduct in the manner alleged in Complaint A.

Complaint B - Charging a grossly excessive amount or improper charges

The expert evidence

198 Opinions as to the appropriate charges for the work done in relation to Mr D'Agui's matter were proffered to the Tribunal by Mr Forbes and Mr Lang.

199 Mr Forbes approached the assessment by considering what amount would have been likely to have been allowed at a solicitor/client taxation. He prepared a schedule of what he considered to be reasonable costs for time spent on work which was identified from the contents of the file. As in the Pizatta matter, Mr Forbes did not have regard to the WIP records nor to the provisions of the D'Agui costs agreement. Having undertaken that process, Mr Forbes assessed the reasonable costs to be charged for the work done by the practitioner in the D'Agui matter to be approximately $11,800. He undertook a cross-check by preparing schedules of costs based upon the various applicable Workers Compensation Determinations and Supreme Court Determinations which produced a sum for costs of $12,514.75. Having undertaken that process, Mr Forbes was of the opinion that reasonable costs for work done on behalf of Mr D'Agui would have been $12,500.

200 In making his assessment, Mr Lang worked from the WIP record and then checked that record against the file. He noted that there were a number of different applications to Workcover, and he apportioned different items of work against the different applications. Where he assessed that work was done which was relevant both to an application in Workcover and a possible future District Court application, he attributed that item 50% to each jurisdiction and assessed the proper charge accordingly. Where he found that work was shown in the WIP records, but he could find no evidence of that work, he allowed a charge for 25% of that work. He applied the costing method contemplated by the D'Agui costs agreement, although where outgoing correspondence was of a short or routine nature, he allowed only one six minute unit of charge, rather than the two units per page contemplated by the costs agreement. He assessed the work before Workcover as being unusually complex, and thus permitting an uplift from the scale rates. On that basis, he arrived at an assessment of reasonable costs of $23,389.40, assuming that it would be reasonable to apply the Supreme Court rate for the Form 22 review proceedings before Workcover on the basis of unusual complexity. If it were not considered reasonable to apply that rate, then Mr Lang assessed the reasonable costs at $21,034,55.

201 In their joint statement, Mr Forbes and Mr Lang agreed that, if reliance is not placed on the cost agreement for assessing the reasonable costs to be charged, costs would be calculated by reference to actual time spent rather than by reference to six minute units of time. Mr Lang agreed that, if that approach were taken, then some reduction in the amount that would be assessed as reasonable cost would be required from the figure at which he had arrived.

202 We consider that Mr Lang's assessment of reasonable costs is too high. That is because of his reliance upon the costs agreement, which, for reasons we have explained, breached s 84ZL of the WCR Act, and provides charges for individual items of work which are unreasonable. As Mr Lang properly acknowledged, reliance upon the scales would involve assessment of actual time spent, and would result in a reduction in the allowable costs. Nor do we think it appropriate to allow, even at the rate of 25%, items of work for which no evidence can be found on the file. Mr Lang's assessment of costs assumes unusual complexity in relation to the Form 22 application. We were told by both Mr Lang and Mr Forbes, and Mr Gunasekera, an experienced Workers' Compensation practitioner, that they were not aware of any determinations by Workcover or by taxing officers, in relation to what constitutes 'unusual complexity' for the purposes of the Workers Compensation Determinations. In the context of professional disciplinary proceedings, we think it appropriate to extend the benefit of the doubt to the practitioner, and to accept that a reasonable charge in respect to the Form 22 application in relation to Mr D'Agui might be considered unusually complex, and some greater allowance for costs made.

203 We have not undertaken the detailed assessment of every item allowed by Mr Lang in arriving at his figure of $23,389.40. Removing reliance upon the costs agreement is likely, however, to bring Mr Lang's assessment significantly down closer to Mr Forbes' assessment. The consequence of that is that the amount actually charged by the practitioner is, whatever final figure might be determined as reasonable costs, well in excess of that figure. In our view, the expert evidence leads to an inevitable conclusion that Mr O'Halloran's charges of $38,427.41, comprising as it did $35,179.13 for professional fees grossly exceeded the reasonable costs chargeable to Mr D'Agui.

Improper Charges

204 As in the Pizzata application, the Complaints Committee alleged that Mr O'Halloran raised improper charges for tasks of an administrative nature (resulting in an overcharge of $2,224.08) and items which were duplicated (resulting in an overcharge of $1086.47). In addition, the Complaints Committee allege that Mr O'Halloran charged an hourly rate in excess of the rates allowed in the applicable costs determinations which it says resulted in an overcharge of $14,173.36.

205 The Complaints Committee set out detailed particulars of what it said constituted purely administrative tasks in Table C to its particulars of

para 72. The schedule consisted of some 522 items. Mr O'Halloran maintained that most of those items were chargeable on one basis or another. Mr Lang assessed the WIP records. We have not undertaken a cross-referencing of the many items contained within the WIP records which he disallowed, and the items contained in Table C of the particulars to para 72 of the D'Agui application. There are many items, however, in Mr Lang's schedule which he disallowed on the basis that they comprised 'administration'. Undoubtedly, those items largely reflect the items which the Complaints Committee takes objection to in Table C.

206 It is not necessary for us to analyse each item of Table C. Charges for administrative items, which were recorded on the WIP record, were undoubtedly made by Mr O'Halloran, and ought not to have been. That aspect of the Complaints Committee's allegation is therefore made out.

207 In relation to duplication of charges, Mr O'Halloran admitted to duplicate charges of $925 of the $1,827 identified by the Complaints Committee as duplicated charges. That is a significant sum of money for a client such as Mr D'Agui.

208 We have already concluded that the charging at an hourly rate in excess of that permissible under the relevant costs determination breached the provisions of the WCR Act.

209 The fact that, as we have found, Mr O'Halloran charged grossly excessive fees makes it inevitable that components of those fees were not properly charged. The elements of improper charges identified by the Complaints Committee clearly contributed to the excessive charges.

Conclusion in relation to Complaint B

210 For the reasons explained above, we consider that Complaint B is made out, and that Mr O'Halloran did charge Mr D'Agui fees which were grossly excessive and which included charges which were not properly able to be charged and is thereby guilty of professional misconduct.

Complaint C - Failing to deliver up the file

211 On 3 October 2005, Mr O'Halloran received a letter from CLP Lawyers advising that the latter firm had taken over the conduct of Mr D'Agui's file, and enclosing a file release authority signed by Mr D'Agui. The authority requested release of Mr D'Agui's file, and provided an irrevocable authority to the new solicitors to pay Mr O'Halloran's 'reasonable costs incurred on settlement of' Mr D'Agui's claim.

212 It appears that CLP Lawyers acted only briefly for Mr D'Agui, before he instructed a further firm, Messrs Vertannes Georgiou. On 25 November, Mr O'Halloran wrote to Vertannes Georgiou enclosing an account for a total of $31,084.91. Mr O'Halloran also enclosed a further irrevocable authority for signing by Mr D'Agui. That document contained an acknowledgement of indebtedness in the sum of $31,086.38 inclusive of GST and of Paul O'Halloran & Associates' claim to be entitled to exercise a lien over Mr D'Agui's papers until the legal fees were paid. It then contained an agreement to grant a first charge on settlement funds and an irrevocable authority to the new solicitors to pay the sum of $31,086.38 from the proceeds of settlement. It also provided for a covenant to pay interest at 6% on the amount outstanding.

213 It is apparent from the file that Vertannes Georgiou ceased acting for Mr D'Agui sometime later in 2005. It would appear that, on 1 January 2006, Mr O'Halloran's firm sent a demand for payment of the costs of $31,084.91. Mr D'Agui responded by facsimile on 6 February 2006 seeking an itemised account. No authority had been signed at that time. On 20 February 2006, Mr O'Halloran responded to Mr D'Agui demanding payment of the outstanding invoice. On 22 March 2006, another firm, Talbot Oliver, wrote to Mr O'Halloran requesting that an itemised account be filed at the Supreme Court for taxation. The papers do not make clear what occurred in response to that request, but on 12 May 2006, Mr D'Agui applied, through Talbot Oliver, to the Supreme Court to have the practitioner's accounts taxed.

214 On 23 June 2006, Registrar Rimmer gave a direction that, by 4 August 2006, the practitioner serve an itemised bill of costs in taxable form, and the taxation was otherwise adjourned sine die.

215 A letter appears on the practitioner's file to Ms Maria-Liusa Coulson, a barrister who practices in the area of legal costs, dated 27 June 2006. A letter in identical terms dated 2 August 2006 also appears on file. Mr O'Halloran was unable to say whether the first version of the letter was sent, although he thought it may have been. We think it unlikely that it was. The letter purports to enclose the files. However, a memorandum on the file dated 11 July 2006 from Mr Haynes to 'Melissa' (presumably a secretary or paralegal within Mr O'Halloran's office) queries whether the files had yet gone to Ms Coulson and requests that they be forwarded. There then appears on file the letter of 2 August 2006. We think it more probable that the files and the covering letter were not sent across to Ms Coulson until 2 August 2006. The time for compliance with the direction of Registrar Rimmer expired on 4 August 2006. The letter to

Ms Coulson requested that she prepare an itemised bill of costs in taxable form.

216 By letter dated 30 August 2006, Ms Coulson suggested to Mr O'Halloran that he try to resolve the costs by informal discussions with Talbot Oliver. On 26 September 2006, the Registrar wrote to Mr Haynes referring to his direction made on 23 June 2006, and advising that if action was not taken without delay, a further appointment would be scheduled with a view to summary disposal of the costs issue.

217 On 10 October 2006, Ms Coulson wrote to Mr O'Halloran. She referred to her letter of 30 August 2006 to which she had not received a reply. She also enclosed a draft solicitor/client bill of costs for taxation which claimed a total of $16.588.75. The letter went on to note that it appeared on her assessment that the client had been significantly overcharged, and recommended a refund to the client.

218 On 3 November 2006, Mr D'Agui's file was released to new solicitors SC Nigam & Co who were apparently acting for Mr D'Agui in relation to the workers' compensation matter.

219 Mr D'Agui's application for taxation of the account was adjourned in November 2006, and on 21 November 2006, Mr O'Halloran and Mr D'Agui settled the dispute regarding costs on the basis that Mr O'Halloran would write off the November account in its entirety and Mr D'Agui would withdraw his application to have his accounts taxed by the Court.

Was failure to deliver up file unreasonable?

220 There is no evidence of any demand for delivery up of the file after Vertannes Georgiou sought its release in November 2005. At that point, there was no operative irrevocable authority to pay Mr O'Halloran's reasonable fees. The authority which had been provided under cover of CLP Lawyer's letter of 3 October 2005 contained an authority for that firm to pay the fees. That firm ceased to act within weeks. Mr O'Halloran was entitled to retain possession of the file until such time as his fees were paid or an appropriate authority was provided. The authority drafted by Mr O'Halloran and provided to Vertannes Georgiou was not drawn in appropriate terms. In its terms, it sought to bind Mr D'Agui to an acknowledgment of the quantum of the account rather than simply to Mr O'Halloran's reasonable costs. It is hardly surprising that that authority was not executed. Vertannes Georgiou did not, so far as the materials before us reveal, seek to provide any alternative form of

authority in respect to payment of Mr O'Halloran's fees. Talbot Oliver appears to have acted only in relation to the costs question and not in relation to the substantive workers' compensation matter. It is apparent from the file that Vertannes Georgiou ceased to act, it was some months before Mr O'Halloran was advised of who was acting on the substantive matter. During that period, no further requests for release of the file appear to have been made.

221 The Complaints Committee's allegation appears to rest on the proposition that Mr O'Halloran should have released his file based upon the authority provided by CLP Lawyers. It is not apparent from the file when Mr O'Halloran learned of the fact that Mr D'Agui had again changed solicitors from CLP Lawyers to Vertannes Georgiou. It is clear, however, that CLP Lawyers acted at most for only a few weeks.

222 Given the numerous changes of solicitors, and the absence of any operative irrevocable authority in relation to the payment of fees, we do not consider that Mr O'Halloran's failure to deliver the files to new solicitors can be said to have amounted to unsatisfactory professional conduct or professional misconduct. He was entitled to exercise a lien on the papers until such time as an appropriate and effective authority was provided to him. The fact that he proposed a draft of an authority which went beyond his reasonable entitlements does not support the conclusion that he should have delivered the files earlier. It was encumbent upon Mr D'Agui's solicitors to propose some alternative arrangement for the payment of Mr O'Halloran's reasonable costs. There is no evidence that any such proposal was made after CLP Lawyers ceased to act.

223 Complaint C in relation to D'Agui should be dismissed.

Complaint D - Failure to comply with Registrar Rimmer's direction

224 The account of the facts set out above demonstrates that no substantive steps were taken by Mr O'Halloran to ensure compliance with Registrar Rimmer's direction in a timely way. Although a letter was drafted on 23 June 2006 to a costs consultant to have the bill prepared, we are satisfied that that letter, and the accompanying files, were not provided to Ms Coulson until 2 August 2006, only two days before the bill was to be provided. Given the extent of the files, the direction could not reasonably have been complied with within the time set.

225 Thereafter, the matter was not progressed in a timely way, and it was necessary for the Registrar to follow the matter up by letter dated

26 September 2006. That was almost two months after the itemised bill was due to have been served.

226 Against the background of instructions having been terminated in October 2005, the delay in the provision of a bill in taxable form in accordance with the Registrar's direction was inordinate, and in our view amounts to unsatisfactory professional conduct.

227 Accordingly, Complaint D in relation to D'Agui is made out. We would characterise that complaint as unsatisfactory professional conduct.

VR 39 of 2009 - Challen

228 The complaints against Mr O'Halloran concerning his client Ms Challen arise from the entry into a costs agreement dated 12 February 2002 in relation to a claim for personal injuries arising from a motor vehicle accident on 15 March 2000. The Complaints Committee also alleges that the practitioner charged Ms Challen fees which were grossly excessive and which were not properly able to be charged.

229 Ms Challen was a violinist who was injured when the car she was driving was hit by a bus. In September 2000, she gave the Insurance Commission of Western Australia (ICWA) a notice of intention to make a claim pursuant to the MV (TPI) Act. On 12 September 2000, ICWA accepted liability for Ms Challen's claim, and on 25 January 2002, Ms Challen retained Mr O'Halloran to act for her and entered into a costs agreement. That costs agreement (Challen costs agreement) reads as follows:

COSTS AGREEMENT

I confirm that I have agreed to the following terms and conditions upon which PAUL O'HALLORAN will act for me in this or any other matter:

(a) $270.00 per hour (or pursuant to the Fourth Schedule of the Supreme Court Rules) for all time spent on your file including interviews, court appearances, incoming and outgoing telephone calls, perusing documents, drawing documents, travelling and waiting time, file reviews, conferences, etc.;

(b) Minimum charge of one tenth of an hour for time spent on the above matters whether it be Solicitor or clerical time;

(c) Minimum charge of two tenths of an hour per page (or part thereof) for outgoing correspondence, Court documents, statements, proofs, etc. and thereafter at the rate of $270.00 per hour (or pursuant to the Fourth Schedule of the Supreme Court Rules;

(d) $130.00 per hour for all clerical and non-professional time spent for such things as collating and photocopying, outside deliveries and attendances; incoming and outgoing telephone conversations, messages, file notes, etc. (but excluding the making of appointments for you to see us or our staff);

(e) 5% increase in charge rate per annum;

(f) 5% interest on unbilled time per annum;

(g) 10% interest per annum on outlays incurred by Paul O'Halloran;

(h) Paul O'Halloran is authorised at his own discretion to brief Counsel to prepare court documents, provide opinions, appear at Court and generally give independent advice from time to time;

(i) You shall be ultimately responsible for the payment of all medical, Barrister and other expenses necessarily incurred on your behalf and you shall fully and promptly pay us for such expenses upon demand, whether or not you win your case. In the event that the above expenses are not paid or reimbursed by you upon demand by Paul O'Halloran, you acknowledge Paul O'Halloran's right to withdraw from your case and cease work on your file without further notice;

(j) Paul O'Halloran is authorised to deduct monies from my Trust account for fees and disbursements at any time;

(j) You agree that Paul O'Halloran reserves the right to charge pursuant to the Fourth Schedule of the Supreme Court Rules (as amended from time to time) in lieu of the above rates;

(k) Plus 10% GST on legal fees and disbursements.

230 On 1 March 2002, Mr O'Halloran's firm advised ICWA that the firm acted for Ms Challen in relation to the accident. On 11 March 2002, ICWA informed Mr O'Halloran's firm that its insured's negligence in causing the accident would not be denied.

231 On 13 February 2003, the practitioner caused a writ to be issued in the District Court on behalf of Ms Challen, and a statement of claim was filed on 8 July 2003. A defence was filed and, in October 2003, the proceedings were entered for trial.

232 On 21 November 2003, Mr O'Halloran caused an account for $4,000 to be rendered to Ms Challen. That account was paid from funds held in trust on behalf of Ms Challen. On 18 February 2004, Mr O'Halloran sent

an account to Ms Challen for $15,000. That account was also paid from funds held in trust for the benefit of Ms Challen.

233 On 19 July 2004, Ms Challen instructed another firm, Dwyer Durack, to act for her in lieu of the practitioner in relation to the accident.

234 On 4 August 2004, the practitioner issued an account to Ms Challen for $12,257.95 comprising professional fees of $11,669.44 (including GST) and disbursements of $588.51. That was sent to the client along with an account which had been received from counsel instructed by Mr O'Halloran in relation to Ms Challen's claim totalling $5,830. That amount was not included in the $12,257.95 claimed in the 4 August 2004 account.

235 When sending the account to Ms Challen, the practitioner enclosed an acknowledgment and irrevocable authority which, by its terms, required Ms Challen to acknowledge her indebtedness to Paul O'Halloran & Associates for the amount of the 4 August 2004 account and authorised Dwyer Durack to pay Paul O'Halloran & Associates the amount of that account and counsel's account from any monies received by them in respect to Ms Challen's claim.

236 Both Paul O'Halloran & Associates' account and counsel's account were paid by Dwyer Durack in June 2005.

237 The effect of those accounts was that the practitioner charged Ms Challen a total of $31,257.95 made up of $29,950.96 in professional fees including GST, and $1,306.99 in disbursements in addition to counsel fees of $5,830. Taxation of Mr O'Halloran's accounts was sought by Ms Challen, and on 5 June 2007, the practitioner caused to be lodged a bill of costs for solicitor/client taxation in the Supreme Court claiming a total amount of $27,432.25 in professional fees. That amount included costs associated with drawing the bill of costs and taxing costs. The amount claimed in the bill which related to the services the subject of the invoiced costs was $23,439 in professional fees.

238 On 25 September 2007, the taxing officer allowed the amount of $12,378.95 (inclusive of GST) and $979.20 in disbursements.

239 On 9 October 2007, the practitioner lodged objections to the taxation but the objections were dismissed by the taxing officer in a decision dated 18 July 2008. An appeal from that decision to a judge at the

Supreme Court was dismissed - see ***Challen v Paul O'Halloran & Associates*** [2008] WASC 169.

240 The amounts allowed on taxation included disbursements of $979.20, and $807.70 for items charged for separately by counsel. The taxed amount, less the disbursements and separate charges by counsel, therefore represented an allowance for professional fees charged by Paul O'Halloran & Associates of $10,592.25.

241 Against that background, the Complaints Committee makes the following complaints.

COMPLAINT A

THAT the practitioner, PAUL JOHN O'HALLORAN (the 'practitioner'), was guilty of unsatisfactory conduct by unprofessional conduct in that on or about 12 February 2002 he entered into a written agreement with a client, Fleur Louise Challen, (the 'Challen Costs Agreement') which purported to allow him to charge Ms Challen above that allowed by the *Motor Vehicle (Third Party Insurance) Act 1943* (WA) *('the MVA')* and the *Legal Practitioners (Supreme Court) Contentious Business Determination 1999 (the 'Legal Practitioners Determination 1999')* for legal costs the subject of that Act and Determination and/or the terms of which were unreasonable. In particular, the Challen Costs Agreement purported to allow the practitioner to charge Ms Challen:

(i) for secretarial or administrative work: see Clause (b) and (d) of the Challen Costs Agreement;

(ii) unreasonable minimum charges for certain tasks irrespective of the time taken to perform the task: see Clause (c) of the Challen Costs Agreement;

and

(iii) a 5% increase in "charge rate" per annum: see Clause (e) of the Challen Costs Agreement;

(iv) 5% interest on unbilled time per annum: see Clause (f) of the Challen Costs Agreement;

COMPLAINT B

THAT the practitioner was guilty of unsatisfactory conduct by unprofessional conduct on or about each of 21 November 2003, 18 February 2004 and 4 August 2004 by charging Ms Challen fees for representation arising out of a motor vehicle accident, or causing her to be charged fees, and receiving payments in respect of the same, where the fees:

(i) were grossly excessive; and, or

(ii) included charges which were not properly able to be charged.

The practitioner's response

242 The practitioner's response in relation to Complaint A reflects substantially the response he made to the similar allegations in relation to the Pizzata and D'Agui costs agreements. In respect to clerical or secretarial functions, Mr O'Halloran said that the relevant clauses of the Challen costs agreement were not interpreted as entitling him to charge for purely administrative tasks. In response to the allegations concerning clauses (e), (f) and (g) of the Challen costs agreement, Mr O'Halloran said that no charges were ever raised under those paragraphs.

Complaint A - entering into the Challen costs agreement

243 The complaints made by the Complaints Committee concerning entry into the Challen costs agreement raise for consideration the same issues as arose in relation to the Pizzata costs agreement. For the reasons which we explained in relation to Complaint A in the Pizzata matter, entry into the Challen costs agreement which included clauses (b), (c), (d), (e) and (f) permitted recovery of costs in breach of s 27A of the MV (TPI) Act and amounted to professional misconduct.

Complaint B - charging a grossly excessive amount or improper charges

244 It is of significance that the taxation which occurred in the Challen case was a solicitor/client taxation rather than a party/party taxation. The costs allowed on taxation represented roughly one third of the costs charged by Mr O'Halloran. Adopting the observations of Ipp J in ***D'Alessandro*** which are referred to above, the sum of $10,592.25 inclusive of GST, becomes the standard by reference to which an assessment as to whether or not the amount charged was grossly excessive should be made.

245 As with the other matters, opinions as to the reasonable costs on the Challen matter were prepared by Mr Forbes, Mr Lang and Mr Tedeschi. Mr Lang had had some personal involvement in the matter in that he appeared on Mr O'Halloran's behalf on the review of the taxation by the Registrar.

246 In taxing the accounts, the Registrar had, as he recited in his reasons for decision on review, found the WIP records to be 'unhelpful and lacking in credibility', and thus had not relied upon them.

247 Mr Forbes agreed with the approach by the Registrar. He assessed the reasonableness of the costs by reference of the factors outlined by Ipp J in ***D'Alessandro***. He reviewed the allowances made by the Registrar in the taxation, and assessed that some of the items were subject to fairly generous allowances, others were as he would have expected, and in one case, the allowance was lower than he would have expected to have been allowed. He assessed that he would have expected the taxation to result in costs being allowed in the range of $11,442.45 to $14,040.45. On that basis, he was of the opinion that a reasonable sum for costs to be charged for the work done by the practitioner would have been $13,000.

248 Mr Tedeschi did not consider that the costs allowed on the solicitor/client taxation were of any assistance in assessing reasonable charges. He considered that the taxing officer had not adequately assessed the file and had taxed off excessive amounts. He expressed the view that, despite the finding to the contrary by Templeman J on the appeal from taxation, the taxing officer had made errors of principle. In arriving at his assessment of reasonable costs, Mr Tedeschi applied the provisions of the Challen costs agreement, and had regard to Mr O'Halloran's audit of unbilled time which identified unbilled costs of $2,813.66 plus GST, of which Mr Tedeschi was satisfied that $1,849.21 was billable time. Having regard to that information, and the information contained in the WIP records, Mr Tedeschi assessed the reasonable fees as being $24,476.25 plus disbursements.

249 Mr Tedeschi's assessment of reasonable costs produces a figure in excess of $5,000 less than was charged to Ms Challen by Mr O'Halloran. Mr Tedeschi's figure was arrived at applying the costing provisions of the Challen costs agreement, including the specified minimum charges. For reasons which we have explained in relation to the minimum charges applicable under the Pizzata and D'Agui costs agreements, that approach produces charges which exceed reasonable levels.

250 The accounts rendered to Ms Challen were subjected to a taxation before a Registrar of the Supreme Court, a review of the taxation by that Registrar in light of detailed objections, and an appeal to a Supreme Court judge in relation to the conclusions reached at taxation. The amount as allowed by the Court gives significant guidance to the level of reasonable costs for the work done. Mr Forbes had regard to the amounts allowed at taxation, but made an analysis of the upper and lower range of possible allowances, based on his review of the files, for each item. That approach is, in our view, preferable to that taken by Mr Tedeschi. In our view, a

reasonable charge for the work done in relation to the Challen matter was in the range identified by Mr Forbes.

251 We would add in passing that, even if Mr Tedechi's assessment were accepted an overcharge in the vicinity of $5,000, or approximately 20%, is itself grossly excessive.

252 As with the Pizzata and D'Agui matters, the Complaints Committee particularised a number of items of work for which charges were made which it contended were of a purely administrative nature and some relatively minor duplication charges. The duplication charges were of a considerably lower order than occurred in relation to the Pizzata and D'Agui matters (two items totalling $104.20 in all). In those circumstances, Mr O'Halloran's contention that these charges were raised by inadvertent error has much more force. Undoubtedly, however, the amount charged in total by Mr O'Halloran to Ms Challen included charges for work of a purely administrative nature. It is charges of that character which inevitable contribute to the amount of the excessive charges.

253 It follows that Complaint B in relation to Challen is established.

VR 36 of 2009 - Lovett

Background facts

254 On 16 September 2005, Mr O'Halloran received instructions from Ms Patricia Lovett to act for her in a claim for damages against her former solicitors. On 22 September 2005 she signed a costs agreement. The costs agreement provided that the practitioner would charge Ms Lovett according to the time spent supplying various legal services (with a minimum time of six minutes) and that the practitioner would not be entitled to any greater reward than was provided for by determination in force under the LP Act. By clause 12, the costs agreement recited the client's entitlement to request an itemised account within 30 days of receipt of a lump sum account, and the right to submit a bill for taxation. No complaint is made by the Complaints Committee as to the terms of the costs agreement with Ms Lovett or as to the entry into that costs agreement by Mr O'Halloran.

255 Ms Lovett met with Mr Haynes, a senior solicitor employed by Paul O'Halloran & Associates on 22 September 2005. On 3 October 2005, an endorsed writ was filed in the District Court on the client's behalf. The writ named two defendants, Davies & Co (first defendant) and Dawson Davies (second defendant).

256 The writ was not served immediately. Mr Haynes left the employment of Paul O'Halloran & Associates in June 2006.

257 On 28 September 2006, a junior solicitor employed by Mr O'Halloran, Mr Reid, noted that the writ would become stale on 3 October 2006, and proceeded to serve the writ on the defendants.

258 Some work was done in November 2006 to prepare a statement from the client and a file of documents was prepared for counsel. On 26 February 2007, Ms Lovett attended on Mr O'Halloran at his office and the claim was discussed. The Complaints Committee alleges that, shortly afterwards, on 7 March 2007, the practitioner rendered a lump sum account for $6,152.80, made up of $5,593.45 in professional fees and $559.35 in GST (the March account). That was (if it was sent) the second account that had been sent to Ms Lovett, the first being an account for $478 for professional fees inclusive of GST which was sent in February 2006, and was paid from trust shortly thereafter. Mr O'Halloran contends that, although a letter dated 7 March 2007 was sent to Ms Lovett, the account was not enclosed with it and was never sent to her.

259 In his letter to the client of 7 March 2007, Mr O'Halloran advised her that he had arranged a doctor's appointment to obtain a medico-legal review.

260 By letter dated 14 March 2007, the client requested an itemisation of the March account and advised that she had decided not to continue with the case.

261 Although instructions had been terminated in March 2007, a chamber summons was served on Mr O'Halloran's firm on 11 June 2007 seeking orders that Ms Lovett's claim be dismissed for want of prosecution and that Ms Lovett pay the costs of the application. An order was made on 18 June 2007 that Ms Lovett file and serve a statement of claim within 21 days. On 4 July 2007, Mr O'Halloran wrote to Lavan Legal to say that he no longer acted for Ms Lovett.

Was any account sent?

262 It is not in issue that, on 7 March 2007, Mr O'Halloran wrote to Ms Lovett concerning steps that had been taken in relation to her claim. The letter made reference to the financial risks of Ms Lovett proceeding, and advised her that financial arrangements needed to be made in relation to prosecuting the claim. The letter continued:

As such, we enclose an account to date.

263 The book of documents compiled from the practitioner's file contains the March account for $6,152.80. That account bears a stamp which reads 'Client's Copy'. Mr O'Halloran gave evidence that, whilst he could not be sure, given the length of time which had elapsed, he believed that the March account was never in fact rendered to Ms Lovett, but rather that he spoke to Ms Lovett on a date between 14 and 19 March 2007 and told her he would not be charging her. He says that the stamp on the invoice found on his file supports that recollection.

264 In his oral evidence, Mr O'Halloran said that the telephone conversation with Ms Lovett in which he said he would not bill her was prompted by receipt of a facsimile from her dated 14 March 2007. That facsimile opens by requesting 'an itemised invoice for your account'.

265 There are other documents contained in the bundle of documents provided by the Complaints Committee in relation to the Lovett matter which suggest that Ms Lovett did receive the March account. A letter dated 11 April 2007 from Ms Lovett to Mr O'Halloran refers to an account 'for over $6,000 plus the other account I received for $198'. The reference to $198 is a reference to an account from ProCol Recoveries Australia which was forwarded to Ms Lovett by Mr O'Halloran under cover of a letter dated 13 March 2007. Ms Lovett's letter of 11 April 2007 refers to her request for an itemised account of the bill, and states that 'when all accounts have been presented I will endeavour to make some arrangement with you to pay them'. Ms Lovett said that she sent that letter to Mr O'Halloran, and we accept that evidence. Ms Lovett's comments about the account are inconsistent with the proposition that she had been told by Mr O'Halloran in a conversation in March that he did not propose to send an account and are inconsistent with the proposition that she had not already received an account.

266 Mr O'Halloran's file also contains a file note apparently dictated by Mr Haynes recording a telephone conversation with Ms Lovett. That note, accommodated 13 June 2007, records that the client told Mr Haynes that she had received a bill but could not pay it. That note is also inconsistent with Mr O'Halloran's evidence that no bill was sent and that he had told Ms Lovett that no charge was to be made.

267 We find that the March account was enclosed with the letter from Mr O'Halloran to Ms Lovett dated 7 March 2007. We accept that Mr O'Halloran ultimately did not pursue recovery of the fees from Ms Lovett, but we do not accept that the decision not to pursue recovery

of the fees was made in March 2007, and find it more probable that the decision was made sometime later.

The complaints relating to Lovett

268 Against that background, the Complaints Committee makes the following complaints against Mr O'Halloran concerning Ms Lovett.

COMPLAINT A

THAT the practitioner, PAUL JOHN O'HALLORAN ('the practitioner'), was guilty of unsatisfactory conduct by unprofessional conduct on or about 14 February 2006 and, or alternatively 7 March 2007 by charging fees to Ms Lovett for representation arising out of her claim of negligence against a former solicitor, or causing her to be charged the fees, and receiving payments in respect of the same, where the fees:

(i) were grossly excessive; and, or

(ii) included charges which were not properly able to be charged.

COMPLAINT B

THAT the practitioner was guilty of unsatisfactory conduct by neglect and, or undue delay in the course of the practice of the law concerning Patricia Lovett, who had instructed the practitioner with respect to a claim for damages arising out of professional negligence:

(i) in his failure between October 2005 and June 2006 to adequately, or at all, supervise the conduct of the client's claim by his employed solicitor/consultant, Paul Haynes, or to put in place procedures to ensure that the client's claim was progressed satisfactorily; and, or

(ii) in failing to adequately, or at all, progress, or cause to be progressed, the client's claim in the period June 2006 to about June 2007.

COMPLAINT C

THAT the practitioner was guilty of unsatisfactory conduct by unprofessional conduct and/or neglect in the course of the practice of the law from 14 March 2007 and in failing to provide his client with an itemisation of his invoice dated 7 March 2007 when obliged to do so, or otherwise respond to the requests for itemisation in a satisfactory manner.

Complaint A - grossly excessive or improper charges

269 Mr Forbes and Mr Lang both undertook an analysis to determine the reasonable amount that Ms Lovett should have been charged.

270 Mr Forbes made several analyses. He prepared a schedule based on his review of the practitioner's files as to the costs associated with each item of work that was revealed by the files. He assessed that the total amount attributable to all items identified by him, would give a maximum of $6,166.60. That figure included, however, a number of items which he considered questionable and unlikely to be allowed on taxation. The value of those questionable items was $2,676.30 including GST. On that basis, Mr Forbes said that the 'probable minimum amount likely to be regarded as a reasonable sum of costs for work on the Lovett matter would be $3,490.30. He expressed a view that no more than 25% of the questionable items would be recoverable on taxation which would increase the amount that might be regarded as a reasonable sum of costs to $4,159.38.

271 Mr Forbes carried out an alternative analysis based upon assessment of the costs 'on a global basis … rather than on an item by item basis'. That process involved taking a global consideration of the services provided by the practitioner and a global assessment being made of the reasonable costs. On that basis, Mr Forbes assessed that a taxing officer would allow a sum of $1,705 including GST.

272 Mr Lang assessed the likely taxed figure for costs calculated in accordance with the costs agreement at $5,000 or if assessed on the basis of the applicable costs determination at $4,603.

273 Mr Forbes and Mr Lang conferred in advance of the hearing and prepared a joint report. In that joint report, Mr Forbes agreed that, upon taxation, the practitioner might possibly succeed in taxing his costs for an amount of $4,250, but he considered that to be at the upper end. A point of departure between Mr Lang and Mr Forbes is whether or not any allowance would be made for perusal of the previous solicitors file. They agreed that, if perusal of the file were allowed, an amount of $1,500 would be a reasonable allowance. They also agreed that if that amount was allowed for perusal, then the reasonable fees of the practitioner would be approximately $5,000. If no allowance was made for perusal of documents, then the reasonable fees would be $3,500.

274 Notwithstanding that evidence, the Complaints Committee's primary position was that the amount assessed on a global basis, namely $1,705,

should be regarded as the reasonable costs on the matter, given the limited benefit to the client of the work done by the practitioner.

275 We do not agree that, in the context of considering whether the practitioner's charges were grossly excessive, it is appropriate to compare his charges to a charge arrived at on the basis of a 'global assessment'. The work which was done was done pursuant to a costs agreement to which no exception is taken. Mr O'Halloran was entitled to charge by reference to the charges contemplated in the costs agreement, so long as the work done in relation to the matter was properly chargeable.

276 The Complaints Committee asserts that components of Mr O'Halloran's charges were not properly chargeable. Table B of the particulars to para 38 of the Lovett application sets out certain charges which the Complaints Committee says were purely administrative and not chargeable. The Complaints Committee's position was reviewed in light of Mr O'Halloran's response with the result that the total value of the tasks said to have been purely administrative by the Complaints Committee was $127. We agree with the Complaints Committee that the bulk of that amount does relate to purely administrative tasks such as a charge for a letter enclosing an account to the client and perusing a reminder account in relation to a disbursement.

277 The Complaints Committee also noted that the account to Ms Lovett contained charges totalling $693 which were duplicated charges. The practitioner acknowledged that those charges were duplications.

278 The Complaints Committee identified charges totalling $2,687.30 which it submitted were either services which were not performed, or if they were, were of no benefit to the client. The bulk of that amount was made up of a charge of $1,550 for reading the previous solicitor's file and reading certain documents on file for which charges of $620, being two hours work, were raised.

279 The assessments of costs by each of Mr Forbes and Mr Lang involved identification of items which were not properly chargeable. An acceptance of the assessments by either of the experts renders it unnecessary to separately analyse the items for which a charge was made where it should not have been.

280 A major point of departure between Mr Lang's assessment and Mr Forbes' assessment was whether the charge for five hours reading Ms Lovett's previous solicitor's file should properly have been made. Mr O'Halloran's evidence was that at least two hours was spent reviewing

the previous solicitor's file, and that the work was necessary to progress Ms Lovett's claim. In our view, in the context of assessing reasonable costs for the purpose of professional disciplinary proceedings, it is appropriate to accept that Mr O'Halloran considered himself reasonably entitled to spot charge for the time spent reading the previous solicitor's file, that over the life of the file that work wad done, and reasonable costs should be assessed on the basis that a charge for that work should be included.

281 For present purposes, we consider that the figure of $5,000 agreed by Mr Lang and Mr Forbes as the amount of reasonable fees for the practitioner if the charges for perusal of documents were included, should be accepted. The consequence is that Mr O'Halloran's charges to Ms Lovett exceeded a reasonable charge for the work done by approximately $1,600 or slightly in excess of 30%. In the context of the limited benefit that the proceeding provided to the client, and given that the assessment of $5,000 is a figure in our view at the top of the range of what might have been a reasonable charge, 30% in excess of that figure amounts, in our view, to a grossly excessive charge. Complaint A in relation to Ms Lovett is made out.

Complaint B - neglect or undue delay

282 Primary conduct of Ms Lovett's claim was handled by Mr Haynes between the time instructions were received in October 2005, and Mr Haynes leaving the firm in June 2006. Thereafter, responsibility for progress of the claim rested with Mr O'Halloran.

283 The Complaints Committee asserts that after the writ was issued in October 2005, the only work undertaken for the client until September 2006 was a letter to the client's former solicitors, Ilberys, on 14 December 2005 seeking a release of Ilberys' files, writing to QBE Insurance enquiring about its attitude as to the client's level of disability, a brief letter to the ATO seeking copies of the client's tax returns, responding on 16 January 2006 to a letter from the client dated 4 January 2006 and collecting Ilberys' file.

284 In his response, Mr O'Halloran identifies additional work which he says was done. That is including reading reasons for decisions by a Workcover officer on 24 January 2006, collecting Ilberys' files on 3 February 2006 and reading those files that day (although Mr O'Halloran's subsequent evidence was that they may have been read subsequent to that time), reading ATO returns on 7 February 2006, reading a response from QBE on 14 February 2006 and sending an

account to the client on that day. Mr O'Halloran also points out that the file reveals a file memo by a paralegal which reads 'Please do brief to counsel - Mr Peter McGowan'. No brief was in fact done at that time, and that activity can hardly be categorised as progressing the matter in any significant way. On 28 September 2006, certain activities occurred with a view to serving the writ, and having it served, before it become stale on 3 October 2006.

285 Following service of the writ, several communications were received from Lavan Legal who had been instructed to act on behalf of the defendants. On 13 October 2006, Lavan Legal wrote to Mr O'Halloran advising that one of the firms named as a defendant had not come into existence at the time the cause of action was said to have accrued, and suggesting that there should be a notice of discontinuance against that firm. A statement of claim in relation to the other firm named as a defendant, Davies & Co, was requested ' as soon as possible'.

286 On 25 October 2006, a solicitor in the employ of Mr O'Halloran, Mr Read, sent a fax to Mr Haynes enquiring as to why the writ had not been served after it was first filed so that Mr Read could respond to the client's complaint about delay in service of the writ. On the same date, Mr Read wrote to Lavan Legal advising that counsel was being briefed to prepare a statement of claim.

287 On 10 November 2006, Lavan Legal wrote to Mr O'Halloran giving notice that if a statement of claim was not received within 14 days a chambers summons for an order for dismissal of the action would be issued.

288 On 20 November 2006, steps were taken to brief counsel to prepare a statement of claim. Arrangements were also made for a statement to be taken from Ms Lovett, and that was done on 27 November 2006. On 29 November 2006, counsel advised that, before completing a statement of claim, he required 'a covering letter with proper clear instructions' and a statement from the client. On 6 December 2006, Lavan Legal wrote to Mr O'Halloran denying any liability and putting Mr O'Halloran on notice that indemnity costs would be sought if the claim proceeded. That letter was forwarded to the client on 9 January 2007. The client responded on 31 January 2007.

289 Some steps were taken in February 2007 in relation to arranging an appointment for Ms Lovett to see a physician, and on 6 March 2007, Mr Haynes wrote to the physician enclosing medical reports obtained

from Ilberys' file. On 7 March 2007, a more detailed letter of instruction was sent to counsel. It was shortly after those steps were taken that Ms Lovett advised Mr O'Halloran that she did not wish to proceed with the claim.

290 In his response to the Lovett complaint, which Mr O'Halloran adopted in his evidence, he asserted that he told Ms Lovett at the outset that he would not brief counsel without being placed in funds and that the absence of funds 'meant that the firm's retainer was limited to issuing the writ and investigating the merits of proceeding further'. He asserted that counsel was not briefed because Ms Lovett did not provide either instructions or funds to take that step. His position was, therefore, that the limited brief to the firm was fulfilled.

291 We do not accept that assertion by Mr O'Halloran. There is no mention of a limited brief in Mr O'Halloran's file note of 16 September 2005 recording his conference with Ms Lovett that day. The costs agreement signed by Ms Lovett on 22 September 2005 is not limited in that way, but constitutes a retainer in relation to 'negligence claim against Davies & Co'. It is inconsistent with Ms Lovett's complaint about delay in service of the writ which was recorded in Mr Read's facsimile to Mr Haynes on 25 October 2006. Ms Lovett denied that her instructions were limited in that way. There is no evidence on the practitioner's file that, having issued the writ, and gathered (and apparently reviewed) documents related to the claim, any advice was provided to Ms Lovett as to further conduct of the matter, or any request for further instructions or for funds on account, was made before October 2006 when the writ was served. If a limited retainer had been given, it could be expected that completion of that retainer would have been reported to the client and instructions sought as to the next appropriate action. A prudent solicitor would, of course, provide clear written confirmation to the client as to the limits of a retainer to conduct litigation.

292 In the absence of any documented support for the proposition that Ms Lovett's retainer was limited to the issue of a writ, we find that the retainer was not limited in that way. We note that, in his witness statement, Mr Haynes asserts that Mr O'Halloran was instructed to file 'a preservative writ of summons only'. We are not prepared to rely on that hearsay assertion. Extraordinarily, Mr Haynes' witness statement, and indeed all of the statements of other witnesses filed by the respondent, appeared to have been prepared in an initial draft by Mr O'Halloran himself, and to have been finalised by a process of consultation between

Mr O'Halloran and the witness concerned. Statements filed were replete with assertion, conclusion and argument. Once that objectionable material was removed, little remained of some witness statements. The process of preparation clearly undermined the reliability of the evidence contained in the witness statements filed on behalf of Mr O'Halloran. It is on that basis that we place no weight on Mr Haynes' hearsay assertion as to the terms of the retainer.

293 In our view, there was undue delay in progressing Ms Lovett's matter. If the reason for that lack of progress was a lack of funds, then it was incumbent upon Mr O'Halloran, or the solicitor conducting the matter to make clear the requirement for funds to progress the matter, and to follow up the client on a regular basis. All that happened was that some initial work was done and then the file appears to have been ignored substantially from about February 2006 until October 2006. Thereafter, the process of briefing counsel and organising for the preparation of a statement of claim did not proceed in a timely way.

294 Mr O'Halloran took initial instructions, and accepts that he had responsibility to supervise the conduct of the matter, notwithstanding that it appears that (despite Mr Haynes' indication to the contrary in his evidence), Mr Haynes had primary responsibility for the Lovett matter until he left the firm in June 2006. From June 2006 until October 2006, responsibility for progressing the matter clearly rested with Mr O'Halloran.

295 In our view, Complaint B alleging neglect or undue delay in the course of dealing with Ms Lovett's matter is made out. We would characterise that conduct as unsatisfactory professional conduct.

Complaint C - failure to provide itemisation of an account

296 The Complaints Committee contends that, having regard to s 231(3) of the 2003 Act, it was incumbent upon the practitioner having received a request for itemisation of his account on 14 March 2007 either to inform Ms Lovett in writing that he did not require payment of the account, or alternatively provide an itemised account within a reasonable time. The Complaints Committee asserts that Mr O'Halloran did neither.

297 Mr O'Halloran's response to that allegation is substantially based on his proposition that the account of 7 March 2007 was never actually rendered to Ms Lovett. We have rejected that contention above.

298 It is the case that Mr O'Halloran did not ultimately require Ms Lovett to pay the March account. As discussed above, however, Mr O'Halloran's file reveals that, as late as 13 June 2007, Ms Lovett was still expressing concern to Mr Haynes about her capacity to pay the bill. Her letter of 11 April 2007 demonstrates that she still considered herself liable for the bill as of that date.

299 Having concluded that the decision to not pursue the account was not made until some months after March 2007, we find that Mr O'Halloran failed either to advise his client that he did not propose to enforce payment of the account, or to provide an itemised account in accordance with her request within a reasonable time. There is a clear statutory obligation to provide an itemised account when requested. In our view, the failure to meet that obligation amounts to unsatisfactory professional conduct. We thus find Complaint C in relation to Ms Lovett is proved.

Conclusion

VR 35 of 2009 - Superannuation

300 For the foregoing reasons, we find that the evidence establishes that Mr O'Halloran is guilty of professional misconduct in that he did not either make the required superannuation contributions or lodge superannuation guarantee statements within the time required by the *Superannuation Guarantee (Administration) Act 1992* (Cth) in relation to:

1. Ms Claire Louise Gibbs for the quarter ending 31 March 2006

2. Ms Cherry Linda Gibbs for the quarters ending 31 December 2005 and 31 March 2006.

3. Ms K Fubbs for the quarters ending 31 December 2005 and 31 March 2006

4. Ms K Byers for the quarters ending 31 December 2005 and 31 March 2006

5. Ms F Parrella for the quarters ending 31 December 2005 and 31 March 2006

6. Ms A Schmidt for the quarters ending 31 December 2005 and 31 March 2006.

7. Ms A Creek for the quarters ending 31 December 2005 and 31 March 2006.

8. Ms M Romeo (nee Figliomeni) for the quarter ending 31 March 2006.

9. Mr L A Martin for the quarters ending 30 September 2005, 31 December 2005 and 31 March 2006

10. Ms F Parrella, Ms K Byers, Ms K Fubbs, Ms M Romeo, Ms M T Lam, Ms J B Holland, Ms T Dueckershoff, Mr L A Martin and Mr A D Read for the quarter ending 30 September 2006.

11. Ms F Parrella, Ms A Staszewski, Ms K F Byers, Ms K Fubbs, Ms M T Lam, Ms J B Holland, Ms L Bradford, Ms P Dang, Ms A Willcock, Ms C Bennett, Ms J S Kang, Mr L A Martin, Mr A D Read, and Ms D F Taylor for the quarter ending 31 December 2006;

12. Ms F Parrella, Ms K Byers, Ms K Fubbs, Ms P Dang, Ms C Bennett, Ms J S Kang, Ms C A Ebert, Ms A Staszewski, Ms E Terrill and Ms T D Worroll for the quarter ending 31 March 2007.

13. Ms F Parrella, Ms A L Paik, and Ms C W Claude for the quarter ending 30 June 2007.

14. Ms F Parrella, Ms V A Fubbs, Ms C A Ebert, Ms K F Byers, Ms K Fubbs, Ms A N Staszewski, Ms T D Worroll, and Ms C W Claude for the quarter ending 30 September 2007

VR 36 of 2009 - Lovett

1. The practitioner is found guilty of professional misconduct in that on or about 14 February 2006 and, or alternatively 7 March 2007 by charging fees to Ms Lovett for representation arising out of her claim of negligence against a former solicitor, or causing her to be charged the fees, and receiving payments in respect of the same, where the fees:

(i) were grossly excessive; and, or

(ii) included charges which were not properly able to be charged.

2. The practitioner was guilty of unsatisfactory professional conduct in the course of the practice of the law concerning Patricia Lovett, who had instructed the practitioner with respect to a claim for damages arising out of professional negligence:

(i) in his failure between October 2005 and June 2006 to adequately, or at all, supervise the conduct of the client's claim by his employed solicitor/consultant, Paul Haynes, or to put in place procedures to ensure that the client's claim was progressed satisfactorily; and, or

(ii) in failing to adequately, or at all, progress, or cause to be progressed, the client's claim in the period June 2006 to about June 2007.

3. The practitioner was guilty of unsatisfactory professional conduct in the course of the practice of the law from 14 March 2007 and in failing to provide his client with an itemisation of his invoice dated 7 March 2007 when obliged to do so, or otherwise respond to the requests for itemisation in a satisfactory manner.

VR 37 of 2009 - Pizzata

1. The practitioner is found guilty of professional misconduct in that:

(a) On or about 1 April 1999, he entered into a written agreement with Elizabeth Pizzata, a client, (the 'Pizzata Costs Agreement') which allowed him to charge Ms Pizzata above that allowed by the Motor Vehicle (Third Party Insurance) Act 1943 (WA) (the MV (TPI) Act) and, the Legal Practitioners (Supreme Court) Contentious Business Determination 1996 (the 'Legal Practitioners Determination 1996'), - for legal costs the subject of that Act and Determination

and/or the terms of which were unreasonable. In particular, the Pizzata Costs Agreement allowed the practitioner to charge Ms Pizzata:

(i) for secretarial or administrative work

(ii) unreasonable minimum charges for certain tasks irrespective of the time taken to perform the task:

(iii) a 5% increase in 'charge rate' per annum;

(iv) 5% interest on unpaid fees per annum:

(v) 15% interest per annum on outlays incurred by the practitioner, being an amount in excess of that allowed pursuant to section 75 of the *Legal Practitioners Act 1893* (WA)

(b) On or about each of 29 October 2003, 20 January 2004 and 3 February 2004 by charging Ms Pizzata fees for representation arising out of two motor vehicle accidents, or causing her to be charged the fees, and receiving payments in respect of the same, where the fees:

(i) were grossly excessive; and, or

(ii) included charges which were not properly able to be charged.

3. The practitioner is found guilty of unsatisfactory professional conduct in that:

(a) On various dates in 2001, 2002 and 2003, he applied trust moneys which he held for the benefit of Ms Pizzata towards disbursements without complying with section 34A(b) of the *Legal Practitioners Act 1893* (WA)

VR 38 of 2009 - D'Agui

1. The practitioner is found guilty of professional misconduct in that:

(a) On or about 28 January 2004 he entered into a written agreement with a client, Antonio (Tony) D'Agui, (the 'D'Agui Costs Agreement') which allowed him to charge Mr D'Agui above that allowed by the *Workers' Compensation and Rehabilitation Act 1981* ('the Workers Compensation Act') and the Legal Practitioners (Conciliation Review proceedings and Magistrates Court) Determination 2003 (the 'Determination') for legal costs the subject of the Determination and/or the terms of which were unreasonable. In particular, the D'Agui Costs Agreement allowed the practitioner to charge Mr D'Agui:

(i) at the rate of $284.55 (plus GST) per hour for all time spent by a senior practitioner, $190 (plus GST) per hour for all time spent by a junior practitioner, and $137.28 (plus GST) per hour for certain time spent by clerks and secretaries;

(ii) for secretarial or administrative work;

(iii) unreasonable minimum charges for certain tasks irrespective of the time taken to perform the task; and

(iv) 5% interest per annum on unbilled time.

(b) He charged Mr D'Agui fees on about each of 4 February 2004, 20 February 2004, 31 March 2004, 11 November 2004, 1 December 2004 and 25 November 2004 for representation arising out of an accident, or causing him to be charged fees, where the fees:

(i) were grossly excessive; and

(ii) included charges which were not properly able to be charged.

2. The practitioner is found guilty of unsatisfactory professional conduct in that he made no, or no adequate,

attempt to comply with, or otherwise address, a direction made by Registrar Rimmer of the Supreme Court on 23 June 2006 to serve Mr D'Agui with an itemised bill of costs by 4 August 2006.

VR 39 of 2009 - Challen

1. The practitioner is found guilty of professional misconduct in that:

   (a) On or about 12 February 2002 he entered into a written agreement with a client, Fleur Louise Challen, (the 'Challen Costs Agreement') which allowed him to charge Ms Challen above that allowed by the Motor Vehicle (Third Party Insurance) Act 1943 (WA) ('the MVA') and the Legal Practitioners (Supreme Court) Contentious Business Determination 1999 (the 'Legal Practitioners Determination 1999') for legal costs the subject of that Act and Determination and/or the terms of which were unreasonable. In particular, the Challen Costs Agreement allowed the practitioner to charge Ms Challen:

      (i) for secretarial or administrative work;

      (ii) unreasonable minimum charges for certain tasks irrespective of the time taken to perform the task;

      (iii) a 5% increase in "charge rate" per annum;

      (iv) 5% interest on unbilled time per annum;

   (b) On or about each of 21 November 2003, 18 February 2004 and 4 August 2004 by charging Ms Challen fees for representation arising out of a motor vehicle accident, or causing her to be charged fees, and receiving payments in respect of the same, where the fees:

      (i) were grossly excessive; and, or

      (ii) included charges which were not properly able to be charged.

Orders

1. The applications are adjourned for directions on 26 July 2011 at 10:30 am in order to make directions in relation to the determination of penalty.

I certify that this and the preceding [300] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUSTICE J A CHANEY, PRESIDENT