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**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**ACT** : LEGAL PROFESSION ACT 2008 (WA)

**CITATION** : LEGAL PROFESSION COMPLAINTS  
COMMITTEE and CHANG [2019] WASAT 67

**MEMBER** : JUDGE D PARRY, DEPUTY PRESIDENT  
MR D AITKEN, SENIOR MEMBER  
MS S GILLETT, SENIOR SESSIONAL MEMBER

**HEARD** : 13 JUNE 2019

**DELIVERED** : 9 SEPTEMBER 2019

**FILE NO/S** : VR 51 of 2018

**BETWEEN** : LEGAL PROFESSION COMPLAINTS  
COMMITTEE  
Applicant

AND

CHRISTINA MARIE CHANG  
Respondent

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*Catchwords:*

Vocational regulation - Legal practitioners - Professional misconduct - Practitioner also registered migration agent - Client of practitioner in her capacity as registered migration agent issued notice of demand claiming refund of fees paid in relation to unsuccessful visa application and subsequently commenced minor case proceedings in Magistrates Court against practitioner seeking refund of fees - Evidence - Admissibility of evidence - Negotiations privilege - 'Without prejudice' statements - Whether court documents concerning pre-trial conference and statements made by practitioner at pre-trial conference

in minor case proceedings in Magistrates Court not admissible in vocational disciplinary proceedings in State Administrative Tribunal against practitioner arising out of those statements under s 37(2) of *Magistrates Court (Civil Proceedings) Act 2004* (WA) - Whether pre-trial conference in minor case proceedings in Magistrates Court is 'compulsory mediation' under Pt 5 of *Magistrates Court (Civil Proceedings) Act 2004* (WA) and therefore whether court documents concerning minor case proceedings and statements made by practitioner at pre-trial conference in minor case proceedings 'not admissible in any proceedings before any court, tribunal or body' under s 37(2) of *Magistrates Court (Civil Proceedings) Act 2004* (WA) - Whether statements by practitioner at pre-trial conference in minor case proceedings in Magistrates Court not admissible in vocational disciplinary proceedings in State Administrative Tribunal against practitioner arising out of those statements under s 27(3) of *Magistrates Court (Civil Proceedings) Act 2004* (WA) - Whether practitioner's statements were said 'for the purpose of attempting to settle a minor case' - Whether vocational disciplinary proceedings in State Administrative Tribunal arising out of statements made at pre-trial conference in minor case proceedings in Magistrates Court are 'in respect of the proceedings' in which the statements were made - Ethical duties of candour and fairness when responding to letter of demand - Allegation of professional misconduct by knowingly seeking to mislead client by email statements referring to notification of, and correspondence with, practitioner's insurer regarding claim, in circumstances where practitioner did not notify or correspond with any insurer regarding claim, in order to defer or delay client from commencing proceedings against practitioner seeking refund of fees - Ethical duties of candour and fairness in court proceedings - Allegation of professional misconduct by knowingly seeking to mislead Magistrates Court and client by statements to the effect that 'the matter is in the insurer's hands' and 'there is an insurer involved', in circumstances where practitioner did not notify or correspond with any insurer regarding claim, in order to defer or delay proceedings - Legal and ethical duties to respond to notification letters and summonses for production of documents from regulatory authority - Allegation of professional misconduct by, without reasonable excuse, failing to respond to three notification letters of complaint and conduct investigations requesting practitioner's submissions, a Summons to Produce Documents and a Summons to Produce Documents and Provide Written Information Verified by Statutory Declaration within the periods specified in the letters and summonses or at all - Words & phrases: 'disgraceful', 'dishonourable'

*Legislation:*

*Legal Profession Act 2008* (WA), s 5(a), s 56, s 401, s 402, s 403, s 403(1),

s 403(1)(b), s 404, s 404(a), s 410, s 410(1)(e), s 421, s 428(1), s 438, s 438(1), s 442, s 520, s 520(1)(a), s 520(1)(c), s 520(1)(d), s 520(3), s 520(5), s 531, s 531(2), s 532, s 532(3)

*Legal Profession Conduct Rules 2010* (WA), r 50, r 50(3)

*Magistrates Court (Civil Proceedings) Act 2004* (WA), s 3(1), s 26, s 27, s 27(1), s 27(3), s 34, s 35, s 33, s 37, s 37(2), Pt 4, Pt 5

*Magistrates Court (Minor Cases Procedure) Rules 2005* (WA), r 28(2), r 29, r 29(1), r 29(2), r 30, r 31, r 32

*State Administrative Tribunal Act 2004* (WA), s 32, s 35(1)

*Result:*

Findings of professional misconduct on all three grounds

*Summary of Tribunal's decision:*

The Legal Profession Complaints Committee alleged that Ms Christina Marie Chang, a legal practitioner, engaged in professional misconduct, in her personal capacity or capacity as a registered migration agent (and not in her capacity as a legal practitioner):

1. Between 23 June 2016 and 7 July 2016, in the course of corresponding with a client who had instructed the practitioner as a registered migration agent to prepare and lodge a permanent residency visa application, and who subsequently terminated the practitioner's instructions, withdrew the visa application and sent a letter of demand to the practitioner seeking 'compensation' of \$10,000 'to refund us your fee, one [visa] application fee and all the documents that we obtained due to your incorrect advice' and stating that, if the practitioner was 'not willing [to] pay us any compensation', then 'you will leave me no other choice than [to] take legal action', by knowingly seeking to mislead the client by email statements referring to notification of, and correspondence with, the practitioner's insurer in relation to the claim for compensation, when, in truth, the practitioner did not notify, or correspond with, any insurer during that period regarding the claim for compensation, so as to defer or delay the client from commencing proceedings against the practitioner in respect of the claim; and
2. Between 23 August 2016 and 27 September 2016, in the course of defending Magistrates Court minor case proceedings brought by the client against the practitioner seeking the payment of \$10,000 'as (part of) reimbursement for one [visa] application and her honorarium' plus court

fee, by knowingly seeking to mislead the Magistrates Court and the client by making statements at pre-trial conferences to the effect that:

'I cannot disclose any details because the matter is in the insurer's hands. I will discuss it as soon as I have more information on what they are going to do', and

'I cannot speak about the matter because there is an insurer involved',

when, in truth, at no time prior to 23 August 2016, and between 23 August 2016 and 27 September 2016, did the practitioner notify, or correspond with, any insurer regarding the claim for compensation or the Magistrates Court proceedings, so as to defer or delay the Magistrates Court proceedings.

The Committee also alleged that the practitioner engaged in professional misconduct, in her capacity as a legal practitioner, on and after 6 October 2017, following a complaint to the Committee by the client against the practitioner, by, without reasonable excuse, failing to respond to three notification letters, a Summons to Produce Documents and a Summons to Produce Documents and Provide Written Information Verified by Statutory Declaration.

The practitioner objected to the admissibility of the client's evidence as to what the practitioner said during pre-trial conferences in the Magistrates Court proceedings, on the basis that those statements were privileged under s 27(3) and s 37(2) of the *Magistrates Court (Civil Proceedings) Act 2004* (WA). Under s 27(3), '[a]nything said or done by a party for the purpose of attempting to settle a minor case is to be taken to be said or done without prejudice to any evidence or submission that the party ... may subsequently adduce or make, in or in respect of the proceedings ...' and under s 37(2) '[e]vidence of ... anything said or done ... in the course of, or for the purpose of, attempting to settle a case by compulsory mediation ... is not admissible in any proceedings before any court, tribunal or body ...'. However, the Tribunal determined that neither of these provisions relevantly applied in the professional disciplinary proceedings brought by the Committee against the practitioner in the Tribunal. Furthermore, and in any case, the Tribunal determined that even if it were necessary to seek to balance competing aspects of public interest in this case, between the primary object of the minor cases procedure 'to attempt to bring the parties to a settlement acceptable to all the parties' (or, more generally, the public interest in facilitating the settlement of legal disputes without the need for litigation), on the one hand, and the protection of the public in their dealings with legal practitioners and the maintenance of the proper standards of the legal profession,

by referral of a matter arising out of the making of false and misleading statements by a legal practitioner in seeking to settle a dispute and the determination of such a matter by the Tribunal, on the other hand, the latter public interest would prevail. The Tribunal therefore admitted the evidence of the client as to statements made by the practitioner during the pre-trial conferences in the Magistrates Court.

The Tribunal determined that the practitioner engaged in professional misconduct in terms of each of the three grounds alleged by the Committee against her. The Tribunal found that the practitioner knowingly sought to mislead the client by making false and misleading email statements, so as to defer or delay the client from commencing proceedings against the practitioner in respect to the claim, and that her conduct in this regard would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence and hence constitutes professional misconduct. The practitioner's conduct was grossly unfair to the client and dishonest, and involved a breach of a lawyer's fundamental ethical duties of candour and fairness, whether representing a client or acting in a personal capacity, not to knowingly seek to mislead the other party to a demand for payment of money.

The Tribunal also found that the practitioner knowingly sought to mislead the Magistrates Court and the client by making false and misleading statements at two pre-trial conferences in the Magistrates Court proceedings, so as to defer or delay the Magistrates Court proceedings, and that her conduct in this regard would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence and hence constitutes professional misconduct. The practitioner breached her fundamental ethical duties of candour and fairness to the Court and to the client. Knowingly seeking to mislead a court (and the other party to litigation), whether in a professional or personal capacity, strikes at the very heart of, and is an anathema to, a legal practitioner's core ethical duties as an officer of the court and fundamentally undermines the trust and confidence between court and practitioner which is essential to the administration of justice.

Finally, the Tribunal found that the practitioner, without reasonable excuse, failed to respond to the notification letters and summonses issued by the regulatory authority (within the periods specified in those documents or subsequently) and that this conduct would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence and is conduct that, consistently and to a substantial degree, falls short of the standard of professional conduct observed or approved by members of the profession of good repute and competence. The Tribunal determined that the practitioner's

conduct in failing to respond to the notification letters and summonses rises to the level of professional misconduct, rather than constituting (merely) unsatisfactory professional conduct, because:

- the practitioner's failures were sustained and repeated over three stages of investigation by the Committee;
- the practitioner not only failed to respond to the notification letters and to comply with the summonses within the periods specified in those documents, but has failed to do so, now, for over one-and-a-half years; and
- the practitioner never sought an extension nor engaged at all with the Committee in relation to the investigation of the client's complaint about the practitioner and the subsequent conduct investigations resulting from the practitioner's failures to respond to the first two notification letters.

Having made findings of professional misconduct, the Tribunal directed the parties to file and exchange submissions as to penalty and costs and listed the matter for hearing in relation to penalty and costs.

*Category:* B

**Representation:**

*Counsel:*

Applicant : Mr P Yovich SC  
Respondent : Mr S Walker

*Solicitors:*

Applicant : Law Complaints Officer  
Respondent : N/A

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

Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336  
Chamberlain v Law Society of the Australian Capital Territory  
(1993) 43 FCR 148  
Kyle v Legal Practitioners' Complaints Committee [1999] WASCA 115;  
(1999) 21 WAR 56

Legal Practitioners Complaints Committee and Fleming [2006] WASAT 352;  
(2006) 48 SR (WA) 29

Legal Practitioners Complaints Committee and Segler [2009] WASAT 205;  
(2009) 67 SR (WA) 280

Legal Profession Complaints Committee and A Legal Practitioner  
[2013] WASAT 37; (2013) 84 SR (WA) 158

Legal Profession Complaints Committee and Amsden [2014] WASAT 57

Legal Profession Complaints Committee and Caine [2010] WASAT 178

Legal Profession Complaints Committee and in de Braekt [2012] WASAT 58;  
(2012) 80 SR (WA) 134

Legal Profession Complaints Committee and Lee-Steere [2010] WASAT 189

Legal Profession Complaints Committee and Segler [2010] WASAT 135

Legal Profession Complaints Committee and Segler [2013] WASAT 117

Vogt v Legal Practitioners Complaints Committee [2009] WASCA 202

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**REASONS FOR DECISION OF THE TRIBUNAL:**

***Introduction***

1 Ms Christina Marie Chang (practitioner) was admitted to legal practice in Western Australia on 4 February 1985. Since about September 1992, the practitioner has also been a registered migration agent. In her capacity as a registered migration agent (and not as a lawyer), in or about March 2015, the practitioner was retained by Ms E H (the complainant) to prepare and lodge a permanent residency visa application, on behalf of the complainant, her husband and their two children (visa application), with the Commonwealth Department of Immigration and Border Protection (DIBP). The complainant subsequently terminated the practitioner's instructions and withdrew the visa application, because the complainant's International English Language Testing System (IELTS) test, which had to be undertaken within three years prior to the date of lodgement of the visa application with DIBP, had been undertaken more than three years prior to the lodgement of the visa application. On 2 June 2016, the complainant sent a letter of demand to the practitioner seeking 'compensation' of \$10,000 'to refund us your fee, one [visa] application fee and all the documents that we obtained due to your incorrect advice' and stating that, if the practitioner was 'not willing [to] pay us any compensation', then 'you will leave me no other choice than [to] take legal action' (letter of demand).<sup>1</sup> When the practitioner did not pay the money sought by the complainant in the letter of demand, on 25 July 2016, the complainant commenced 'minor case' proceedings against the practitioner under the *Magistrates Court (Civil Proceedings) Act 2004* (WA) (MCCP Act) in the Fremantle Registry of the Magistrates Court of Western Australia seeking the payment of \$10,000 'as (part of) reimbursement for one [visa] application and her honorarium' plus court fee of \$118.20 (Magistrates Court proceedings).<sup>2</sup>

2 The Legal Profession Complaints Committee (Committee) alleges that the practitioner engaged in professional misconduct, within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) (LP Act), in her personal capacity or capacity as a registered migration agent (and not in her capacity as a legal practitioner):

- (1) Between 23 June 2016 and 7 July 2016, in the course of corresponding with the complainant, by knowingly

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<sup>1</sup> Legal Profession Complaints Committee book of documents dated 1 August 2018 (Exhibit 3) page 57.

<sup>2</sup> Legal Profession Complaints Committee book of documents dated 1 August 2018 (Exhibit 3) page 62.

seeking to mislead the complainant by email statements referring to notification of, and correspondence with, the practitioner's insurer in relation to the claim for compensation, when, in truth, the practitioner did not notify, or correspond with, any insurer during that period regarding the claim for compensation, so as to defer or delay the complainant from commencing proceedings against the practitioner in respect of the claim; and

- (2) Between 23 August 2016 and 27 September 2016, in the course of defending the Magistrates Court proceedings, by knowingly seeking to mislead the Magistrates Court and the complainant by making statements at pre-trial conferences to the effect that:

I cannot disclose any details because the matter is in the insurer's hands. I will discuss it as soon as I have more information on what they are going to do[.]

and

I cannot speak about the matter because there is an insurer involved[.]

when, in truth, at no time prior to 23 August 2016, and between 23 August 2016 and 27 September 2016, did the practitioner notify, or correspond with, any insurer regarding the claim for compensation or the Magistrates Court proceedings, so as to defer or delay the Magistrates Court proceedings.

- 3 The Committee also alleges that the practitioner engaged in professional misconduct, within the meaning of s 403, s 404(a) and s 438 of the LP Act, in her capacity as a legal practitioner, on and after 6 October 2017, following a complaint to the Committee by the complainant against the practitioner, by, without reasonable excuse, failing to respond to three notification letters, a Summons to Produce Documents and a Summons to Produce Documents and Provide Written Information Verified by Statutory Declaration.

- 4 We will now set out the three grounds of professional misconduct alleged by the Committee against the practitioner. We will then outline the legal framework in relation to this matter, refer to and set out our

determination of objections made by the practitioner to the admissibility of certain evidence, and make findings of fact for the determination of this proceeding. We will then address each of the three grounds of alleged professional misconduct in turn.

5 For reasons set out below, we have determined that the practitioner engaged in professional misconduct in terms of each of the three grounds alleged by the Committee against her.

***Grounds of alleged professional misconduct***

6 The Committee alleges the following three grounds of professional misconduct against the practitioner:<sup>3</sup>

**GROUND 1**

That the practitioner, CHRISTINA MARIE CHANG (**practitioner**), between 23 June 2016 and 7 July 2016, in the course of corresponding with a former client, [the complainant], in response to a letter of demand from [the complainant] dated 2 June 2016 for a refund of \$10,000 for fees paid by [the complainant] in relation to an unsuccessful visa application the practitioner had prepared and lodged on behalf of [the complainant] and her family on 16 October 2015 (**Claim**), the practitioner engaged in professional misconduct within the meaning of [s] 403 and [s] 438 of the *Legal Profession Act 2008* (WA) (**Act**) in that her conduct would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, and further and alternatively, would justify a finding that she is not a fit and proper person to engage in legal practice, by preparing and sending:

1. an email to [the complainant] dated 23 June 2016 in which she stated "*I will notify my Insurers and will await their response. Once I have that I can then respond to you in detail*";
2. an email to [the complainant] dated 29 June 2016 in which she stated "*Hi the way insurance works is that all claims must be reported to the insurers and I am required by my insurers not to discuss the claim with you directly*";
3. an email to [the complainant] dated 7 July 2016 in which she stated "*Hi I am waiting for [a] reply from my insurer[.] I should hear by next week. They know its [sic] urgent*",

(together, **the email statements**)

in circumstances where:

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<sup>3</sup> Further Amended Annexure A to Application dated and filed 14 June 2019 (Exhibit 1) pages 1-4 (original emphasis). In these reasons, we use the expressions 'email statements' and 'PTC statements' as those terms are defined in grounds 1 and 2, respectively.

- (a) the email statements were false and misleading, as, in truth, at no time between 23 June 2016 and 7 July 2016 did the practitioner notify, or correspond with, any insurer or insurers regarding the Claim;
- (b) the practitioner knew the email statements were false and misleading and intended that [the complainant] be misled by the email statements, so as to defer or delay [the complainant] from commencing proceedings against the practitioner in respect of the Claim.

## GROUND 2

That the practitioner, between 23 August 2016 and 27 September 2016, in the course of defending Fremantle Magistrates Court (**Court**) proceedings [number] lodged by [the complainant] against the practitioner on 25 July 2016 in respect of the Claim, by which [the complainant] sought the sum of \$10,118.20 (including allowable Court fees) (**Proceedings**), engaged in professional misconduct within the meaning of [s] 403 and [s] 438 of the Act in that her conduct would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, and further and alternatively, would justify a finding that she is not a fit and proper person to engage in legal practice, by:

1. at a pre-trial conference (**PTC**) before a registrar of the Court (**Registrar**) on 23 August 2016, saying words to the effect "*I cannot disclose any details because the matter is in the insurer's hands. I will discuss it as soon as I have more information on what they are going to do*";
2. at a further PTC before the Registrar on 27 September 2016, saying words to the effect "*I cannot speak about the matter because there is an insurer involved*",

(together, **the PTC statements**)

in circumstances where:

- (a) the PTC statements were false and misleading as, in truth, at no time prior to 23 August 2016, and between 23 August 2016 and 27 September 2016, did the practitioner notify, or correspond with, any insurer or insurers regarding the Claim or the Proceedings;
- (b) the practitioner knew the PTC statements were false and misleading and intended that the Court and [the complainant] be misled by the PTC statements, so as to defer or delay the Proceedings.

**GROUND 3**

That the practitioner, on and after 6 October 2017, following a complaint to the Legal Profession Complaints Committee (**Committee**) by [the complainant] against the practitioner arising from the practitioner's response to the Claim, her conduct in the Proceedings and her failure to pay the Judgment sum (**Complaint**), engaged in professional misconduct within the meaning of [s] 403, [s] 404(a) and [s] 438 of the Act in that her conduct would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence and fell short, consistently and to a substantial degree, of the standard of professional conduct observed or approved by members of the profession of good repute and competence, and further and alternatively, would justify a finding that she is not a fit and proper person to engage in legal practice, by, without reasonable excuse, failing to respond to:

1. by 5 October 2017 or at all, a letter from the Committee to the practitioner dated 15 September 2017 which formally notified her of, and requested her submissions in relation to, the Complaint (**First notification letter**), in breach of rule 50(3) of the [*Legal Profession Conduct Rules* (2010) (WA) (LPCR)] and/or [s] 531(2) of the Act;
2. by 5 October 2017 or at all, a Summons to Produce Documents dated 14 September 2017 issued to the practitioner by the Committee pursuant to [s] 520(1)(a) of the Act (**First summons**), in breach of [s] 520(5) and [s] 532(3) of the Act;
3. by 7 November 2017 or at all, a letter from the Committee to the practitioner dated 17 October 2017 which formally notified her of, and requested her submissions in relation to, a conduct investigation commenced on the Committee's own initiative pursuant to [s] 421 of the Act in relation to the practitioner's failure to respond to the First notification letter and the First summons (**Second notification letter**), in breach of rule 50(3) of the LPCR and/or [s] 531(2) of the Act;
4. by 6 December 2017 or at all, a letter from the Committee to the practitioner dated 15 November 2017 which formally notified her of, and requested her submissions in relation to, a conduct investigation commenced on the Committee's own initiative pursuant to [s] 421 of the Act in relation to the practitioner's failure to respond to the Second notification letter, in breach of rule 50(3) of the LPCR and/or [s] 531(2) of the Act;
5. by 6 December 2017 or at all, a Summons to Produce Documents and Provide Written Information Verified by Statutory Declaration dated 15 November 2017 issued to the

practitioner by the Committee pursuant to [s] 520(1)(a), (c), and (d) and [s] 520(3) of the Act, in breach of [s] 520(5) and [s] 532(3) of the Act.

***Legal framework***

7 The Committee has determined that this matter should be heard by the Tribunal and has referred the matter to the Tribunal under s 428(1) of the LP Act. Section 438(1) of the LP Act confers jurisdiction on the Tribunal in this proceeding in the following terms:

The State Administrative Tribunal has jurisdiction to make a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct.

8 The Committee bears the onus of proof in relation to the allegations of professional misconduct it makes against the practitioner. The civil standard of proof ('on a balance of probabilities') applies together with the *Briginshaw* approach,<sup>4</sup> which requires clear and cogent evidence to be adduced by the Committee and for the Tribunal to feel an actual persuasion of the occurrence or existence of relevant facts before it can find the practitioner guilty of professional misconduct (or unsatisfactory professional conduct). The *Briginshaw* approach applies in disciplinary proceedings, because of the nature and seriousness, and potential consequences, of allegations of wrongdoing (or incompetence) made in such proceedings. As Dixon J said in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361-362:

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

9 Section 402 and s 403 of the LP Act contain non-exhaustive<sup>5</sup> definitions of the terms 'unsatisfactory professional conduct' and

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<sup>4</sup> See *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361-362 (Dixon J) (a case concerning a petition for the dissolution of a marriage on the grounds of adultery).

<sup>5</sup> *Legal Practitioners Complaints Committee and Segler* [2009] WASAT 205; (2009) 67 SR (WA) 280 at [97].

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

For the purposes of this Act –

*unsatisfactory professional conduct* includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

10 Section 403 of the LP Act states as follows:

(1) For the purposes of this Act –

*professional misconduct* includes –

- (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
  - (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
- (2) For the purpose of finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission or for the grant or renewal of a local practising certificate.

11 As the statutory definitions of the terms 'professional misconduct' and 'unsatisfactory professional conduct' in s 403(1) and s 402 of the LP Act, respectively, are non-exhaustive definitions, conduct which constitutes 'unprofessional conduct' (sometimes expressed as 'professional misconduct', signifying more serious misconduct) at common law can constitute professional misconduct (or unsatisfactory professional conduct) under the LP Act.<sup>6</sup>

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<sup>6</sup> *Legal Profession Complaints Committee and Caine* [2010] WASAT 178; *Legal Profession Complaints Committee and in de Braekt* [2012] WASAT 58; (2012) 80 SR (WA) 134; *Legal Profession Complaints Committee and A Legal Practitioner* [2013] WASAT 37; (2013) 84 SR (WA) 158.

12 The common law concept of unprofessional conduct was restated by Parker J in *Kyle v Legal Practitioners' Complaints Committee* [1999] WASCA 115; (1999) 21 WAR 56 at [61] (Ipp J at [1] and Steytler J at [22] agreeing) as follows:

... This Court has long accepted and applied, in this context, the understanding of the notion of unprofessional conduct which was expressed by the Full Court of the South Australian Supreme Court in *Re a Practitioner of the Supreme Court* [1927] SASR 58: see, eg, *Re a Practitioner* (unreported, Supreme Court, WA, Full Court, Library No 4989, 18 July 1983). It was usefully summarised (at 3) by the Full Court as conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, or that, to a substantial degree, fell short of the standard of professional conduct observed or approved by members of the profession of good repute and competence. The first limb of this summary includes, but is not confined to, conduct which occurs in the course of legal practice. The other limb necessarily relates to conduct in the course of legal practice because of the reference to 'professional conduct'. While the words should not be taken as necessarily an exhaustive or codified statement, the essence of the notion of unprofessional conduct is usefully revealed in these decisions.

13 As is apparent from the expression of the grounds of alleged professional misconduct set out at [6] above, the Committee contends, in relation to each of the three grounds, that the practitioner's alleged conduct constitutes 'professional misconduct' under the LP Act, because it falls within the 'first limb' of the restatement of the common law concept of unprofessional conduct in *Kyle v Legal Practitioners' Complaints Committee* at [61] ('conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence') and, further and alternatively, because it falls within the statutory definition of 'professional misconduct' in s 403(1)(b) of LP Act ('conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice'). As Parker J held in *Kyle v Legal Practitioners' Complaints Committee* at [61], the first limb of the restatement of the common law concept of unprofessional conduct in that case 'includes, but is not confined to, conduct which occurs in the course of legal practice'. The statutory definition of 'professional misconduct' in s 403(1)(b) of the LP Act also expressly states that that paragraph applies to conduct 'whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law'.

As indicated earlier, the Committee contends that the practitioner's alleged conduct which is the subject of grounds 1 and 2 did not occur in connection with the practice of law, but rather occurred in the practitioner's personal capacity or in her capacity as a registered migration agent.

14 As is apparent from the expression of ground 3 set out at [6] above, the Committee contends that the practitioner's conduct, which is the subject of that ground, constitutes professional misconduct under the LP Act, also because it falls within the 'second limb' of the restatement of the common law concept of unprofessional conduct in *Kyle v Legal Practitioners' Complaints Committee* at [61] ('conduct ... 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'), although ground 3 also alleges that the practitioner's conduct 'fell short, *consistently* and to a substantial degree' of that standard of professional conduct.<sup>7</sup> As we will indicate later, the sustained and repeated nature of the practitioner's failures, without reasonable excuse, to respond to the Committee's notification letters and summonses is part of the reason why we find that the practitioner engaged in professional misconduct, rather than (merely) unsatisfactory professional conduct, in terms of ground 3.

15 Whereas, in relation to grounds 1 and 2, the Committee contends that the practitioner engaged in professional misconduct 'within the meaning of [s] 403 and [s] 438 of the [LP] Act', in relation to ground 3 the Committee also contends that the practitioner engaged in professional misconduct 'within the meaning of ... [s] 404(a) ... of the [LP] Act'. Section 404 of the LP Act states, in part, as follows:

Without limiting section 402 or 403, the following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct —

(a) conduct consisting of a contravention of this Act or a previous Act;

...

16 As is apparent from the expression of [1] - [5] of ground 3, the 'contravention[s] of [the LP] Act' alleged by the Committee are contraventions of s 531(2) of the LP Act in relation to, without reasonable excuse, failing to respond to the three notification letters

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<sup>7</sup> Emphasis added.

([1], [3] and [4]) and contraventions of s 520(5) and s 532(3) of the LP Act in relation to, without reasonable excuse, failing to respond to the two summonses ([2] and [5]). For the purpose of carrying out a complaint investigation in relation to a legal practitioner, an investigator may serve a summons on the practitioner concerned under s 520 of the LP Act. Section 520 of the LP Act states, in relevant part, as follows:

- (1) For the purpose of carrying out a complaint investigation in relation to an Australian lawyer, an investigator may, by notice or summons served on the lawyer, require the lawyer to do any one or more of the following —
  - (a) to produce, at or before a specified time and at a specified place, any specified document (or a copy of the document);
  - (b) to produce, at a specified time and at a specified place, any specified document (or a copy of the document);
  - (c) to provide written information on or before a specified date;
  - (d) to otherwise assist in, or cooperate with, the investigation of the complaint in a specified manner.

...

- (3) An investigator may require that information required to be given under subsection (1) or (2) be verified on oath or affirmation or by statutory declaration.

...

- (5) A person who is subject to a requirement under subsection (1), (2) or (3) must comply with the requirement.

Penalty: a fine of \$5 000.

...

17 Section 531 of the LP Act states as follows:

- (1) In this section —

*obstruct* includes hinder, delay, resist or attempt to obstruct.
- (2) A person must not, without reasonable excuse, obstruct or mislead an investigator exercising a power under this Act.

Penalty: a fine of \$10 000.

18 Section 532 of the LP Act states as follows:

- (1) The duties imposed on an Australian lawyer by this section are additional to obligations imposed under other provisions of this Part, whether or not the lawyer is the subject of the investigation, examination or audit concerned.
- (2) An Australian lawyer must not mislead an investigator, the Board or the Complaints Committee in the exercise of —
  - (a) any function under this Part; or
  - (b) any function under a provision of a corresponding law that corresponds to this Part.
- (3) An Australian lawyer who is subject to —
  - (a) a requirement under section 520; or
  - (b) a requirement under provisions of a corresponding law that correspond to that section,

must not, without reasonable excuse, fail to comply with the requirement.

19 As indicated in [1], [3] and [4] of ground 3, the Committee contends that the practitioner's conduct by, without reasonable excuse, failing to respond to the three notification letters involves a contravention of r 50(3) of the *Legal Profession Conduct Rules 2010* (WA) (Conduct Rules). Rule 50 of the Conduct Rules states as follows:

- (1) In this rule —

***regulatory authority*** means a local regulatory authority and an interstate regulatory authority.
- (2) A practitioner must be open and candid in his or her dealings with a regulatory authority.
- (3) A practitioner who is requested by a regulatory authority to provide comments or information in relation to the practitioner's conduct or professional behaviour must —
  - (a) respond to the request within a reasonable time and in any event within 14 days (or such extended time as the regulatory authority may allow); and

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

20 Finally, we note that s 442 of the LP Act enables the Tribunal to make an alternative finding that a person is 'guilty of unsatisfactory professional conduct[,] even though the referral alleged professional misconduct'.

### *Objections to admissibility of evidence*

21 In her response to the Committee's facts and contentions, the practitioner expresses the following contention in relation to ground 2:<sup>8</sup>

[T]he alleged [PTC] [s]tatements (if proven) [were] made at a formally convened Court-ordered mediation [and] is [sic] privileged and such privilege has not been waived by the [p]ractitioner.

22 Furthermore, in response to the paragraphs of the Committee's statement of facts and contentions alleging and referring to the PTC statements, the practitioner states as follows:<sup>9</sup>

Not admitted. In any event the [p]ractitioner says that the PTC having been formally convened and is akin to a Court-ordered mediation and hence anything said or done attracts negotiation privilege and such privilege has not been waived by the [p]ractitioner.

23 When the Committee sought to tender its book of documents containing documents relating to the Magistrates Court proceedings, Mr S Walker, counsel for the practitioner, objected to the tender of the documents 'apparently containing references or implicit references at least to what was said at the pre-trial conference[s] [in the Magistrates Court proceedings]',<sup>10</sup> on the basis that the pre-trial conferences were 'compulsory mediation' under and for the purposes of s 37(2) of the MCCP Act. Section 37(2) of the MCCP Act states as follows:

Evidence of —

- (a) anything said or done; or
- (b) any communication, whether oral or written; or
- (c) any admission made,

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<sup>8</sup> Practitioner's response to applicant's facts and contentions dated 28 August 2018 (Exhibit 2) page 2.

<sup>9</sup> Practitioner's response to applicant's facts and contentions dated 28 August 2018 (Exhibit 2) [37] and [38] at page 8.

<sup>10</sup> ts 21, 13 June 2019. The documents objected to are at pages 65, 68, 72 and 73 of the Legal Profession Complaints Committee book of documents (Exhibit 3).

in the course of, or for the purpose of, attempting to settle a case by compulsory mediation is to be taken to be in confidence and is not admissible in any proceedings before any court, tribunal or body unless subsection (4) applies.

24 In support of the objection to admissibility, Mr Walker referred to the terms of the 'Notice of Pre-Trial Conference Minor Case' issued by the Magistrates Court to the complainant and the practitioner stating:<sup>11</sup>

You are required to attend a pre-trial conference ...

The primary role of the registrar at a pre-trial conference is to attempt to bring the parties to a settlement acceptable to all parties.

...

**You must attend the pre-trial conference in person.**

...

25 Mr Walker made the following submission:<sup>12</sup>

... [T]he inference that should be drawn from the material that the [C]ommittee is producing is that pursuant to [s] 35 [of the MCCP Act] ... the Magistrates Court had ordered that the case be mediated and had appointed a registrar as the mediator, and thus, [s] 37 [of the MCCP Act], I submit, does apply and has been, if you like, established on the material and by a proper inference as applying in this case.

26 For the following reasons, which we gave orally, we ruled that the documents objected to by the practitioner are admissible:<sup>13</sup>

The term "compulsory mediation" is defined in [s] 34 of the [MCCP Act], to mean:

[m]ediation carried out by a mediator in accordance with an order of the [C]ourt and the rules of court[.]

The term "mediator" is defined in the same section to mean, "a mediator appointed or agreed under section 35".

Section 35 [of the MCCP Act] states as follows:

If the [C]ourt orders that a case[,] or any issue arising in it[,] be mediated[—]

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<sup>11</sup> Original emphasis. The Notice of Pre-Trial Conference Minor Case is set out in full at [87] below.

<sup>12</sup> ts 22-23, 13 June 2019.

<sup>13</sup> ts 24-25, 13 June 2019.

- (a) the [C]ourt may appoint a registrar or another person as the mediator; or
- (b) the parties may agree on who is to be the mediator.

On the evidence before the [T]ribunal, there was no ["]compulsory mediation["] within the meaning of [s] 34 of the [MCCP Act]. There was no order made by the Magistrates Court under [s] 35 of the [MCCP Act], that [the] case or an issue arising in the case be mediated[,] and the [C]ourt did not appoint a registrar or another person as mediator. Rather, the evidence in the book of documents at pages 62 and 63 clearly indicates and [we feel an actual] persuasion, that the proceeding in the Magistrates Court was as stated on page 63 in the form of the application or initiating process filed by [the complainant], "a minor case".

The application was made by a [F]orm 6 filed on 25 July 2016. As Mr Yovich [SC, counsel for the Committee] submits, minor cases are a particular category of the jurisdiction of the Magistrates Court dealt with in [Pt] 4 of the [MCCP Act] which defines a ["]minor case["] to be ["]a claim within the jurisdiction of the Court where [—] [(i) the value of the claim or of the relief claimed is not more than the minor cases jurisdictional limit[;<sup>14</sup>] and [(ii) the [claimant] has elected to have the claim dealt with under the minor cases procedure["], as defined in [s] 26 of the [MCCP Act]. It is plain on the face of the document at page 62 of the book of documents [the Form 6 by which the Magistrates Court proceedings was commenced] that the proceeding commenced by [the complainant] against the respondent practitioner, in the Magistrates Court, was a minor case claim, being [at] the jurisdictional limit and [the complainant] having elected to have the claim dealt with under the minor cases procedure. It is clear from page 63 of the book of documents[,] to which Mr Walker draws particular attention, that the Magistrates Court issued a "[N]otice of [P]re-[T]rial [C]onference [M]inor [C]ase".

Although that document states, as Mr Walker points out, "You must attend the pre[-]trial conference in person", it is clear on the face of the document that it was a procedure, namely a pre[-]trial conference[,] in a "minor case". It is also clear beyond any question on the face of the document, that the Magistrates Court did not make an order under [s] 35 of the [MCCP Act], that the case or any issue in the case be mediated. The pre[-]trial conference was not a "compulsory mediation".

Furthermore, ... it is also clear from the orders made by the Magistrates Court on 27 August 2016, at page 66 of the book of documents, adjourning the pre[-]trial conference to 27 September 2016, that the

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<sup>14</sup> The term 'minor cases jurisdictional limit' is relevantly defined in s 3(1) of the MCCP Act to mean 'on and after 1 January 2009, ... \$10 000'.

Magistrates Court did not make an order under [s] 35 of the [MCCP Act,] but rather made an order adjourning the pre[-]trial conference under the minor cases procedure of that [C]ourt.

And furthermore, it is clear from the Magistrates Court order at page 69 of the book of documents made on 27 September 2016 further adjourning the pre[-]trial conference to 22 November 2016, that the [C]ourt did not make an order under [s] 35 of the [MCCP Act] [that] the case or any issue arising in the case be mediated. Rather, on its face, the [C]ourt adjourned the pre[-]trial conference within the minor [cases] jurisdiction of the Magistrates Court. Consequently, [s 37(2)] of the [MCCP Act] is not applicable in relation to the circumstances of this case.

27 Immediately after making this ruling, the Tribunal raised for Mr Walker's consideration 'in fairness ... to your client',<sup>15</sup> 'particularly in relation to [the complainant's] evidence, but [also] more broadly',<sup>16</sup> the terms of s 27 of the MCCP Act, and in particular s 27(1) and s 27(3) of the MCCP Act. Section 27 of the MCCP Act states as follows:

- (1) The primary object of the Court when dealing with a minor case is to attempt to bring the parties to a settlement acceptable to all the parties.
- (2) The Court may, at any stage of the proceedings, do all things and take all such steps as it considers to be appropriate to achieve that primary object.
- (3) Anything said or done by a party for the purpose of attempting to settle a minor case is to be taken to be said or done without prejudice to any evidence or submission that the party —
  - (a) has adduced or made; or
  - (b) may subsequently adduce or make,in or in respect of the proceedings, and the saying or doing of that thing does not disqualify the person or persons constituting the Court from sitting or continuing to deal with the case.
- (4) If the Court is unable to bring the parties to a settlement acceptable to all the parties, the Court must deal with the minor case.

28 Mr Walker subsequently objected to the admissibility of the paragraphs of the complainant's witness statement in which she states

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<sup>15</sup> ts 25, 13 June 2019.

<sup>16</sup> ts 26, 13 June 2019.

that the practitioner made the PTC statements alleged in ground 2,<sup>17</sup> 'primarily' on the basis of s 27 of the MCCP Act and also on the basis that 'I do renew ... or reiterate my submissions about [s] 37 [of the MCCP Act]', although Mr Walker said that 'of course I recognise that the [T]ribunal has ruled against me a short while ago regarding the application of [s] 37 to a pre[-]trial conference of a minor case'.<sup>18</sup> Mr Walker said that 'for the record, and as a formality, I do rely on those submissions about [s] 37'.<sup>19</sup>

29 Mr Walker made essentially two submissions in support of the practitioner's objection under s 27 of the MCCP Act to the admissibility of the parts of the complainant's evidence in which she says that the practitioner made the PTC statements. Firstly, Mr Walker submitted that:<sup>20</sup>

... the section as a whole, particularly subsections 1, 2 and 3, when taken together, clearly demonstrate an intention on the part of the legislature that, so far as minor cases are concerned, it is of great significance to encourage parties to such a case to attempt to come to a settlement, or as subsection 1 says, to be brought, in effect, to a settlement, that is, by the [C]ourt. It is submitted that even before one gets the precise words on which in a moment in the second limb of my submission I will seek to rely – even before one gets there, one readily identifies and easily identifies a clear intention on the part of the legislature that things said or done in a minor case for the purpose of attempting to settle it are to be treated, in my words, confidentially.

And so that provides a foundation for a submission that the legislature has evinced an intention that a mediation privilege be recognised, and that intention, I respectfully submit, is to be [weighed] by this [T]ribunal when considering, particularly by reference to [s] 32 of the SAT Act, whether it is appropriate to permit evidence of something said at a minor case pre[-]trial conference to be heard. We would submit that this is a matter of very considerable weight.

That is to say, the confidential nature of what is said in an attempt to settle a minor case, and that it weighs very heavily in favour of excluding the admission of the evidence, it may be that the [T]ribunal will consider it should conduct the balancing exercise in putting on one side of the scales the confidential nature of what is said at the minor case pre[-]trial conference and the importance of preserving that so as to encourage settlement discussions, against other considerations such as – no doubt Mr Yovich would say, and I think properly if he said it –

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<sup>17</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [58] and [59].

<sup>18</sup> ts 32, 13 June 2019.

<sup>19</sup> ts 32, 13 June 2019.

<sup>20</sup> ts 32-33, 13 June 2019.

the public interest in the [C]ommittee being able to rely on such evidence in order to support ... the allegations contained really in ... ground 2.

But it's our submission that if such a weighing exercise is to be undertaken, then very considerable attention has to be given to the undesirability of undermining a perception that litigants would have in minor case pre[-]trial conferences, a perception that things that they say in the course of settlement discussions may in fact be used in some respect against them in the future. If such an undermining is to occur then the efficacy of pre[-]trial conferences in this setting will be severely or may be severely reduced, I would submit.

30 Mr Walker submitted that:<sup>21</sup>

... the clear character that the [P]arliament has clearly intended that such discussions or statements would have confidentiality, gives rise to a submission that the [Tribunal] would, particularly looking at [s] 32 [of the SAT Act], decline to accept such evidence.

31 Mr Walker's second submission was as follows:<sup>22</sup>

The second limb of my submission here though refers not to those general considerations about legislative intention of confidentiality to be – or things said that such a pre[-]trial conference to be characterised as of a confidential nature, instead I refer now to some of the precise words in subsection 3. ... [F]irst of all, the proposed evidence is of things allegedly said by a party. There can be no doubt about that. Ms Chang being a party to those proceedings in the Magistrates Court.

Anything said, therefore, by her for the purpose of attempting [to settle] that minor case, is to be taken to be said or done without prejudice to any evidence or submission that she [has] adduced or later – I don't rely on that but I do rely on (b) – any evidence or submission that she may subsequently adduce or make in or in respect of the proceedings. My submission here is that [s 27(3)] is not to be construed narrowly so as to mean that it merely has the effect that any submission that she might have subsequently made, or indeed any evidence she might have subsequently adduced in the Magistrates Court, is, in my words, not to be affected by anything said at the pre[-]trial conference.

That's one possible and narrow way of reading the provision. But in my submission, it's far too narrow because in particular as well as not giving sufficient weight to the confidential nature of such things that are said at the pre[-]trial conference. It gives no work to be done so the key words "or in respect of", that is, in or in respect of the proceedings. It would have been simple enough if a narrow meaning was intended

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<sup>21</sup> ts 36, 13 June 2019.

<sup>22</sup> ts 33-35, 13 June 2019.

for the legislature to be able to insert the words, "or in respect of", and for it simply to provide that anything said for the purposes of attempting to settle a minor case is to be taken to be said or done without prejudice to any legal submission that the party may subsequently use or make in the proceedings.

That would be an obvious and straightforward way of expressing and giving content to a notion that a party at a minor case pre[-]trial conference and in confidence that anything they say for the purpose of attempting to settle it is not going to be used against them in further – in a further or future hearing of the minor case. If that's all that was intended and the only target to be achieved by the legislature, then it would not have used the additional words "or in respect of".

In my submission, the insertion of those words evinces an intention that the protection – if I put it that way – to be accorded to a person who says something at a minor case pre[-]trial conference, is to extend beyond the minor case proceeding itself and is to shroud anything said in those circumstances at the pre[-]trial conference with protection from it being used in any derivative or indirect way which is – and such a proposed use would be in respect of the proceeding.

So, specifically in this case, [the complainant] issued proceedings against Ms Chang in the Magistrates Court. [The complainant] says that Ms Chang said things at a pre[-]trial conference which, in my submission, was for the purpose of attempting to settle the minor case, and if the [C]ommittee is permitted to lead the evidence, it will impact upon and be to the prejudice of Ms Chang in this proceeding and this [T]ribunal, which is a proceeding that is in respect of the proceedings in the Magistrates Court.

32 After adjourning to consider the practitioner's objection to the admissibility of the complainant's evidence in relation to the PTC statements and the submissions made in relation to that objection, we returned and said the following:<sup>23</sup>

For four reasons which we will detail fully in writing as part of the [T]ribunal's reasons for decision in relation to this proceeding, the objection to the evidence foreshadowed at paragraphs 58 and 59 of [the complainant's] witness statement of 1 March 2019 is dismissed. The four reasons, in brief outline, to be detailed fully in writing as part of our reasons for determination of this matter, are as follows. ...

33 Our first reason for dismissing the objection to admissibility was that a pre-trial conference in a minor case under Pt 4 of the MCCP Act is not a 'compulsory mediation' under and for the purposes of s 37(2) of the MCCP Act. In addition to the reasons we gave orally, which are set

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<sup>23</sup> ts 42, 13 June 2019.

out at [26] above, we note that s 35 of the MCCP Act (which refers to an order of the Magistrates Court that a case, or an issue arising in it, 'be mediated' and to the appointment by the Magistrates Court of a registrar or another person as the 'mediator') and s 37(2) of the MCCP Act (which prescribes the privilege from admissibility of anything said or done in the course of, or for the purpose of, attempting to settle a case by 'compulsory mediation' in very broad terms, extending to 'any proceedings before any court, tribunal or body ...') are contained in Pt 5 of the MCCP Act, which is entitled 'Mediation', whereas the provisions of the MCCP Act relating to minor cases are contained in Pt 4 of that Act, which is entitled 'Minor case procedure'. Moreover, s 34 of the MCCP Act, which defines the terms 'compulsory mediation' and 'mediator', states that those definitions apply '[i]n this Part [that is, Pt 5 'Mediation'], unless the contrary intention appears'. The fact that s 35 of the MCCP Act, which enables the Magistrates Court to appoint a registrar or another person as the 'mediator', and s 37(2) of the MCCP Act, which prescribes the broad privilege attaching to anything said or done in the course of, or for the purpose of, attempting to settle a case by 'compulsory mediation', are in a different Part of the MCCP Act to the provisions of the MCCP Act concerning minor cases procedure, and, indeed, the fact that s 34 of the MCCP Act defines the terms 'compulsory mediation' and 'mediator' '[i]n this Part [and not elsewhere in the Act]', further supports our determination that the 'pre-trial conferences' which took place in the Magistrates Court proceedings, during the course of which, the complainant says in her evidence, the practitioner made the PTC statements, were not a 'compulsory mediation' and the Registrar conducting the pre-trial conferences was not a 'mediator', as those terms are defined in s 34 of the MCCP Act, and, consequently, the pre-trial conferences were not 'compulsory mediation' within the meaning and for the purposes of s 37(2) of the MCCP Act.

34 We also note that our determination is consistent with the terms of the *Magistrates Court (Minor Cases Procedure) Rules 2005 (WA)* (Minor Cases Rules), which are made pursuant to s 33 of the MCCP Act (contained in Pt 4 of the MCCP Act). Section 33 of the MCCP Act states as follows:

Rules of court made for the purposes of this Part may —

- (a) provide for the procedures to be followed when conducting a minor case;

- (b) specify the circumstances in which any of the Court's powers in Part 3 may be exercised;
- (c) provide that all or some of the general procedure, with or without modifications, applies to minor cases.

35 The Minor Cases Rules recognise and distinguish between a 'pre-trial conference' in a minor case and a 'mediation' in a minor case. The procedures for 'pre-trial conferences' are prescribed in Pt 5 of the Minor Cases Rules (which is entitled 'Pre-trial conferences'), whereas the procedures for mediation are prescribed in Pt 6 of the Minor Cases Rules (which is entitled 'Mediation'). Rule 28(2) of the Minor Cases Rules, which is contained within Pt 5, essentially restates s 27(3) of the MCCP Act.<sup>24</sup> Part 6 of the Minor Cases Rules comprises r 29 - r 32, which state as follows:<sup>25</sup>

**29. Mediation conference**

- (1) If the Court orders you and the other parties to attend before a mediator, you must ensure that a mediation conference before the mediator is arranged.
- (2) A mediation conference must be conducted in private.

**30. Attendance of parties at mediation conferences**

Unless the mediator otherwise approves, you must attend a mediation conference in person.

**31. Outcome of mediation**

If you are the claimant you must, within 14 days after the mediation conference, lodge a notice of the outcome of the mediation in the approved form.

**32. Further pre-trial conference if case not settled**

If the case is not settled at the *mediation conference* a registrar must list the case for a further *pre-trial conference* and notify you and the other parties in writing.

36 The Magistrates Court did not order the complainant and the practitioner to attend 'before a mediator' under r 29(1) of the Minor Cases Rules. Furthermore, the Minor Cases Rules expressly

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<sup>24</sup> The only difference between r 28(2) of the Minor Cases Rules and s 27(3) of the MCCP Act is the substitution of the words 'you or the other party' in place of the words 'the party' immediately before the dash prior to par (a) and par (b) in s 27(3) of the MCCP Act.

<sup>25</sup> Emphasis in bold original. Emphasis in italics added.

distinguish between a 'pre-trial conference', on the one hand, and a 'mediation conference', on the other hand, in the terms of r 32, which states that '[i]f the case is not settled at the *mediation conference* a registrar must list the case for a further *pre-trial conference* and notify you and the other parties in writing'.<sup>26</sup> Plainly, a 'pre-trial conference' is not the same as a 'mediation' under the Minor Cases Rules.

37 Our second reason for dismissing the practitioner's objection to the admissibility of the complainant's evidence that the practitioner made the PTC statements was that the PTC statements were not something said 'for the purpose of attempting to settle a minor case', within the meaning and for the purposes of s 27(3) of the MCCP Act. Indeed, we accept the submission made by Mr P Yovich SC, on behalf of the Committee, that 'they are on their face, words said for the opposite of the purpose of attempting to settle a minor case',<sup>27</sup> because, as we find below, the practitioner made the PTC statements knowingly seeking to mislead the Magistrates Court and the complainant, so as to defer or delay the Magistrates Court proceedings.

38 Our third reason for dismissing the practitioner's objection was that the expression 'in or in respect of the proceedings' in s 27(3) of the MCCP Act does not include vocational disciplinary proceedings in the Tribunal arising out of statements made by a practitioner as a party in a minor case before the Magistrates Court. As we said:<sup>28</sup>

... any evidence or submission that [the practitioner] ... may wish to give, call or make in this disciplinary proceeding in the State Administrative Tribunal is not any evidence or submission that would be made "in or in respect of the proceedings" within the meaning of [s 27(3)] of the [MCCP Act].

39 In our view, the expression 'in or in respect of the proceedings' refers to the minor case proceedings, an appeal arising from those proceedings, a rehearing following a successful appeal, and any supplementary application to the minor case proceedings, such as for enforcement of the outcome of those proceedings. However, vocational disciplinary proceedings in this Tribunal, even if arising in consequence of statements made at a pre-trial conference in a minor case before the Magistrates Court, is not 'in or in respect of the proceedings' in the Magistrates Court. Contrary to the practitioner's submission, this does not involve a 'far too narrow' reading of the words 'in respect of the

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<sup>26</sup> Emphasis added.

<sup>27</sup> ts 36, 13 June 2019.

<sup>28</sup> ts 42, 13 June 2019

proceedings'. Rather, it reflects the grammatical meaning of those words. A vocational disciplinary proceeding is not 'in respect of' a minor case proceeding, even if it arises out of statements made in the minor case proceeding. The vocational disciplinary proceeding is relevantly 'in respect of' the professional regulation of the conduct of the practitioner, not 'in respect of' the minor case proceeding in which she was a party.

40 Furthermore, contrary to the practitioner's submission, the interpretation of s 27(3) of the MCCP Act which we consider is correct does not undermine the utility or purpose of the privilege reflected in that provision. The admissibility in vocational disciplinary proceedings of statements made by a legal practitioner as a party in minor case proceedings before the Magistrates Court, by which the practitioner knowingly sought to mislead the Magistrates Court and the other party to those proceedings, does not harm, much less 'undermine' or 'severely reduce' the 'efficacy' of pre-trial conferences or the 'primary object' of the Magistrates Court, when dealing with a minor case, 'to attempt to bring the parties to a settlement acceptable to all the parties' under s 27(1) of the MCCP Act and the privilege in s 27(3) of the MCCP Act, which is obviously related to the achievement of that object. It is hardly inimical to the efficacy of the minor cases procedures of the Magistrates Court for a legal practitioner, who knowingly seeks to mislead the Court and the other party in that jurisdiction, to face vocational disciplinary proceedings arising in consequence of the practitioner's conduct. To the contrary, such a prospect buttresses the efficacy of the minor cases jurisdiction. Moreover, a 'settlement' achieved by a false and misleading statement by a party is not a settlement that the legislature has evinced an intention to achieve.

41 Our fourth reason for overruling the practitioner's objection to admissibility was:<sup>29</sup>

[F]urthermore[,] and in any case, for the reasons given at paragraphs 83 to 84 of the decision of the [T]ribunal in *Legal Practitioners Complaints Committee [and] Fleming* [2006] WASAT 352 [(2006) 48 SR (WA) 29], with which we respectfully agree and which are, in our view, fully applicable in the context of [s 27(3)] and [s] 37 of the [MCCP Act] as in relation to negotiations privilege at common law.

42 In *Legal Practitioners Complaints Committee and Fleming* [2006] WASAT 352; (2006) 48 SR (WA) 29, the Committee alleged

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<sup>29</sup> ts 42, 13 June 2019.

that Mr Fleming, a legal practitioner, was guilty of unprofessional conduct by, in the course of professional communications with another practitioner seeking to settle a testamentary dispute, making representations to the other practitioner which were, to Mr Fleming's knowledge, misleading. The Tribunal determined that the practitioner's statements were misleading and that, although they were made in the context of negotiations which were subject to negotiations privilege at common law (sometimes called 'without prejudice privilege'), the statements were admissible in professional disciplinary proceedings arising out of the making of those statements. The Tribunal reasoned as follows at [83]-[84]:

83 The public interest in practitioners acting professionally both in the conduct of litigation and in matters ancillary to it is extremely important. The proposition which the practitioner appears to advance is that unless the wrongdoing can be categorised as "unambiguous impropriety", a solicitor can engage in some minor impropriety in the course of without prejudice dealings with impunity. That proposition is clearly untenable. There is no room for unfairness or deception in negotiations for the compromise of litigation, or otherwise in dealings between solicitors.

84 Where an allegation of unprofessional conduct is made in relation to conduct taking place in the course of without prejudice negotiations, the public interest demands that those allegations be properly considered and dealt with. A solicitor is not entitled to be shielded from the allegations simply by asserting the existence of without prejudice privilege.

43 As we said when giving our outline of reasons for dismissing the practitioner's objection to the admissibility of the complainant's evidence as to the making of the PTC statements,<sup>30</sup> we respectfully agree with the Tribunal's decision in *Legal Practitioners Complaints Committee and Fleming* at [83]-[84] and consider that its reasoning is 'fully applicable' in the context of s 27(3) and s 37 of the MCCP Act. Furthermore, the reasoning applies equally whether a practitioner is engaged in proceedings on behalf of a client or in their own matter. Indeed, as the Tribunal observed in *Legal Profession Complaints Committee and A Legal Practitioner* [2013] WASAT 37; (2013) 84 SR (WA) 158 at [28]:

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<sup>30</sup> ts 42, 13 June 2019.

... The case [of professional misconduct] is all the stronger when it is the practitioner's own case which he [or she] is seeking to advance by such means.

44 As counsel for both parties in this case recognised, s 32 of the *State Administrative Tribunal Act 2004* (WA) (SAT Act), which, among other things, concerns evidence in SAT proceedings, contemplates the balancing of competing aspects of public interest, where there is a conflict, in determining whether to admit evidence in proceedings before the Tribunal. Section 32 of the SAT Act includes the following provisions:

...

(2) The *Evidence Act 1906* does not apply to the Tribunal's proceedings and the Tribunal —

(a) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures or the regulations or rules make them apply; and

(b) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

...

(4) The Tribunal may inform itself on any matter as it sees fit.

...

(7) The Tribunal —

(a) is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in a proceeding; ...

45 For the reasons given by the Tribunal in *Legal Practitioners Complaints Committee and Fleming* at [83]-[84], even if it were necessary (which it is not, given out first three reasons for dismissing the objection as to admissibility) to seek to balance competing aspects of public interest in this case between the primary object of the minor cases procedure (or, more generally, the public interest in facilitating the settlement of legal disputes without the need for litigation), on the one hand, and the protection of the public in their dealings with legal practitioners and the maintenance of the proper standards of the legal profession, by referral of a matter arising out of the making of false and

misleading statements by a legal practitioner in seeking to settle a dispute and the determination of such a matter by the Tribunal, on the other hand, in our view, the latter public interest would prevail.

## *Facts*

### **Background facts**

46 The facts of this case are either admitted by the practitioner in her response to the Committee's statement of facts and contentions<sup>31</sup> or, where the practitioner has put the Committee to proof in that document, were not seriously contested by her at the hearing. Although the complainant was cross-examined by counsel for the practitioner, she was not challenged in cross-examination in relation to her credibility or seriously in relation to her recollection of events, and no submission was made on behalf of the practitioner to the effect that the complainant's evidence should not be believed or accepted. We add that we found the complainant to be a credible and truthful witness. She was responsive, measured and consistent in the evidence she gave and, when she did not recall something she was asked about, she immediately said so. Furthermore, the complainant's evidence was not contradicted by any other evidence. Indeed, the practitioner did not give evidence, although ground 2 concerns oral statements alleged to have been made by her at pre-trial conferences in the Magistrates Court proceedings and the complainant gave evidence that the practitioner said words to the effect of the alleged statements, and the practitioner did not call or present any other evidence, with the exception of tendering a single exhibit, being the practitioner's PAYG payment summary for the period 14 September 2015 to 30 June 2016.<sup>32</sup> We, therefore, have no hesitation in accepting the entirety of the complainant's evidence.

47 On the basis of the facts admitted by the practitioner in her response to the Committee's statement of facts and contentions, the evidence of the complainant and the documentary evidence we refer to, we make the following findings of fact.

48 As indicated earlier, the practitioner was admitted to legal practice in Western Australia on 4 February 1985 and has been a registered migration agent since about September 1992.<sup>33</sup> At all material times,

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<sup>31</sup> Practitioner's response to applicant's facts and contentions dated 28 August 2018 (Exhibit 2).

<sup>32</sup> Exhibit 10. Counsel for the practitioner did not refer to this exhibit in his closing submissions.

<sup>33</sup> Legal Profession Complaints Committee statement of facts and contentions (Exhibit 1) [1] and practitioner's response to applicant's facts and contentions (Exhibit 2) [1].

the practitioner was an Australian legal practitioner within the meaning of s 5(a) of the LP Act, and was also a registered migration agent.<sup>34</sup> The practitioner was:

- an employee of James Chong Lawyers (JCL) from 3 July 2012 to 1 May 2015;
- an employee of iLaw Barristers and Solicitors (iLaw) from 4 May 2015 to 21 September 2015; and
- a sole practitioner practising as Christina Chang Lawyers from 17 December 2015 to 7 February 2018.

49 In 2012, the complainant, who was then living with her family in Italy, instructed the practitioner to lodge a temporary working visa application (known as a '457 visa') for her husband and herself, sponsored by an employer which was a restaurant owned and operated by her mother and her mother's husband in Perth. On 15 May 2012, the complainant undertook and passed the IELTS test in Rome. In December 2012, the 457 visa application was granted and the complainant and her family moved from Italy to Perth in January 2013.<sup>35</sup>

50 In August 2013, the complainant met with the practitioner to discuss when and how the complainant's family could apply for a permanent residency visa. The complainant understood that one of the requirements for such an application was that she had to live in Australia for a least two years. Towards the end of 2014, the complainant started preparing the paperwork and assembled the documents for an application for a permanent residency visa for her and her family. Her mother and her mother's husband agreed that their restaurant would act as the employer sponsor for the visa application. The supporting documents for the visa application included the IELTS test. The complainant understood that the IELTS test was only valid for three years and would expire on 15 May 2015.<sup>36</sup>

51 In or about March 2015, the complainant engaged the practitioner, in her capacity as a registered migration agent employed by JCL, to prepare and lodge a permanent residency visa application, on behalf

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<sup>34</sup> Legal Profession Complaints Committee statement of facts and contentions (Exhibit 1) [2] and practitioner's response to applicant's facts and contentions (Exhibit 2) [2].

<sup>35</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [4]-[7]; Legal Profession Complaints Committee supplementary book of documents dated 14 January 2019 (Exhibit 4) page 1.

<sup>36</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [8]-[10].

of the complainant, her husband and their children (visa application), with DIBP. The complainant provided the practitioner with her draft application and supporting documents. The practitioner reviewed the draft application and supporting documents and explained the process for the visa application and what further information and documents the practitioner required.<sup>37</sup>

52 In April 2015, the complainant had a telephone discussion with the practitioner in which the complainant said that she was concerned about the IELTS test expiring and said that she was anxious for the visa application to be lodged shortly. In response, the practitioner said words to the effect:<sup>38</sup>

Don't worry your mark [is] high. It won't be a problem.

53 The practitioner's response gave the complainant 'peace of mind, at least in relation to the IELTS test'.<sup>39</sup>

54 On 23 April 2015, the complainant emailed the practitioner as follows:<sup>40</sup>

Hello Christina,

I'd like to know if there are [sic] some news regarding the visa application. When will we be ready to apply? Can you please tell me how much (more or less) will it cost, fees and honorarium? We are planning a travel [sic] to Italy and really need to calculate my finances as soon as possible.

55 On 30 April 2015, the practitioner wrote the following letter to the complainant:<sup>41</sup>

Dear [complainant],

**EMPLOYER SPONSORED PR VISA**

I refer to your letter dated 7 April 2015 and our telephone conversation today. I apologise for my delayed response due to heavy commitments.

In preparation for visa lodgement, please budget for the following fees:

- DIBP fees primary application \$3,520

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<sup>37</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [11].

<sup>38</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [13].

<sup>39</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [13].

<sup>40</sup> Legal Profession Complaints Committee book of documents dated 1 August 2018 (Exhibit 3) page 6.

<sup>41</sup> Legal Profession Complaints Committee book of documents dated 1 August 2018 (Exhibit 3) page 7.

- Husband \$1,760
- Children (each) \$880

Plus credit card levy (see attached)

In addition to the above you will need to budget for penal clearances, Australian Federal Police clearances for you and your husband and also medical tests.

You can do the medical tests only after the application is lodged because an electronic health referral letter will be generated at the time of lodgement.

You will need to take such referral letter to BUPA to organise your health tests.

Yours faithfully

JAMES CHONG LAWYERS  
Christina Chang  
Solicitor  
Registered Migration Agent (No. 9254751)

56 Also on 30 April 2015, Ms Jacqui Channing from JCL sent the following email to the complainant on behalf of the practitioner, attaching the letter from the practitioner to the complainant set out in the preceding paragraph:<sup>42</sup>

Dear [complainant's first name]

Please see attached.

**IMPORTANT**

PLEASE NOTE that as from 4 May 2015, Ms Christina Chang will commence at a new law practice, namely iLaw Barristers & Solicitors 7-9 Scarborough Beach Road, North Perth WA 6006, Tel: 9444 3300.

To ensure your matter is dealt with with continuity and with as little disruption, subject to any contrary instruction from you, Ms Chang will continue to represent you from her new practice and will be in touch with a new email address as and from 4 May 2015. Accordingly, as and from 4 May 2015, you will officially be represented by iLaw Barristers and Solicitors with Ms Chang as your nominated representative. Ms Chang thanks you in anticipation of your ongoing support.

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<sup>42</sup> Legal Profession Complaints Committee supplementary book of documents (Exhibit 4) page 2.

The principal of this practice Mr Denning Chong extends to you his best wishes as a client of James Chong Lawyers whilst Ms Chang was under its employ.

Kind regards  
Jacqui Channing  
For Christina Chang  
JAMES CHONG LAWYERS  
Commercial | Property & Settlements | Migration | Litigation  
...

57 At 3.15 pm on 14 May 2015, the practitioner emailed the complainant confirming that 'I am now at i-LAW [sic] and will continue with your matter from I-Law [sic]' and stating that 'I will write to you again shortly in preparation for lodgement [of the visa application]'.<sup>43</sup> At 4.41 pm on 14 May 2015, the practitioner emailed the complainant again stating 'Just to let you know DIBP fees increase on 1 July 2015 so you should lodge asap'.<sup>44</sup>

58 Over the period 15 to 18 May 2015, the complainant and the practitioner exchanged emails clarifying that the practitioner would lodge the visa application upon receipt of the DIBP lodgement fee from the complainant.

59 At 9.52 am on 31 May 2015, the complainant emailed the practitioner informing her that 'we finally transferred the amount of [\$]7203 AUD to the account that you provided' and requesting the practitioner to '[p]lease lodge the application as soon as you can'.<sup>45</sup> The practitioner responded to the complainant by email at 12.13 pm that day: 'Will do'.<sup>46</sup>

60 On 8 June 2015, the complainant emailed the practitioner saying 'I'm sure you have it under control, but just following up with the lodgement...is everything ok?'.<sup>47</sup> It does not appear that the practitioner responded to this email.

61 At 7.02 am on 30 June 2015, the complainant emailed the practitioner as follows:<sup>48</sup>

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<sup>43</sup> Legal Profession Complaints Committee book of documents dated 1 August 2018 (Exhibit 3) page 6.

<sup>44</sup> Legal Profession Complaints Committee book of documents dated 1 August 2018 (Exhibit 3) page 9.

<sup>45</sup> Legal Profession Complaints Committee book of documents dated 1 August 2018 (Exhibit 3) page 11.

<sup>46</sup> Legal Profession Complaints Committee book of documents dated 1 August 2018 (Exhibit 3) page 11.

<sup>47</sup> Legal Profession Complaints Committee book of documents dated 1 August 2018 (Exhibit 3) page 12.

<sup>48</sup> Legal Profession Complaints Committee book of documents dated 1 August 2018 (Exhibit 3) page 13.

Before fees rise. I won't pay a dollar more than what I have already paid, so please Christina lodge this application.

62 At 2.36 pm on 30 June 2015, the practitioner responded to the complainant by email as follows:<sup>49</sup>

We are reviewing now but in fact you have not paid me any legal fees at all...the 7k you sent us covers dibp fees only!

63 On 14 July 2015, the practitioner wrote to the complainant confirming that the complainant had 'only provided me with sufficient funds to pay the Immigration Department charges' and stating as follows:<sup>50</sup>

Would you be good enough to send me additional funds which will cover my legal fees as per my original estimate of AU \$2090.00. In addition there is \$1230 for my legal fees to cover [the employer sponsor's] nomination approval so that total amount which I would need for legal fees to do the visa and the nomination is AU \$3300.00.

64 The complainant paid the sum of \$3,300.00 to iLaw's trust account by about 7 August 2015.<sup>51</sup>

65 On 31 August 2015, Australia World Link Pty Ltd (AWL) and the practitioner entered into a written agreement the terms of which provided, among other things, as follows:

- AWL agreed to supply the practitioner, for the purposes of her 'carrying on business as a sole practitioner law practice' (law practice), with, among other things, the use of an office, administrative staff, and litigation-related funding; and
- the practitioner agreed to assign to AWL fees and disbursements paid by clients of the law practice for the period 15 September 2015 to 31 October 2017.<sup>52</sup>

66 By emailed letter on AWL letterhead sent on 8 October 2015, the practitioner wrote to the complainant, her mother and her mother's husband as follows:<sup>53</sup>

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<sup>49</sup> Legal Profession Complaints Committee book of documents dated 1 August 2018 (Exhibit 3) page 13.

<sup>50</sup> Legal Profession Complaints Committee book of documents dated 1 August 2018 (Exhibit 3) page 16.

<sup>51</sup> Legal Profession Complaints Committee book of documents dated 1 August 2018 (Exhibit 3) page 18.

<sup>52</sup> Legal Profession Complaints Committee statement of facts and contentions (Exhibit 1) [11] and practitioner's response to applicant's facts and contentions (Exhibit 2) [11]; Legal Profession Complaints Committee book of documents dated 1 August 2018 (Exhibit 3) pages 20-21.

I advise that I have ceased employment at Ilaw [sic] and now practise on my own account.

Please find attached TRUST TRANSFER AUTHORITY, please sign and send back to me here, so I can progress the visa application[.]

Yours faithfully

Christina Chang  
Barrister, Solicitor and Registered Migration Agent: MARN9254751

67 On 9 October 2015, the complainant, her mother and her mother's husband signed the Trust Transfer Authority.<sup>54</sup> On 16 October 2015, iLaw transferred the sum of \$8,847.70 from its trust account to the bank account held by AWL (being the balance of trust monies held on behalf of the complainant)<sup>55</sup> and AWL issued an invoice to the complainant in the sum of \$9,586.76 inclusive of GST with a handwritten note stating that \$8,847.70 had been '[p]aid' and that 'Balance still to pay [is] \$789.06'.<sup>56</sup> The complainant paid the '[b]alance' in two instalments on 1 December 2015 (\$350) and 7 December 2015 (\$389.06).<sup>57</sup>

68 Also on 16 October 2015, the practitioner lodged the visa application with DIBP, together with supporting documents.

69 On 25 February 2016, the complainant emailed the practitioner saying that she would 'like to check the status of my application' and requesting the DIBP transaction reference number.<sup>58</sup> On 21 March 2016, Nhu Pham, 'legal assistant', emailed the complainant on behalf of the practitioner attaching 'acknowledgement of application received from DIBP as requested'.<sup>59</sup>

70 On 15 April 2016, Nhu Pham emailed the complainant on behalf of the practitioner attaching 'further request from [DIBP] regarding your application [for the visa]' and then stating, in part, as follows:<sup>60</sup>

...

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<sup>53</sup> Legal Profession Complaints Committee statement of facts and contentions (Exhibit 1) [12] and practitioner's response to applicant's facts and contentions (Exhibit 2) [12]; Legal Profession Complaints Committee supplementary book of documents (Exhibit 4) page 3.

<sup>54</sup> Legal Profession Complaints Committee supplementary book of documents (Exhibit 4) page 5.

<sup>55</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) page 35.

<sup>56</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) page 34.

<sup>57</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) pages 37 and 38.

<sup>58</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [31] and Annexure 'EKH1'.

<sup>59</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [32] and Annexure 'EKH2'.

<sup>60</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [33]; Legal Profession Complaints Committee book of documents (Exhibit 3) page 43.

As noted in the request checklist, here is the detail that you need to provide to us asap:

**For yourself:**

- As your IELTS certificate was valid for 3 years from the result date which was 15 May 2012, please send us update of your IELTS test (or any other alternative English test). Please find the details of request in the attached Checklist.

...

71 At 12.05 pm on 18 April 2016, the complainant responded to Nhu Pham's email saying that 'I'm a bit confused regarding your request' as 'I have already provided all the documents required in the attached list to my migration agent, Mrs. Chang'.<sup>61</sup> The practitioner herself responded to the complainant's email at 2.39 pm on the same day confirming that the IELTS test, as well as a number of other documents submitted with the visa application, had expired. The practitioner's email includes the following:<sup>62</sup>

**IELTS TEST SCORE RESULT:**

an IELTS score WAS valid for a two year period for Australian General Skilled Migration (GSM) applications. this IELTS score validity period will be extended to three years. This is part of the numerous changes to the GSM visa program which occurred from July 1, 2012.

72 At 5.27 pm on the same day (18 April 2016), the complainant emailed the practitioner as follows:<sup>63</sup>

How is it possible that you **NEVER** mentioned this possibility?!?!? You lodged in mid-October, so two and a half months before the health examinations expired (and I didn't know they had a validity period of 12 months, because THIS IS NOT MY JOB BUT YOURS) and you didn't say a word, while you were aware that due to heavy workloads, DIBP would have never been able to process the application in such a short time.

I knew about the 3 years validity of IELTS, that's why I recall me to be very anxious about lodging last April, but you were too busy moving from one office to the other and you said that my IELTS was still ok.

Do you understand that they want everything within 28 days and next IELTS test will be held on 30th April and results will be released after

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<sup>61</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) page 43.

<sup>62</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) page 41 (as written).

<sup>63</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) pages 39-40 (original emphasis).

the 9th May? And if I knew I could prepare the test properly, instead of rushing at the very last minute like you ALWAYS have done!

...

I am sorry to speak like this but that's the truth, you have been very inaccurate, it has always been very difficult and stressful to get in touch with you, you refrained in many occasion to deliver proper information to us (I found out that we are entitled to Medicare myself and I didn't know we can't leave Australia while on [a] bridging visa and we were about to plan a Christmas holiday with the risk of losing money), and this is just the last drop.

[Complainant's first name]

73 At 7.00 pm on the same day (18 April 2016), the practitioner responded to the complainant's email as follows:<sup>64</sup>

Dear [complainant's first name]

I will respond to your email tomorrow. Suffice to say I regret that I cannot accept responsibility that you would like to cast upon me and I will explain why in detail tomorrow due to the lateness of the hour.

The 28 day period is STANDARD and if it cannot be met for reasons beyond the control of the applicant, then DIBP will invariably agree to a reasonable period of extension sought. Overseas penals are known to take time and I have NEVER had any requests for extension refused. The same goes for IELTS and medicals - usually all DIBP requires is to be told that they are being arranged and DIBPO [sic] will usually extend a period for compliance.

I know what my job is and I also know what are factors within my control and what are simply not.

Kind regards

74 The practitioner failed to further respond to the complainant's email the following day, as the practitioner said she would.<sup>65</sup>

75 At 7.40 am on 19 April 2016, the complainant emailed the practitioner as follows:<sup>66</sup>

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<sup>64</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) page 39.

<sup>65</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [37].

<sup>66</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) page 39.

Dear Christina,

I understand you don't have responsibility over what happens in DIPB, but I think you have it before the lodgement. Anyway, sorry for being so harsh but I am pretty angry and disappointed at the moment and I made up my mind to dismiss you from your duty for what I am concerned. I will come this morning to your office to collect my file. Again, I regret this nasty situation and wouldn't opt for this solution but I do it for good living's sake.

76 Also on 19 April 2016, the complainant completed Part D of the DIBP Form 956 '[e]nding [the practitioner's] appointment' and signed the '[d]eclaration by client' on that day.<sup>67</sup> The complainant and her husband then attended at the practitioner's office, but the practitioner was not present. The complainant spoke to a staff member who told her that the practitioner would sign the Form 956 and email it to her. On 21 April 2016, the practitioner signed the Form 956 and emailed it to the complainant.<sup>68</sup>

77 The complainant made arrangements to sit another IELTS test on 30 April 2016. On the morning of 30 April 2016, before she sat the test, DIBP telephoned her and informed her that a new IELTS could not be used for the visa application, because a valid test had to be provided at the time of lodgement (that is, on 16 October 2015) and that, unless the complainant withdrew the visa application, it would be rejected by DIBP. The complainant sat the IELTS test on 30 April 2016.<sup>69</sup>

78 After an exchange of emails with DIBP in early May 2016, the complainant withdrew the visa application.<sup>70</sup> The complainant was 'extremely upset and frustrated by DIBP's advice that the [v]isa application would be rejected because of the expired IELTS test'.<sup>71</sup> The complainant:<sup>72</sup>

... couldn't believe that an experienced migration agent and lawyer like [the practitioner] had made such a basic error. I was extremely angry at her, but more importantly [the complainant's husband] and I were tremendously worried about our visa outcome and therefore our future in Australia. I remember days and nights of anxiety and stress.

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<sup>67</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [38]; Legal Profession Complaints Committee supplementary book of documents (Exhibit 4) page 23.

<sup>68</sup> Legal Profession Complaints Committee supplementary book of documents (Exhibit 4) pages 20-23.

<sup>69</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [38].

<sup>70</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [44].

<sup>71</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [41].

<sup>72</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [41].

79 On 4 May 2016, the complainant and her husband emailed the practitioner as follows:<sup>73</sup>

Dear Christina,

[W]e would like to inform you about the situation you left us in, as it is even worse than what we supposed it to be and not just because of the high amount of documents DIBP asked us to provide again that you say you are not responsible for:

...

-IELTS test: if you are not responsible for immigration office procedure and processing time, you definitely are for the correct lodgment of documentation. This is way [sic] we paid you.

DIBP informed us that the IELTS test must be lodged at the time of application and NOT at the time of decision and this is an inadmissible [sic] mistake that cost us the WHOLE application from the beginning. Money that we don't have anymore and money we consider you responsible for.

Therefore, we expect you to take some action in terms of reimbursement.

Regards

[Complainant and her husband]

80 By early June 2016, the complainant had all the necessary updated documents, including the updated IELTS test, and had completed the paperwork for lodging a fresh visa application.<sup>74</sup> On 2 June 2016, the complainant sent the letter of demand to the practitioner by registered post. The complainant did not make a photocopy of the letter of demand. However, as she had not received any response from the practitioner to the letter of demand, on 8 June 2016, the complainant sent the practitioner 'an email version of the letter'<sup>75</sup> 'in identical terms'<sup>76</sup> to the letter of demand as follows:<sup>77</sup>

to the attention of Mrs Christina Chang - IMPORTANT

[Complainant's name and email address] Wed, Jun 8, 2016 at 10:41 PM  
To: Christina Chang <AWL@aus-global.com.au>

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<sup>73</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) page 54.

<sup>74</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [45].

<sup>75</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [48].

<sup>76</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [46].

<sup>77</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) pages 56-57 (emphasis by underlining original; emphasis in italics added).

Australia World Link  
Christina Chang  
475 Charles Street  
North Perth WA

2 June 2016

Dear Mrs Chang,

I am writing you in regards to my Regional Sponsored Migration Scheme Visa Subclass 187.

You have been my migration agent since 2012 when myself and my husband applied for a 457 visa.

Our 457 visa was granted in January 2013 after which we moved to Perth, Western Australia. In 2013 I received a letter from you dated 21 May 2013 instructing us on which pathway to take to get our permanent residency in Australia.

My visa was granted until January 2017 [sic] and I engaged you again in mid 2013 in relation to permanent residency for my family.

You instructed us on what to do and we followed your instructions. We paid a significant amount of money and expected your expertise in return.

You did the paperwork for the nomination for my employer in which you were successful. After that you did the paperwork for the Regional sponsored migration scheme visa subclass 187.

In April 2016 I received correspondence from the immigration department stating that they needed more information such as:

- New medical tests
- Proof of English
- Police clearance from Australia
- Police clearance from Italy

I applied for all the required documents and we had to pay for all of this again. On the day that I was supposed to sit my IELTS test the [D]epartment of Immigration called me and informed me that my IELTS test was not up to date and a new one could not be attached to the existing application, since the application form states clearly that you have to provide an up to date test at the time of lodgment. I had 2 options due to a clear mistake made by you, which were either withdraw my application or wait for it to be rejected. I chose to withdraw my application as I was told that it would have been refused.

Due to the mistakes made by you as a migration expert who I trusted had the expertise to deal with my immigration matter, we are now in the process of lodging yet another application. The mistake was a simple one. It is stated on the applicant documentation checklist and should not have been overseen by an experienced migration agent and lawyer.

I would like to explain to you what the impact on my family has been and what I am seeking from you.

First of all, the emotional stress has been overwhelming. My visa expiries in January 2017 and it is not far away. Our children go to school here and we have a life here. I hope you can imagine some of the stress that we are experiencing plus the time we now have to spend to apply for another visa.

Secondly, there are consequences to not being a permanent resident yet. Such as paying \$4000 for public schooling each year and other benefits we do not receive. Thirdly, the costs that have been made in the process which I will list below.

Cost for migration agent for application \$ 3300

Cost for lodgment of visa \$ 7200

Medicals 2x \$ 2000

Italian Police clearance 2x \$ 150

Cost of second lodgment for visa \$ 7200

Translation of documents 2x \$ 100

Western Australian police clearances \$ 120 (wrong document that you added to the the [sic] application anyway)

Australian Federal police clearances \$ 80

Total \$20150

The total amount is \$ 20150 which is significant. We have been impacted greatly by your mistakes and we are seeking compensation. We recognize that applying for a visa comes at a cost and we are willing to pay for 1 visa application and the documents we would have had to acquire for that visa application. *We would like you to refund us your fee, one application fee and all the documents that we obtained due to your incorrect advice. This comes to the total amount of \$ 10000.*

You can deposit the sum into the following bank account

[BSB and account number]

I have written to you before and you have not responded. Please let me know before 17 June 2015 [sic] in writing. *If I do not hear from you before such time I will assume that you are not willing pay us any compensation.*

*In that case you will leave me no other choice than [to] take legal action.* I am sending a hard copy of this letter to your office. If you have any queries, please do not hesitate to contact me.

Yours sincerely,

[Complainant]

81 On 3 June 2016, the complainant lodged a fresh visa application and paid fees of \$7,277.76 to DIBP.

### **Facts in relation to ground 1**

82 At 1.08 pm on 23 June 2016, the practitioner sent, and the complainant received, the following email, which is the first email referred to in ground 1:<sup>78</sup>

Your Letter

Christina Chang <AWL@aus-global.com.au>

[Complainant's name and email address]

Dear [complainant's first name]

Your recent correspondence (registered post) has been shown to me.

I will notify my Insurers and will await their response. Once I have that I can then respond to you in detail.

Regards

Christina Chang

Barrister, Solicitor and Registered Migration Agent: MARN 9254751

83 At 9.54 pm on 29 June 2016, the complainant sent an email in response to the practitioner's email on 23 June 2016 as follows:<sup>79</sup>

[Complainant's name and email address]

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<sup>78</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [49]; Legal Profession Complaints Committee book of documents (Exhibit 3) page 58.

<sup>79</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [51]; Legal Profession Complaints Committee book of documents (Exhibit 3) page 59 (emphasis added).

To: Christina Chang <AWL@aus-global.com.au>

Dear Christina,

Thank you for your email. *I was going to lodge the paperwork with the [M]agistrates [C]ourt tomorrow* but I will refrain from this if we can work this out between us as that is my preference.

I would like some clarification in regards to your email. I understand that you want to contact your insurer but I cannot see what that has to do with me. I would like to know if you are going to cover the cost that we, my husband and I, have incurred by the mistakes that were made by you. If your insurance will cover that cost for you or not does not concern me.

As I mentioned before I prefer the [sic] resolve this matter between us but I do want this matter to be dealt with swiftly. *Please let me know by the 4th July if you will pay me \$10000 as requested in my letter off [sic] 2nd June 2016. If I do not hear from you I will proceed with lodging the paperwork with the [C]ourt.*

I look forward to your responds [sic].

Kind regards,

[Complainant]

84 Six minutes later, at 10.00 pm on 29 June 2016, the practitioner sent, and the complainant received, the following email, which is the second email referred to in ground 1:<sup>80</sup>

Christina Chang <AWL@aus-global.com.au>

[Complainant's name and email address]

Hi the way insurance works is that all claims must be reported to the insurers and I am required by my insurers not to discuss the claim with you directly. It is nothing personal cheers[.]

85 As the complainant did not receive any further correspondence from the practitioner, at 2.07 pm on 7 July 2016, the complainant sent an email to the practitioner requesting her to '[p]lease let me know asap what is your intention regarding my request'.<sup>81</sup> Two minutes later, at 2.09 pm on 7 July 2016, the practitioner sent, and the complainant

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<sup>80</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [52]; Legal Profession Complaints Committee book of documents (Exhibit 3) page 60.

<sup>81</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [53]; Legal Profession Complaints Committee book of documents (Exhibit 3) page 60.

received, the following email response, which is the third email referred to in ground 1:<sup>82</sup>

Christina Chang <AWL@aus-global.com.au>

[Complainant's name and email address]

Hi I am waiting for [a] reply from my insurer[.] I should hear by next week. They know its [sic] urgent. Regards[.]

## **Facts in relation to ground 2**

86 On 25 July 2016, the complainant commenced the Magistrates Court proceedings against the practitioner by lodging a Form 6 'Minor Case' in the Fremantle Registry of the Magistrates Court seeking '[t]he payment of an amount of money', namely \$10,000 as well as 'Court fee' of \$118.20.<sup>83</sup> As we said in our reasons for dismissing the practitioner's objection to the admissibility of documents relating to the Magistrates Court proceedings, that proceeding was a 'minor case' for the purposes of Pt 4 of the MCCP Act, because the value of the claim was not more than the minor cases jurisdictional limit of \$10,000 and the complainant elected to have the claim dealt with under the minor cases procedure by filing the Form 6 to commence the proceedings. In the Form 6, the complainant stated the 'Details of Claim' as follows:<sup>84</sup>

Parties: [the complainant], Christina Chang.

I have appointed Mrs Christina Chang, a registered migration agent, to prepare, revise and lodge the application for a permanent visa for myself and my husband and our two children.

I trusted her and after various months of waiting, two changes of practice for Mrs Chang and our payment of Immigration fees (7200AUD), fees for documents (1500 AUD approx.) and agent honorarium (3300 AUD), Mrs Chang was finally able to lodge the application in October 2015. In April 2016 though, we have been contacted by the Immigration [D]epartment and informed that our application should have been withdrawn or would be refused as it had been lodged with an expired English test and as clearly stated in the immigration website, English test must be provided at the time of lodgment, not at the time of decision. I had no choice other than withdraw my application, undertake a new test, pay a new application (another 7200 AUD) and new documentation.

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<sup>82</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [54]; Legal Profession Complaints Committee book of documents (Exhibit 3) page 60.

<sup>83</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) page 62 and witness statement of the complainant dated 1 March 2019 (Exhibit 9) [57].

<sup>84</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) page 62.

I trusted Mrs Chang and I thought she was an expert and professional lawyer and migration agent, while in reality she did not even revised [sic] my application before lodging, an oversight that is costing my family lots of money, as well as stress and anxiety regarding our future in Australia.

I therefore ask her or her practice to pay the amount of 10000 AUD as (part of) reimbursement for one [visa] application and her honorarium.

87 On the same day as the complainant commenced the Magistrates Court proceedings, the Court issued a 'Notice of Pre-Trial Conference Minor Case' to the complainant and the practitioner which stated as follows:<sup>85</sup>

You are required to attend a pre-trial conference at the Magistrates Court held at Pre-Trial Conference Room, 8 Holdsworth Street, FREMANTLE on Tuesday the 23rd day of August 2016 at 10:15am.

The primary role of the registrar at a pre-trial conference is to attempt to bring the parties to a settlement acceptable to all parties.

Specifically, the registrar may –

- a) Determine what facts, if any, are agreed by the parties;
- b) Direct the parties to exchange further documents or other information;
- c) Make any other directions necessary to facilitate settlement; and
- d) List the case for a further pre-trial conference.

If the case is not settled the registrar must list the case for trial and notify the parties in writing.

**You must attend the pre-trial conference in person.**

**If you are not ready, or if you are unable to attend the pre-trial conference, you should make a prior application to the Court for an adjournment with the written consent of the other party. If you are unable to obtain the other party's consent you may apply to the Court by lodging a Form 23 Application. Do not leave it until the day of the conference as the Registrar may give default judgment against a party who fails to attend a pre-trial conference.**

If you need an INTERPRETER, you must immediately advise the COURT of the language and dialect you require. Give your name, case number and the date of the conference.

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<sup>85</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) page 63 (original emphasis).

88 At about 10.15 am on 23 August 2016, the complainant and her husband and the practitioner attended a pre-trial conference in the Magistrates Court proceedings before Registrar Louisa Woods at the Fremantle Magistrates Court.<sup>86</sup> During the pre-trial conference, the practitioner said to Registrar Woods words to the effect:<sup>87</sup>

I cannot disclose any details because the matter is in the insurer's hands.  
I will discuss it as soon as I have more information on what they are going to do[.]

89 The practitioner then requested the adjournment of the pre-trial conference.<sup>88</sup> Registrar Woods said words to the effect that she would adjourn the pre-trial conference to allow the practitioner time to talk to the insurer or for the insurer to send their lawyer to the next pre-trial conference, however there would be no further adjournments of the pre-trial conference.<sup>89</sup> Registrar Woods then made the following orders:<sup>90</sup>

1. The Pre-Trial Conference is adjourned to 10.15am on Tuesday, 27 September 2016.
2. No further adjournments of the Pre-Trial Conference.

90 On 27 September 2016, the complainant and her husband attended the Fremantle Magistrates Court for the pre-trial conference listed for 10.15 am on that day.<sup>91</sup> On their arrival, the Registrar informed them that the practitioner was running late and said that the complainant's husband could not attend the pre-trial conference, as he was not a party to the case, even though he was present at the earlier pre-trial conference. The practitioner then arrived and the pre-trial conference proceeded.<sup>92</sup> The practitioner said to the Registrar words to the effect that the practitioner had been dealing with a matter in the Family Court and then said to the Registrar words to the effect that:<sup>93</sup>

I cannot speak about the matter because there is an insurer involved[.]

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<sup>86</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [58a and b].

<sup>87</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [58c].

<sup>88</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [58e].

<sup>89</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [58d] and Legal Profession Complaints Committee book of documents (Exhibit 3) page 65.

<sup>90</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [58a and b] and Legal Profession Complaints Committee book of documents (Exhibit 3) page 66.

<sup>91</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [59a and b].

<sup>92</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [59c].

<sup>93</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [59e].

91 The practitioner then requested a further adjournment of the pre-trial conference.<sup>94</sup> The complainant did not say anything in response to what the practitioner had said to the Registrar. The complainant was nervous being in the pre-trial conference, and thought that, if an insurer was involved and the Registrar appeared to accept what the practitioner said, then 'that must be the way things were done' and there was nothing that she (the complainant) could say.<sup>95</sup> The Registrar then made the following order:<sup>96</sup>

1. The Pre-Trial Conference is adjourned to 10.15am on Tuesday 22 November 2016.

92 On 6 November 2016, the complainant sent the following email to the practitioner:<sup>97</sup>

[I]nsurer's contacts

[Complainant's name and email address]

To: Christina Chang <AWL@aus-global.com.au>

Dear Christina,

[W]e would appreciate if you can provide us the name and contacts of the lawyer from the insurer [sic] company in charge of dealing with our claim.

Thank you for your cooperation.

Kind regards,

[Complainant's first name]

93 The practitioner did not respond to the complainant's email set out in the preceding paragraph.<sup>98</sup>

94 On 22 November 2016, the complainant and her husband attended the Fremantle Magistrates Court for the pre-trial conference listed for 10.15 am that day, but the complainant's husband did not enter the PTC room.<sup>99</sup> The Registrar said to the complainant words to the effect

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<sup>94</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [59e].

<sup>95</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [59f].

<sup>96</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [59g] and Legal Profession Complaints Committee book of documents (Exhibit 3) page 69.

<sup>97</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [60] and Legal Profession Complaints Committee book of documents (Exhibit 3) page 70.

<sup>98</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [60].

<sup>99</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [61].

that the practitioner had left a message with the Court that she was unwell and was unable to attend that day.<sup>100</sup> The Registrar then said to the complainant words to the effect that she would enter judgment against the practitioner, because the practitioner had been 'given many chances to defend the claim'.<sup>101</sup> The Registrar then made the following order:<sup>102</sup>

1. Judgment for [the complainant] against [the practitioner] in the sum of \$10,118.20 inclusive of costs and interest.

95 As at the date of the complainant's witness statement (1 March 2019), the practitioner had not paid, or offered to pay, any of the judgment sum of \$10,118.20.<sup>103</sup> As at the date of her witness statement, the complainant had not taken any steps to enforce the judgment, initially because she believed that the practitioner was 'obliged to pay' and, after the complainant found out that she had to apply to enforce the judgment herself, she did not have 'the time or energy to do the necessary research and the Court paperwork'.<sup>104</sup>

### **Facts in relation to ground 3**

96 On 20 January 2017, the complainant made a complaint about the practitioner to the Committee under s 410 of the LP Act. Section 410(1)(e) of the LP Act enables a complaint about an Australian legal practitioner to be made by 'any ... person who has or had a direct personal interest in the matters alleged in the complaint'.

97 By letter dated 15 September 2017, the Committee formally notified the practitioner of, and requested her submissions in relation to, the Committee's investigation of the complaint made by the complainant about the practitioner (first notification letter).<sup>105</sup> Among other things, the first notification letter set out the email statements, which are the subject of ground 1, and the PTC statements, which are the subject of ground 2. In relation to the 'nature of the complaint', the letter refers to 'possible unsatisfactory professional conduct or professional misconduct', including '[p]ossibly falsely representing to the [R]egistrar of the Magistrates Court and the client' at the pre-trial conferences on 23 August 2016 and 27 September 2016 'that you could

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<sup>100</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [61a].

<sup>101</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [61b].

<sup>102</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [61c] and Legal Profession Complaints Committee book of documents (Exhibit 3) page 74.

<sup>103</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [63a].

<sup>104</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [63d].

<sup>105</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) pages 103-107.

not discuss the circumstances of the Claim ... because the matter was being dealt with by your insurer when you had not, in fact, notified your insurer of the Claim'.<sup>106</sup> The first notification letter then states as follows:<sup>107</sup>

You have the right to make submissions to the Committee about the complaint and you are requested to do so.

Please provide your submissions including such facts and explanations as will enable the Committee to give consideration to the complaint by **4pm on Thursday, 5 October 2017.**

With your submissions, you are reminded that:

- You must be open and candid in your dealings with the Legal Profession Complaints Committee: *Legal Profession Conduct Rules 2010* (WA), Rule 50(2).
- You must provide a full and accurate account of your conduct: *Legal Profession Conduct Rules 2010* (WA), Rule 50 (3).

98 Enclosed with the first notification letter was a Summons to Produce Documents dated 15 September 2017 issued by the Committee to the practitioner under s 520(1)(a) of the LP Act (first summons). The first summons required the practitioner to produce at or before 4.00 pm on Thursday 5 October 2017 to the Law Complaints Officer at the Committee '[a]ll your entire original files and all documents held by you and [AWL]' relating to the visa application and the Magistrates Court proceedings, including:<sup>108</sup>

(a) all correspondence and communications (including email communications) including with your insurer or insurers (including but not limited to Law Mutual);

...

(e) your notification or notifications to your insurer (including, but not limited to, Law Mutual) of the [complainant's] claim seeking compensation in relation to the work performed by you in the matter and/or in relation to the [Magistrates Court] proceedings;

...

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<sup>106</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) pages 105-106.

<sup>107</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) page 106 (original emphasis, as written).

<sup>108</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) pages 108-109.

- (g) all correspondence between you and your insurer or insurers (including, but not limited to, Law Mutual) regarding the matter and/or the [Magistrates Court] proceedings, including file notes recording the contents of telephone discussions;

...

99 The first notification letter and the first summons were sent to the practitioner by registered post to the address of the practitioner's legal practice (and delivered to that address on 19 September 2017) and by email to the email address of her legal practice.<sup>109</sup> The practitioner admits that she received the first notification letter and the first summons.<sup>110</sup> As indicated earlier, the first notification letter requested the practitioner's submissions in relation to the complaint to be provided by 4.00 pm on Thursday 5 October 2017. The first summons required the practitioner to provide the documents sought by the same time and date. The Committee contends - and the practitioner admits - that she failed to respond to the first notification letter and to the first summons within the period specified in those documents or subsequently.<sup>111</sup>

100 By letter dated 17 October 2017, the Committee formally notified the practitioner of, and requested her submissions in relation to, a conduct investigation commenced on the Committee's own initiative, under s 421 of the LP Act, in relation to the practitioner's failure to respond to the first notification letter and the first summons (second notification letter).<sup>112</sup> The second notification letter concludes as follows:<sup>113</sup>

You have a right to make submissions to the Committee about your conduct and are requested to do so.

...

Please provide your written submissions including such facts and explanations as will enable the Committee to give consideration to all 6 aspects of your conduct by **4 pm on Tuesday, 7 November 2017.**

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<sup>109</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) pages 103 and 110.

<sup>110</sup> Practitioner's response to applicant's facts and contentions dated 28 August 2018 (Exhibit 2) pages 3 and 10.

<sup>111</sup> Legal Professional Complaints Committee statement of facts and contentions (Exhibit 1) [54] and Practitioner's response to applicant's facts and contentions dated 28 August 2018 (Exhibit 2) pages 3 and 10.

<sup>112</sup> Legal Professional Complaints Committee book of documents (Exhibit 3) pages 111-113.

<sup>113</sup> Legal Professional Complaints Committee book of documents (Exhibit 3) pages 112-113 (original emphasis).

If your submissions are not received by that date the complaint and conduct investigation may be referred to the Committee for determination without further notice to you.

101 The second notification letter was sent to the practitioner by registered post to the address of the practitioner's legal practice (and was delivered to that address on 19 October 2017) and by email to the email address of AWL.<sup>114</sup> The Committee contends - and the practitioner admits - that the practitioner did not respond to the second notification letter by 7 November 2017 or subsequently.<sup>115</sup>

102 By letter dated 15 November 2017, the Committee formally notified the practitioner of, and requested her submissions in relation to, a conduct investigation commenced on the Committee's own initiative, under s 421 of the LP Act, in relation to the practitioner's failure to respond to the second notification letter and again requested the practitioner's submissions in relation to the complainant's complaint about the practitioner and the conduct investigation in relation to the practitioner's failure to respond to the first notification letter (third notification letter).<sup>116</sup> The third notification letter states, in part, as follows:<sup>117</sup>

You have the right to make submissions to the Committee about the complaint (as set out in paragraphs 1 to 5, above) and the conduct investigation (as set out in paragraphs 6 and 7, above) and you are requested to do so.

Please provide your submissions, including such facts and explanations as will enable the Committee to give consideration to the complaint and the conduct investigation by 4pm on 6 December 2017.

With your submissions, you are reminded that:

- You must be open and candid in your dealings with the Legal Profession Complaints Committee: Rule 50(2) of the Conduct Rules.
- You must provide a full and accurate account of your conduct: Rule 50(3) of the Conduct Rules.

103 Enclosed with the third notification letter were copies of the first notification letter, the first summons and the second notification letter,

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<sup>114</sup> Legal Professional Complaints Committee book of documents (Exhibit 3) page 114.

<sup>115</sup> Legal Professional Complaints Committee statement of facts and contentions (Exhibit 1) [58] and Practitioner's response to applicant's facts and contentions dated 28 August 2018 (Exhibit 2) pages 3 and 10.

<sup>116</sup> Legal Professional Complaints Committee book of documents (Exhibit 3) pages 116-119.

<sup>117</sup> Legal Professional Complaints Committee book of documents (Exhibit 3) pages 118.

together with a Summons to Produce Documents and Provide Written Information Verified by Statutory Declaration dated 15 November 2017 issued by the Committee to the practitioner under s 520(1)(a), (c) and (d) and 520(3) of the LP Act (second summons).<sup>118</sup> The second summons required the practitioner to produce to the Law Complaints Officer at the Committee by 4.00 pm on 6 December 2017:<sup>119</sup>

1. All your original files and all documents held by you and [AWL] relating to you acting for [the complainant] in relation to ... [the] visa application ... and [the] Magistrates Court ... proceedings[.] ...
2. All documents held by you and AWL relating to notification or notifications made by or on behalf of you and/or AWL to an insurer or insurers (including, but not limited to, Law Mutual) in relation to the [complainant's] claim for compensation set out in her email to you/AWL dated 8 June 2016 regarding the work performed by you in the matter and/or in relation to the [Magistrates Court] proceedings (together, the **Claim**) and the management of the Claim by the insurer or insurers[.] ... [and]
3. In respect of the notification or notifications made by or on behalf of you and/or AWL to an insurer or insurers (including, but not limited to, Law Mutual) in relation to the Claim and the management of the Claim by the insurer or insurers, set out in writing:
  - (a) the name/s of the insurer or insurers which were notified of the claim[.]

...

(second summons)

104 The third notification letter and the second summons were served personally on the practitioner at the address of her legal practice at 4.58 pm on 17 November 2017.<sup>120</sup>

105 As indicated earlier, the practitioner was requested to provide submissions in relation to her conduct in the third notification letter by 4.00 pm on 6 December 2017 and was required by the second summons to provide the documents and information specified by the same time and date. The Committee contends - and the practitioner admits - that

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<sup>118</sup> Legal Professional Complaints Committee book of documents (Exhibit 3) pages 120-122.

<sup>119</sup> Legal Professional Complaints Committee book of documents (Exhibit 3) pages 120-122 (original emphasis).

<sup>120</sup> Statutory Declaration of Sheryl Lorraine Harrison dated 4 December 2017 (Legal Profession Complaints Committee book of documents (Exhibit 3) page 124).

she did not respond to the third notification letter or comply with the second summons by 6 December 2017 or subsequently.<sup>121</sup>

***Ground 1 - Knowingly seeking to mislead the complainant***

**Ground 1**

106 As indicated earlier, ground 1 alleges engagement in professional misconduct against the practitioner in the following terms:<sup>122</sup>

That the practitioner, CHRISTINA MARIE CHANG (**practitioner**), between 23 June 2016 and 7 July 2016, in the course of corresponding with a former client, [the complainant], in response to a letter of demand from [the complainant] dated 2 June 2016 for a refund of \$10,000 for fees paid by [the complainant] in relation to an unsuccessful visa application the practitioner had prepared and lodged on behalf of [the complainant] and her family on 16 October 2015 (**Claim**), the practitioner engaged in professional misconduct within the meaning of [s] 403 and [s] 438 of the *Legal Profession Act 2008* (WA) (**Act**) in that her conduct would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, and further and alternatively, would justify a finding that she is not a fit and proper person to engage in legal practice, by preparing and sending:

1. an email to [the complainant] dated 23 June 2016 in which she stated "*I will notify my Insurers and will await their response. Once I have that I can then respond to you in detail*";
2. an email to [the complainant] dated 29 June 2016 in which she stated "*Hi the way insurance works is that all claims must be reported to the insurers and I am required by my insurers not to discuss the claim with you directly*";
3. an email to [the complainant] dated 7 July 2016 in which she stated "*Hi I am waiting for [a] reply from my insurer[.] I should hear by next week. They know its [sic] urgent*",

(together, **the email statements**)

in circumstances where:

- (a) the email statements were false and misleading, as, in truth, at no time between 23 June 2016 and 7 July 2016 did the practitioner notify, or correspond with, any insurer or insurers regarding the Claim;

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<sup>121</sup> Legal Professional Complaints Committee statement of facts and contentions (Exhibit 1) [63] and Practitioner's response to applicant's facts and contentions dated 28 August 2018 (Exhibit 2) pages 3 and 10.

<sup>122</sup> Further Amended Annexure A to Application dated and filed 14 June 2019 (Exhibit 1) page 1 (original emphasis).

- (b) the practitioner knew the email statements were false and misleading and intended that [the complainant] be misled by the email statements, so as to defer or delay [the complainant] from commencing proceedings against the practitioner in respect of the Claim.

### Issues for determination in relation to ground 1

107 The following four principal issues arise for determination in relation to ground 1:

1. Whether the email statements were made by the practitioner.
2. Whether the email statements were false and misleading.
3. Whether the practitioner knew that the email statements were false and misleading and intended that the complainant be misled by the email statements, so as to defer or delay the complainant from commencing proceedings against the practitioner in respect of the claim.
4. Whether the practitioner engaged in professional misconduct by making the email statements.

108 We will address each of these issues in turn.

### Were the email statements made by the practitioner?

109 We are satisfied on a balance of probabilities and feel an actual persuasion (in accordance with the *Briginshaw* approach) on the documentary evidence reproducing the three emails<sup>123</sup> and the complainant's evidence that she received the emails from the practitioner at the time and date stated on the relevant email that the practitioner prepared and sent the emails and made the email statements alleged in ground 1.

110 The email statements were emailed from the practitioner's email address (AWL@aus-global.com.au) to the complainant's email address. The email containing the first email statement on 23 June 2016 was responsive to the letter of demand which had been sent by the complainant to the practitioner by registered post ('Your recent

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<sup>123</sup> See [82]-[85] above.

correspondence (registered post) has been shown to me') and concluded with the sign-off 'Regards Christina Chang'. The emails containing the second and third email statements on 29 June 2016 and 7 July 2016, respectively, were each responsive to emails sent shortly before by the complainant to the practitioner. Furthermore, there is no evidence suggesting that anyone other than the practitioner sent the emails containing the three email statements. There is therefore absolutely no doubt on the evidence that the practitioner prepared and sent the three emails conveying the email statements. Indeed, although the practitioner did not formally admit that she made the email statements, in closing submissions made on her behalf, Mr Walker frankly conceded that:<sup>124</sup>

... there's no contest, as will be apparent to the [T]ribunal members, that indeed the three emails were prepared and sent [by the practitioner].

### **Were the email statements false and misleading?**

111 The practitioner does not admit that the email statements were false and misleading. However, we are satisfied on a balance of probabilities and feel an actual persuasion on the evidence (in accordance with the *Briginshaw* approach) that the email statements were false and misleading. We accept the Committee's submission that the email statements are to be considered 'in their totality in the meaning that they convey' and that:<sup>125</sup>

... [t]hey convey the meaning that [the practitioner] had been in contact with her insurer, [and] that her insurer had told her that she was not to discuss the matter. In truth, the Committee submits, the evidence is overwhelming that [the practitioner] had not been in contact with her insurer.

112 During the period from 30 September 2015 to 4.00 pm on 1 October 2016 (which includes the period between 23 June 2016 and 7 July 2016 during which the practitioner made the email statements), the practitioner held registered migration agents professional indemnity insurance with AAI Limited trading as Vero Insurance under a Certificate of Currency issued by Glenowar Pty Ltd trading as Fenton Green & Co (Fenton Green professional indemnity insurance policy). The Certificate of Currency for the Fenton Green professional

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<sup>124</sup> ts 72, 13 June 2019.

<sup>125</sup> ts 58, 13 June 2019.

indemnity insurance policy which was held by the practitioner during the relevant period is reproduced below:<sup>126</sup>

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**CERTIFICATE OF CURRENCY**

  
**Fenton Green.**

**REGISTERED MIGRATION AGENTS PROFESSIONAL INDEMNITY & OPTIONAL PUBLIC LIABILITY INSURANCE**

Policyholder: Christina Marie CHANG

Registered Agents: 

Name	Surname	MARA	MIA
Christina Marie	CHANG	9254751	

Policy Period: FROM September 30, 2015 TO 4:00 PM October 01, 2016

The Insurer: AAI Limited ABN 48 005 297 807 trading as Vero Insurance

Policy Number: LP5018938616-00003575

Professional Services: The provision of:

- Registered Migration Agent services in respect of Immigration Assistance performed pursuant to Section 276 of the Migration Act 1958 (as amended);
- Migration Education and Training Services
- Employment skill assessment and matching application services
- Education services by Affiliate Members of the MIA
- Translation and interpretation services by NAATI accredited translators and interpreters;
- General referral services

**SECTION A: PROFESSIONAL INDEMNITY INSURANCE**

Limit of Indemnity: \$500,000 each and every claim  
Maximum Aggregate Limit of Indemnity: \$1,500,000  
Basis of Limit: Costs in Addition

Basis of Limit: Costs in Addition


Excess: Nil

Public Relations Expenses: \$1,000 each and every Adverse Publicity Event  
Excess:

Retroactive Date: Unlimited, excluding known claims and circumstances

Endorsements: Nil

Subject to the terms and conditions of the policy schedule, wording & endorsements.



Glenowar Pty Ltd t/as Fenton Green & co  
ABN 14 074 776 631 AFSL 247258

E. & O.E.

N.B.: This Confirmation of Insurance is issued as a matter of information only and confers no rights upon the holder. This Confirmation of Insurance does not amend, extend or alter the coverage afforded by the Policy / Policies listed.

Reference: wvf5NvyjQzIG85W3G4vmlsN2

Date stamp: Wednesday, 30 September 2015 @ 3:12 PM

Glenowar Pty. Ltd. t/as Fenton Green & co. ABN 14 074 776 631 AFSL Licence NO. 247258

<sup>126</sup> Legal Profession Complaints Committee supplementary book of documents dated 14 June 2019 (Exhibit 4) page 24 and Legal Profession Complaints Committee further supplementary book of documents dated 15 May 2019 (Exhibit 5) page 87.

113 On 22 February 2019, on the application of the Committee, the Tribunal issued a Summons to Witness to The Proper Officer, Glenowar Pty Ltd trading as Fenton Green & Co seeking production of the following documents:<sup>127</sup>

1. All documents relating to any notification(s) made by or on behalf of Christina Marie Chang ("Ms Chang") and/or Australia World Link Pty Ltd t/as Australia World Link ("AWL") regarding:
  - (a) a claim for compensation by [the complainant] ("[the complainant]") as particularised in a letter from [the complainant] to Ms Chang dated 2 June 2016 and/or an email from [the complainant] to Ms Chang dated 8 June 2016;
  - (b) Magistrates Court of Western Australia proceedings case no. [Magistrates Court proceedings] commenced by [the complainant] against Ms Chang filed on 26 July 2016 ("Proceedings"); and/or
  - (c) a judgment sum of \$10,118.20 entered against Ms Chang in the Proceedings on 22 November 2016, (together, the "Claim")

and the management of the Claim, including but not limited to:

- (i) any grant or denial of indemnity;
  - (ii) all correspondence and communications (including emails and telephone attendances) with Ms Chang and/or AWL staff in hard copy and electronic form;
  - (iii) all telephone records showing any telephone calls made by Ms Chang and/or AWL staff.
2. The policy schedule, wording, and endorsements applicable to each of professional indemnity insurance policy no. LPS018938616-00003575, LPS019735298-00004631 and LPS020541833-00005591 issued to Ms Chang.

114 On 4 March 2019, Fenton Green produced documents in answer to the Summons to Witness by email. In the covering email to the

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<sup>127</sup> Exhibit 8.

Executive Officer to the Tribunal, Mr Michael Drever, Account Executive at Fenton Green stated as follows:<sup>128</sup>

To the Executive office of SAT,

Please find the requested documents below attached for you to review:

- Ms Chang's completed proposal form
- policy schedule for 2016-2017
- policy schedule for 2017-2018
- policy schedule for 2018-2019
- policy wording
- Email from Vero regarding issuing of documents
- Email from Vero confirming to provide terms for Ms Chang when she first applied for cover

*To date we have no correspondence from Ms Chang in relation to any claim notification relating to [the complainant]. I have confirmed this with the Vero claims team.*

Should you require anything further please let me know.

Kind regards,

**Michael Drever**  
Account Executive

115 The documents produced by Fenton Green in answer to the Summons to Witness do not include any claim notification or correspondence relating to the complainant, as the covering email states.

116 It is highly unlikely that the practitioner held more than one policy of professional indemnity insurance as a registered migration agent during the currency of the Fenton Green professional indemnity insurance policy. Indeed, when the practitioner filled out the proposal form for 'registered migration agents professional indemnity & optional public liability insurance' with Glenowar Pty Ltd trading as Fenton Green & Co on 14 November 2016 for the entities 'Christina Marie CHANG and Australia World Link', which insurance was granted to the practitioner and AWL from 14 November 2016 to 4.00 pm on 1 December 2017, the practitioner answered and declared in response to

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<sup>128</sup> Legal Profession Complaints Committee supplementary further book of documents dated 15 May 2019 (Exhibit 5) page 51 (emphasis in bold original; emphasis in italics added).

a question on the proposal form 'Do you have Professional Indemnity Insurance Cover currently in place?': 'No'.<sup>129</sup>

117 Although the practitioner also held professional indemnity insurance as a legal practitioner with Law Mutual (WA) between 19 October 2015 and 30 June 2016 and between 30 June 2016 and 30 June 2017, as we said earlier, the complainant retained the practitioner as a registered migration agent, not as a legal practitioner. Furthermore, on 15 February 2019, on the application of the Committee, the Tribunal issued a Summons to Witness to the Manager Claims of Law Mutual (WA) seeking production of the following documents:<sup>130</sup>

1. All documents relating to any notification(s) made by or on behalf of Christina Marie Chang ("Ms Chang") regarding:
  - (a) a claim for compensation by [the complainant] ("the complainant") as particularised in a letter from [the complainant] to Ms Chang dated 2 June 2016 and/or an email from [the complainant] to Ms Chang dated 8 June 2016;
  - (b) Magistrates Court of Western Australia proceedings case no. [Magistrates Court proceedings] commenced by [the complainant] against Ms Chang filed on 26 July 2016 ("Proceedings"); and/or
  - (c) a judgment sum of \$10,118.20 entered against Ms Chang in the Proceedings on 22 November 2016, (together, the "Claim")

and the management of the Claim, including but not limited to:

- (i) any grant or denial of indemnity;
  - (ii) all correspondence and communications (including emails and telephone attendances) with Ms Chang and/or her staff in hard copy and electronic form;
  - (iii) all telephone records showing any telephone calls made by Ms Chang and/or her staff.
2. The policy schedule, wording, and endorsements applicable to the professional indemnity insurance policies issued to by Law

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<sup>129</sup> Legal Profession Complaints Committee further supplementary book of documents dated 15 May 2019 (Exhibit 5) page 52.

<sup>130</sup> Exhibit 7.

Mutual (WA) to Ms Chang covering the period 2 June 2016 to 7 February 2018.

118 On 1 March 2019, Law Mutual (WA) produced documents in answer to the Summons to Witness. Law Mutual (WA) did not produce any documents in response to par 1 of the Summons. In a covering letter to the Tribunal enclosing documents in response to par 2 of the Summons, the Manager Claims of Law Mutual (WA) said the following:<sup>131</sup>

Ms Chang has not notified Law Mutual (WA) in respect to a claim for compensation by [the complainant] and no such claim has been registered on Law Mutual (WA)'s database. There is no record of any correspondence and communications (either by emails, letters or telephone calls) received from Ms Chang and/or her staff in respect to a claim by [the complainant].

119 On the evidence referred to at [112]-[118] above, we are satisfied on a balance of probabilities and feel an actual persuasion (in accordance with the *Briginshaw* approach) that the email statements were false and misleading, as, in truth, at no time between 23 June 2016 and 7 July 2016 did the practitioner notify, or correspond with, any insurer or insurers regarding the claim. The fact that the practitioner failed to respond to the complainant's request in her email of 6 November 2016 for the insurer's lawyer's details 'in charge of dealing with our claim' also supports this finding.<sup>132</sup>

120 As indicated earlier, the practitioner did not give evidence or present any evidence other than a PAYG payment summary. Furthermore, it was not contended on her behalf that there is any evidence that she notified, or corresponded with, any insurer or insurers regarding the claim between 23 June 2016 and 7 July 2016, or at any other time. Rather, Mr Walker submits, on behalf of the practitioner, that the Committee:<sup>133</sup>

... stands or falls on ground 1 by reference to whether it establishes that *each and all* of the three emails were false and misleading.

121 In particular, Mr Walker submits that the statement made by the practitioner in the email dated 23 June 2016 ('I will notify my Insurers and will await their response. Once I have that I can then respond to

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<sup>131</sup> Legal Profession Complaints Committee further supplementary book of documents dated 15 May 2019 (Exhibit 5) page 1.

<sup>132</sup> See [92]-[93] above.

<sup>133</sup> ts 76, 13 June 2019 (emphasis added).

you in detail') is 'a statement of ... future intent'<sup>134</sup> and is, therefore, 'incapable of being false and misleading'.<sup>135</sup> In relation to the statement in the email dated 29 June 2016 ('Hi the way insurance works is that all claims must be reported to the insurers and I am required by my insurers not to discuss the claim with you directly'), Mr Walker submits that it:<sup>136</sup>

is of a different character, but, likewise, in my submission, [it] does not express the, or by invitation, claim or suggest that the practitioner had notified or corresponded with any insurer or insurers, let alone between the identified dates.

...

It's capable of making sense and of being read as a statement about what would happen, or will happen, or may happen if an insurance claim or a claim is made on the insurer. And it sits comfortably with the earlier email statement in subparagraph 1 made six days earlier:

I will notify.

It really builds upon that and is conformable with it.

122 In relation to the statement made in the practitioner's email on 7 July 2016 ('Hi I am waiting for [a] reply from my insurer[.] I should hear by next week. They know its [sic] urgent.'), Mr Walker submits:<sup>137</sup>

... email 3 in what it implies is – the [T]ribunal may well find that it's misleading.

I would submit it's not false, it implies that a claim has been made, it doesn't expressly assert it. And if this [T]ribunal came to the conclusion that email 3 was misleading but not false, then I submit it follows that it's not established that that email statement, the third one, was both false and misleading. And that's the necessary conclusion for the [T]ribunal to find that ground 1 is made out.

123 Mr Walker also submits in relation to the practitioner's email dated 7 July 2016 that the Tribunal 'needs to consider whether it clearly establishes the statement', given that it is 'a casual and hurriedly put together email'.<sup>138</sup>

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<sup>134</sup> ts 72, 13 June 2019.

<sup>135</sup> ts 73, 13 June 2019.

<sup>136</sup> ts 73, 13 June 2019.

<sup>137</sup> ts 76, 13 June 2019.

<sup>138</sup> ts 74, 13 June 2019.

124 However, as the Committee submits, it is not open to 'compartmentalise and sever the statements relied upon' in the manner contended by the practitioner.<sup>139</sup> As the Committee submits:<sup>140</sup>

The [C]ommittee's pleaded case is that in relation to ground 1, the email statements together were false and misleading because, together, in combination, they created a false and misleading impression that [the practitioner] had contacted an insurer and the insurer had told [her] certain things.

125 In our view, the email statements, which, as the Committee submits, are pleaded in relation to ground 1 together, were plainly false and misleading, because, together and in combination, 'they created a false and misleading impression that [the practitioner] had contacted an insurer and the insurer had told [her] certain things', namely that she may not discuss the claim with the complainant directly. This was false and misleading, because the practitioner had not contacted her professional indemnity insurer during the relevant period, or subsequently. Read as they are pleaded, collectively, the email statements were false and misleading.

126 Furthermore, we do not accept the practitioner's submission that the second email is 'capable of making sense and of being read as a statement about what would happen, or will happen, or may happen if an insurance claim or a claim is made on the insurer'.<sup>141</sup> In our view, the clear implication from the use of the present tense and the definite article 'the' before 'claim' in the statement 'I am required by my insurers not to discuss the claim with you directly' is that the practitioner had already notified her insurers of 'the claim' that had been made by the complainant in the letter of demand and that the practitioner was required 'by my insurers' not to discuss the complainant's claim made in the letter of demand with the complainant directly. This was false and misleading, because the practitioner had not, in fact, notified her insurer of the claim or corresponded with the insurer in relation to the claim.

127 We also do not accept the practitioner's submission that the statement made in the email dated 7 July 2016 'was misleading but not false', because 'it doesn't expressly assert' that a claim had been made on the practitioner's insurer. The only reasonable inference from the practitioner's words 'Hi I am waiting for [a] reply from my insurer' and 'I should hear by next week' is that she had notified the insurer of the

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<sup>139</sup> ts 92, 13 June 2019.

<sup>140</sup> ts 92-93, 13 June 2019.

<sup>141</sup> ts 73, 13 June 2019.

complainant's claim and was in correspondence with the insurer about that claim.

128 Finally, the fact that the practitioner's email of 7 July 2016 (and also her email of 29 June 2016) was 'casual and hurriedly put together' does not affect our finding that the email statements, taken together, were false and misleading. Although the expression is 'casual' and the emails were sent shortly after the complainant's emails to which they replied were received, we have no doubt that the emails of 29 June 2016 and 7 July 2016 'clearly establish the statement[s]' set out in those emails. The clear and obvious implication from the email statements is that the practitioner had notified and corresponded with her insurer in relation to the claim made by the complainant in the letter of demand. This was both false and misleading.

**Did the practitioner know that the email statements were false and misleading and did she intend that the complainant be misled by the email statements, so as to defer or delay her from commencing proceedings against the practitioner in respect of the claim?**

129 The clear and, indeed, only reasonable inference which is open on the evidence is that the practitioner knew that the email statements were false and misleading and intended that the complainant be misled by the email statements, so as to defer or delay her from commencing proceedings against the practitioner in respect to the claim. As the Committee submits, this inference is 'irresistible'.<sup>142</sup> The practitioner obviously knew that she had not notified, or corresponded with, any insurer regarding the complainant's claim in the letter of demand. Particularly given that the letter of demand said that, if the practitioner was not willing to pay any compensation, 'you will leave me no other choice than [to] take legal action' and the complainant's email on 29 June 2016 said that 'I was going to lodge the paperwork with the [M]agistrates [C]ourt tomorrow but I will refrain from this if we can work this out between us as that is my preference', the only reasonable inference available from the practitioner knowingly making the false and misleading email statements is that she intended to defer or delay the complainant from commencing legal proceedings against her.

130 We note that, although it appears the complainant was misled for a period of time into deferring or delaying the commencement of the Magistrates Court proceedings, it is not necessary for the complainant to have in fact been misled for the practitioner to have committed

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<sup>142</sup> ts 61, 13 June 2019.

professional misconduct. Rather, it was the making of the false and misleading statements, with the intention that the complainant be misled by them into deferring or delaying commencing legal proceedings, that, we find below, constitutes professional misconduct.

**Did the practitioner engage in professional misconduct by making the email statements?**

131 In our view, the practitioner engaged in professional misconduct by making the email statements, as her conduct would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, within the first limb of the restatement of the common law concept of unprofessional conduct in *Kyle v Legal Practitioners' Complaints Committee* at [61].

132 In her response to the Committee's facts and contentions (although not in submissions made by counsel on her behalf at the hearing), the practitioner submits that she:<sup>143</sup>

... has no case to answer in relation to Grounds 1 and 2 as the conduct alleged (if proven) arise out of the Practitioner providing immigration assistance as defined in [s] 276 of the Migration Act as an employee of Australia World Link ("AWL") to [the complainant] who at all material times was a client of AWL and not a client of the law practice which was conducted by the Practitioner as a sole practitioner under the style "Christina Chang Lawyers".

The Law Council of Australia is of the view that "Immigration Assistance" is not considered legal work that is subject to legal services regulators such as the Applicant.

...

133 This submission is misconceived. As indicated earlier, the Committee does not contend, in relation to grounds 1 and 2, that the practitioner engaged in professional misconduct in her capacity as a lawyer. Rather, the Committee contends that the practitioner engaged in professional misconduct in those grounds in her personal capacity or capacity as a registered migration agent.

134 In *Chamberlain v Law Society of the Australian Capital Territory* (1993) 43 FCR 148, Lockhart J observed at 163 as follows:

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<sup>143</sup> Practitioner's response to applicant's facts and contentions dated 28 August 2018 (Exhibit 2) page 2.

It is well established ... that unprofessional conduct on the part of a legal practitioner may extend to conduct in his [or her] private capacity[.]

135 Furthermore, as the Full Court of the Supreme Court observed in *Kyle v Legal Practitioners' Complaints Committee* at [61], the first limb 'is not confined to ... conduct which occurs in the course of legal practice'.

136 Mr Walker submits on behalf of the practitioner that although 'the conduct in making and sending the three emails containing the relevant statements is poor conduct, it is inappropriate, it's to be criticised',<sup>144</sup> it would not be reasonably regarded as 'disgraceful or dishonourable' by practitioners of good repute and competence. Mr Walker submits:<sup>145</sup>

... with a rhetorical question if I may – is it disgraceful, and would it be so regarded by the relevant people as disgraceful to prepare and send any one of those three emails? I submit not. I submit they, they the reasonable the practitioners of [good repute and competence] would [criticise] it, and perhaps [criticise] it strongly, but would resist from saying it is disgraceful.

It is not so bad as to be disgraceful, to bring disgrace upon perhaps the practitioner or the profession. Disgraceful is a strong word, I submit, it's intended as part of the test to attach only to conduct at – towards one end of the spectrum of wrong behaviour or behaviour to be criticised. Is it dishonourable? Would it be regarded, reasonably, as dishonourable by those practitioners? In my submission, again, it doesn't get to that level.

It may be close to the level, it may be in the ballpark, if I can put it that way. But is it dishonourable for a person, focussing on email 3, to, arguably, mislead the litigant who's issuing the [proceedings] to imply that a claim has been made to an insurer? In my submission, no. Poor behaviour, not to be encouraged, to be criticised; not dishonourable.

Dishonourable is an adjective like, perhaps, disgraceful that, in my submission, to preserve its meaning and the full range of connotations that are properly attached to it, it can't be stretched though as to include conduct of a lesser character. Otherwise, it loses the place it should have, that is to say, reserved for severe cases. ...

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<sup>144</sup> ts 77, 13 June 2019.

<sup>145</sup> ts 77-78, 13 June 2019.

137 As counsel for the practitioner submits, the adjectives 'disgraceful' and 'dishonourable' are 'strong words'. These words bear the following meanings:<sup>146</sup>

**disgraceful** ... bringing or deserving disgrace; shameful; dishonourable; disreputable. ...

**dishonourable** ... **1.** showing lack of honour; ignoble; base; disgraceful; shameful: *a dishonourable act*. **2.** having no honour or good repute: *a dishonourable man*. ...

138 Significantly, in this case, as the Committee submits, '[b]y the time of ground 1[,] a court proceeding was certainly in contemplation'.<sup>147</sup> As indicated earlier, in the letter of demand, the complainant said that, if the practitioner was 'not willing [to] pay us any compensation ... you will leave me no other choice than [to] take legal action'. Furthermore, in her email to the practitioner on 29 June 2016, the complainant said that 'I was going to lodge the paperwork with the [M]agistrates [C]ourt tomorrow' and that '[i]f I do not hear from you I will proceed with lodging the paperwork with the [C]ourt'.

139 Thus, the email statements were made by the practitioner in the knowledge of, and in response to, contemplated and foreshadowed court proceedings against her. Furthermore, although the complainant considered that the work that the practitioner was doing for her 'was as a migration agent' and '[n]ot as a lawyer',<sup>148</sup> she certainly understood at the time of the email statements, which are the subject of ground 1, that the practitioner was a lawyer. As indicated earlier, some of the practitioner's emails to the complainant stated that she was a 'Barrister, [and] Solicitor' as well as a 'Registered Migration Agent'. Furthermore, in the letter of demand, the complainant said that, as 'an experienced migration agent and *lawyer*', the practitioner should have known that the IELTS test was not current.<sup>149</sup>

140 In our view, the circumstances in this case in relation to ground 1 are somewhat analogous to the circumstances in *Legal Profession Complaints Committee and Amsden* [2014] WASAT 57 in which the Tribunal determined that a legal practitioner engaged in professional misconduct in a personal capacity by demanding payment of \$2,022 from the owners of a strata unit in a complex in which the practitioner

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<sup>146</sup> *Macquarie Dictionary* (6<sup>th</sup> edition, 2013) pages 426 and 427 (original emphasis).

<sup>147</sup> ts 63, 13 June 2019.

<sup>148</sup> ts 50, 13 June 2019.

<sup>149</sup> *Legal Profession Complaints Committee book of documents* (Exhibit 3) page 57 (emphasis added).

owned the other two units (and in commencing and prosecuting a minor case claim for that amount against them in the Magistrates Court) in circumstances where the recipients of the demand had no existing liability to pay the amount the practitioner demanded from them. The Tribunal determined in *Legal Profession Complaints Committee and Amsden* at [49]-[51] as follows:

- 49 In our view, the practitioner's conduct in demanding payment of the amount of \$2,022 from Mr A and Ms A, when they were under no existing liability to pay that amount, and in commencing and prosecuting the Magistrates Court proceeding, in circumstances where she had no cause of action, the proceeding lacked any legal foundation and was therefore an abuse of the Court's process, would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence, within the first limb of the restatement of the common law concept of unprofessional conduct in *Kyle*, and constitutes professional misconduct under the LP Act. The practitioner's conduct involved the breach of duties of fairness to Mr A and Ms A not to demand payment from them when they had no existing liability to make payment and not to bring legal proceedings against them when she had no founding cause of action, and the breach of a duty of propriety to the Court not to commence and prosecute proceedings which involve an abuse of process. The practitioner's conduct was grossly unfair to Mr A and Ms A and wasted valuable court time and resources.
- 50 Moreover, the letter of demand and the Magistrates Court proceeding was clearly intended to apply inappropriate and improper pressure on Mr A and Ms A to pay the amount of \$2,022. Although the practitioner did not write the letter of demand on her professional letterhead, Mr A and Ms A knew that the practitioner is a lawyer, because the practitioner said so in the documents she filed in the proceeding she commenced against Mr A and Ms A under the [*Strata Titles Act 1985 (WA)*]. Indeed, in a letter that Mr A and Ms A wrote to the practitioner on 4 April 2011, they said that '[y]ou have used your majority ownership of 2 of the 3 lots *and your knowledge as a lawyer to bully and disadvantage us since buying unit 3 on 2 May 2006*' (emphasis added).
- 51 The clear implication to Mr A and Ms A from the letter of demand written to them by a lawyer was that Mr A and Ms A had an obligation to pay the practitioner the sum demanded. Similarly, the clear implication to Mr A and Ms A from the commencement of legal proceedings against them by a lawyer was that they had an obligation to pay the amount claimed in the proceeding. And, indeed, the practitioner gave evidence in this proceeding that, before the Magistrates Court proceeding was

listed for hearing, Mr A 'made an offer to settle for an amount less the cost of private repairs he had done at the property that he said I was responsible for causing', although the practitioner 'refused his offer'.

141 The practitioner in this case did not commit the same ethical breach as the practitioner in *Legal Profession Complaints Committee and Amsden*. In that case, the practitioner relevantly issued a letter of demand in circumstances where the recipients of the demand were under no existing liability to pay the amount demanded. In this case, the practitioner responded to the complainant's letter of demand knowingly seeking to mislead the complainant so as to defer or delay her from commencing proceedings against the practitioner in respect of the claim made in the letter of demand. However, the circumstances are somewhat analogous, because in both *Legal Profession Complaints Committee and Amsden* and in this case, the practitioner's conduct, although in a personal, rather than (legal) professional, capacity, occurred in the context of a letter of demand for payment of money and contemplated and foreshadowed court proceedings if the money demanded is not paid, and the other party to the letter of demand knew that the practitioner was a lawyer.

142 In our view, for a legal practitioner, in a personal capacity, to knowingly seek to mislead a person who has issued a letter of demand to the practitioner for payment of money, so as to defer or delay that person from commencing legal proceedings against the practitioner in respect of the claim in the letter of demand, would be reasonably regarded as disgraceful, that is bringing or deserving disgrace, shameful and disreputable, or dishonourable, that is showing lack of honour, ignoble, base and shameful, by practitioners of good repute and competence. The practitioner's conduct was grossly unfair to the complainant and dishonest. Such conduct would certainly be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence if it occurred in circumstances where the practitioner was acting on behalf of a client who had received a letter of demand. It is no less the case when a practitioner is responding to a letter of demand in a personal capacity. Such conduct involves a breach of a lawyer's fundamental ethical duties of candour and fairness, whether representing a client or acting in a personal capacity, not to knowingly seek to mislead the other party to a demand for payment of money.

143 As the Tribunal said in the context of different ethical duties (of fairness, honesty and propriety in relation to third parties and not to mislead a court or tribunal) in *Legal Profession Complaints Committee and A Legal Practitioner* at [28], a legal practitioner's ethical duties of candour and fairness when responding to a letter of demand are:

... so fundamental and self-evident for the proper conduct of a legal practitioner, that it is unnecessary for them to be recorded in a written rule or practise in order to be binding on members of the profession.

144 In *Legal Profession Complaints Committee and A Legal Practitioner*, the Tribunal referred to High Court authority to this effect at [123]-[124] as follows:

123 Even in the absence of an express authority on point, we have no doubt such duty exists. As Rich J said in *Kennedy v The Council of the Incorporated Law Institute of New South Wales* (1939) 13 ALJR 563:

... a charge of misconduct as relating to a solicitor need not fall within any legal definition of wrong doing. It need not amount to an offence under the law. It was enough that it amounted to grave impropriety affecting his professional character and was indicative of a failure either to understand or to practise the precepts of honesty or fair dealing in relation to the courts, his clients or the public.

124 Similarly, the High Court of Australia observed in *Clyne v New South Wales Bar Association* [1960] HCA 40; (1960) 104 CLR 186 at 200 that certain rules (or duties) which govern the conduct of legal practitioners, which their Honours described as 'fundamental' and contrasted with rules which are 'merely conventional in character':

... are, for the most part, not to be found in writing. It is not necessary that they should be reduced to writing, because they rest essentially on nothing more and nothing less than a generally accepted standard of common decency and common fairness.

145 Furthermore, as the Tribunal also said in *Legal Profession Complaints Committee and A Legal Practitioner* at [28], breach of an ethical duty by a practitioner when acting for themselves in a court proceeding, and in our view, in this case, when responding to a letter of demand in a personal capacity, is no less than when acting for a client. Indeed, as the Tribunal said at [28]:

The case is all the stronger when it is the practitioner's own case which he [or she] is seeking to advance for such means.

146 In our view, therefore, ground 1 is made out. The practitioner engaged in professional misconduct within the meaning of s 403 and s 438 of the LP Act, because her conduct in terms of ground 1 would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, within the first limb of the restatement of the common law concept of unprofessional conduct in *Kyle v Legal Practitioners' Complaints Committee* at [61]. By knowingly seeking to mislead the complainant, so as to defer or delay her from commencing legal proceedings against the practitioner, the practitioner breached her fundamental ethical duties of candour and fairness when responding to a letter of demand.

147 In the circumstances, it is unnecessary to determine whether the practitioner's conduct would also constitute professional misconduct on the alternative basis contended by the Committee in terms of the statutory definition of the term in s 403(1)(b) of the LP Act.

### ***Ground 2 - Knowingly seeking to mislead the Magistrates Court and the complainant***

#### **Ground 2**

148 As indicated earlier, ground 2 alleges engagement in professional misconduct against the practitioner in the following terms:<sup>150</sup>

That the practitioner, between 23 August 2016 and 27 September 2016, in the course of defending Fremantle Magistrates Court (**Court**) proceedings [number] lodged by [the complainant] against the practitioner on 25 July 2016 in respect of the Claim, by which [the complainant] sought the sum of \$10,118.20 (including allowable Court fees) (**Proceedings**), engaged in professional misconduct within the meaning of [s] 403 and [s] 438 of the Act in that her conduct would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, and further and alternatively, would justify a finding that she is not a fit and proper person to engage in legal practice, by:

1. at a pre-trial conference (**PTC**) before a registrar of the Court (**Registrar**) on 23 August 2016, saying words to the effect "*I cannot disclose any details because the matter is in the*

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<sup>150</sup> Further Amended Annexure A to Application dated and filed 14 June 2019 (Exhibit 1) page 2 (original emphasis).

*insurer's hands. I will discuss it as soon as I have more information on what they are going to do";*

2. at a further PTC before the Registrar on 27 September 2016, saying words to the effect "*I cannot speak about the matter because there is an insurer involved*",

(together, **the PTC statements**)

in circumstances where:

- (a) the PTC statements were false and misleading as, in truth, at no time prior to 23 August 2016, and between 23 August 2016 and 27 September 2016, did the practitioner notify, or correspond with, any insurer or insurers regarding the Claim or the Proceedings;
- (b) the practitioner knew the PTC statements were false and misleading and intended that the Court and [the complainant] be misled by the PTC statements, so as to defer or delay the Proceedings.

## **Issues for determination in relation to ground 2**

149 The following four principal issues arise for determination in relation to ground 2:

1. Whether the PTC statements were made by the practitioner.
2. Whether the PTC statements were false and misleading.
3. Whether the practitioner knew that the PTC statements were false and misleading and intended that the Magistrates Court and the complainant be misled by the PTC statements, so as to defer or delay the Magistrates Court proceedings.
4. Whether the practitioner engaged in professional misconduct by making the PTC statements.

150 We will address each of these issues in turn.

### **Were the PTC statements made by the practitioner?**

151 We are satisfied on a balance of probabilities and feel an actual persuasion on the evidence presented by the Committee (in accordance

with the *Briginshaw* approach) that the practitioner made the PTC statements alleged in ground 2.

152 As indicated earlier, the complainant gave evidence that during the pre-trial conference on 23 August 2016, the practitioner said to Registrar Woods words to the effect:<sup>151</sup>

I cannot disclose any details because the matter is in the insurer's hands. I will discuss it as soon as I have more information on what they are going to do[.]

153 As also indicated earlier, the complainant gave evidence that during the pre-trial conference on 27 September 2016, the practitioner said to the Registrar words to the effect that:<sup>152</sup>

I cannot speak about the matter because there is an insurer involved[.]

154 We accept the complainant's evidence on these matters (and generally), because we find her to be a credible and truthful witness. She was responsive, measured and consistent in her evidence. She frankly conceded when she could not remember something, such as, when the practitioner moved workplaces, how the practitioner had informed the complainant that she had moved workplaces.<sup>153</sup> The complainant also accepted that, when she told the officer of the Committee, who recorded her witness statement, what the practitioner said at the pre-trial conferences, it was about two-and-a-half years later and so she could not remember 'the exact wording' of what the practitioner said, but she said that 'I remember the message that was given to us by [the practitioner]'.<sup>154</sup>

155 Other aspects of the pre-trial conferences referred to by the complainant also indicate that it is highly likely that she has accurately recalled the relevant statements made by the practitioner at the pre-trial conferences. The complainant gave evidence that the pre-trial conference on 23 August 2016 lasted '[p]robably no more than five, 10 minutes' and was '[v]ery[,] very short'.<sup>155</sup> The complainant also recalled that after the practitioner said to Registrar Woods words to the effect:<sup>156</sup>

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<sup>151</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [58c].

<sup>152</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [59e].

<sup>153</sup> ts 55, 13 June 2019.

<sup>154</sup> ts 49, 13 June 2019.

<sup>155</sup> ts 50, 13 June 2019.

<sup>156</sup> Witness statement of complainant dated 1 March 2019 (Exhibit 9) [58c].

I cannot disclose any details because the matter is in the insurer's hands. I will discuss it as soon as I have more information on what they are going to do[.],

the Registrar said words to the effect that she would adjourn the pre-trial conference to allow the practitioner time to talk to the insurer or for the insurer to send their lawyer to the next pre-trial conference, however there would be no further adjournments.<sup>157</sup> The complainant's recollection of the Registrar's response to the practitioner is consistent with the practitioner having made the statement alleged by the Committee, as is the fact that the Registrar adjourned the pre-trial conference to 27 September 2016. Furthermore, the '[v]ery[,] very short' length of the pre-trial conference on 23 August 2016 makes it highly likely that the complainant accurately recalled words to the effect of the practitioner's statement.

156 After the complainant said in evidence that the practitioner said to the Registrar at the pre-trial conference on 27 September 2016 words to the effect that 'I cannot speak about the matter because there is an insurer involved', the complainant said that the practitioner requested a further adjournment of the pre-trial conference that she (the complainant) 'didn't say anything to that' and that she 'was nervous being in the conference, and thought that if an insurer was involved and if the Registrar appeared to accept what [the practitioner] said then that must be the way things were done and there was nothing I could say'.<sup>158</sup> Again, the context makes it highly likely that the complainant accurately recalled the relevant statement made by the practitioner at the second pre-trial conference. The complainant was nervous, being a non-lawyer in a pre-trial conference, and recalled that the Registrar appeared to accept what the practitioner said about an insurer being involved. Furthermore, although the Registrar had, on 23 August 2016, ordered that there would be '[n]o further adjournment of the Pre-Trial Conference',<sup>159</sup> the Registrar in fact adjourned the second pre-trial conference, which is consistent with the complainant's evidence that the practitioner requested a further adjournment after saying 'I cannot speak about the matter because there is an insurer involved'.

157 Another aspect of the evidence which is consistent with the practitioner having made the PTC statements, as the complainant said in evidence, is that, as indicated at [92] above, on 6 November 2016,

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<sup>157</sup> Witness statement of complainant dated 1 March 2019 (Exhibit 9) [58d].

<sup>158</sup> Witness statement of the complainant dated 1 March 2019 (Exhibit 9) [59f].

<sup>159</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) page 66.

that is between the second and third pre-trial conferences, the complainant emailed the practitioner requesting her to 'provide us [with] the name and contacts of the lawyer from the insurer [sic] company in charge of dealing with our claim'. The complainant's request for the insurer's lawyer's details on 6 November 2016 is consistent with the practitioner having said words to the effect that 'the matter is in the insurer's hands' at the pre-trial conference on 23 August 2016 and words to the effect that 'there is an insurer involved' at the pre-trial conference on 27 September 2016. The complainant's request for the insurer's lawyer's details on 6 November 2016 is also consistent with Registrar Woods having said at the pre-trial conference on 23 August 2016 words to the effect that she would adjourn the pre-trial conference to allow the practitioner time to talk to the insurer or for the insurer to send their lawyer to the next pre-trial conference which, in turn, is consistent with the practitioner having said to Registrar Woods words to the effect:

I cannot disclose any details because the matter is in the insurer's hands.  
I will discuss it as soon as I have more information on what they are going to do[.]

158 Furthermore, although the complainant was cross-examined by counsel for the practitioner, it was not suggested to her in cross-examination (nor was it submitted) that her evidence about what the practitioner said at the first pre-trial conference that 'the matter is in the insurer's hands' and at the second pre-trial conference that 'I cannot speak about the matter because there is an insurer involved' was untrue, incorrect or even mistaken.

159 Finally, no contrary evidence to the complainant's evidence was presented. Indeed, as indicated earlier, the practitioner gave no evidence.

### **Were the PTC statements false and misleading?**

160 On the evidence referred to at [112]-[118] above, we are satisfied on a balance of probabilities and feel an actual persuasion (in accordance with the *Briginshaw* approach) that the PTC statements were false and misleading as, in truth, at no time prior to 23 August 2016 and between 23 August 2016 and 27 September 2016, did the practitioner notify, or correspond with, any insurer or insurers regarding the claim in the letter of demand or the Magistrates Court proceedings. The fact that the practitioner failed to respond to the complainant's

request in her email of 6 November 2016 for the insurer's lawyer's details also supports this finding.<sup>160</sup>

161 Mr Walker submits that the Tribunal should not be satisfied that the PTC statements were false and misleading, because:<sup>161</sup>

It is significant, I submit, that – and thinking back also to the evidence of [the complainant] – that she does not assert, and the [C]ommittee does not assert, that the practitioner said, in effect, "The matter is in my insurer's hands". Implying, "I have made a report or notification to my insurer". Instead, in quite a striking way, given that it appears in both of the two subparagraphs on both of the two occasions, instead, the identification is just that the matter is in either the or an insurer's hands. Which is a statement in each case that is perfectly capable, without stretching the meaning, of referring to the matter being in the hands of someone else's insurer who has made a claim, by the implication.

Who might that other body or person be? Of course it might be AWL. And so the identified statements made at the pre-trial conferences are equally capable of being seen as implying that (a) the practitioner has made a report and a claim upon her insurer or (b) AWL as her employer has made a claim on AWL[']s insurer. For those reasons, I submit that the [T]ribunal should not find that the words uttered on the two occasions at the pre-trial conferences were, as asserted in paragraph [(a)], false and misleading, or either false or misleading.

162 In our view, the clear inference from the PTC statements is that the practitioner had contacted her insurer and was awaiting advice from her insurer, because the Magistrates Court proceeding was brought by the complainant against the practitioner personally, alleging that her failures cost the complainant 'lots of money, as well as stress and anxiety'.<sup>162</sup> The proceeding was not taken against AWL. Furthermore, and in any case, on the Committee's application, on 16 November 2018, the Tribunal made an order, pursuant to s 35(1) of the SAT Act, requiring the proper officer of AWL to produce nominated documents to the Tribunal at a directions hearing at 3.00 pm on 30 November 2018. The nominated documents included the following set out in order 1(b) of the orders made by the Tribunal on 16 November 2018:<sup>163</sup>

All documents held by AWL relating to the notification or notifications made by or on behalf of Christina Marie Chang and/or AWL to an insurer or insurers (including, but not limited to, Law Mutual) in relation to the client's claim for compensation set out in her email to

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<sup>160</sup> See [92]-[93] above.

<sup>161</sup> ts 78, 13 June 2019.

<sup>162</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) page 62.

<sup>163</sup> Annexure JBM-1 to the witness statement of James Bruce McTernan dated 25 February 2019 (Exhibit 6).

Christina Marie Chang dated 8 June 2016 regarding the work performed in the matter and/or in relation to the proceedings (together, the Claim) and the management of the Claim by the insurer or insurers including, but not limited to:

- (i) the notification or notifications to the insurer or insurers of Christina Marie Chang or AWL (including, but not limited to, Law Mutual) of the Claim;
- (ii) any grant or denial of indemnity by the insurer or insurers;
- (iii) all correspondence and communications (including email communications) in hard copy and electronic form;
- (iv) all internal correspondence, file notes (including notes of attendances and telephone discussions), memoranda, reports, advice, draft documents and administrative information in hard copy and electronic form;
- (v) all telephone records showing telephone calls made by Christina Marie Chang to any insurer or insurers (including, but not limited to, Law Mutual) regarding the Claim; and
- (vi) all documents which may be held in electronic form only.

163 Mr James Bruce McTernan, a paralegal employed by the Legal Practice Board of Western Australia at the Committee, gave evidence that, on 3 December 2018, he attended at the Tribunal's premises and inspected and photocopied the documents produced by AWL pursuant to the order of the Tribunal on 16 November 2018 and that 'none of the ... documents [produced by AWL] fell within the terms' of the order set out in the preceding paragraph.<sup>164</sup> Mr McTernan was not required for cross-examination. We have no hesitation in accepting Mr McTernan's evidence and find that AWL did not produce any documents to the Tribunal pursuant to the order made on 16 November 2018 relating to any notification or notifications made by or on behalf of the practitioner and/or AWL to an insurer or insurers in relation to the complainant's claim for compensation in the letter of demand and/or in relation to the Magistrates Court proceedings. Consequently, although we do not accept that the PTC statements could reasonably refer to AWL's insurer, even if they could potentially do so, we are satisfied on a balance of probabilities and feel an actual persuasion (in accordance with the *Briginshaw* approach) that neither the practitioner nor AWL notified, or corresponded with, any insurer or insurers regarding the claim in the letter of demand or the Magistrates Court proceedings, at

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<sup>164</sup> Witness statement of James Bruce McTernan dated 25 February 2019 (Exhibit 6) [19].

any time prior to 23 August 2016, or between 23 August 2016 and 27 September 2016.

164 The PTC statements were false and misleading.

**Did the practitioner know that the PTC statements were false and misleading and did she intend that the Magistrates Court and the complainant be misled by the PTC statements, so as to defer or delay the Magistrates Court proceedings?**

165 We are satisfied on a balance of probabilities and feel an actual persuasion on the evidence (in accordance with the *Briginshaw* approach) that the practitioner knew that the PTC statements were false and misleading and intended that the Magistrates Court and the complainant be misled by the PTC statements, so as to defer or delay the Magistrates Court proceedings. As Mr Yovich submits, 'the conclusion that the statements were false and that [the practitioner] knew they were false when she made them is irresistible'.<sup>165</sup> Indeed, not only is this inference clear on the evidence, it is the only reasonable inference that is open on the evidence. The practitioner obviously knew there was no notification of, or correspondence with, an insurer in relation to the complainant's claim in the letter of demand and in the Magistrates Court proceedings, because the practitioner had not notified, or corresponded with, any insurer in relation to the claim. It is also clear that the practitioner knowingly sought to mislead the Magistrates Court and the complainant, in order to defer or delay the Magistrates Court proceedings, because the practitioner requested each of the first two pre-trial conferences to be adjourned after she made the relevant statement concerning the insurer and the Registrar then adjourned the first two pre-trial conferences. In short, we find, the practitioner lied to the Magistrates Court and to the complainant at the first two pre-trial conferences in order to defer and delay the proceedings.

166 Finally, in relation to this issue, we note that, as in relation to ground 1, it appears the practitioner succeeded in misleading the Magistrates Court and the complainant by making the PTC statements, because the Registrar twice adjourned the Magistrates Court proceedings and the complainant thought 'there was nothing I could say' at the pre-trial conference on 27 September 2016 and on 6 November 2016, and requested the practitioner to provide her with 'the name and contacts of the lawyer from the insurer [sic] company in charge of

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<sup>165</sup> ts 61, 13 June 2019.

dealing with our claim'. However, it is not necessary for the Magistrates Court or the complainant to have in fact been misled for the practitioner to have committed professional misconduct. Rather, it was the making of the PTC statements, with the intention we have found the practitioner had, that is the conduct constituting professional misconduct.

**Did the practitioner engage in professional misconduct by making the PTC statements?**

167 In *Legal Profession Complaints Committee and A Legal Practitioner*, the Tribunal reviewed authorities in relation to professional misconduct by knowingly or intentionally misleading a court or tribunal at [148]-[151] as follows:<sup>166</sup>

148 Knowingly or intentionally misleading a court or tribunal constitutes unprofessional conduct of a most serious nature (historically, professional misconduct) at common law (and under the Legal Practice Act), in that it is conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, and is therefore professional misconduct under the LP Act. In *Vogt v Legal Practitioners Complaints Committee* [2009] WASCA 202 at [61] and [70], the Court of Appeal said the following:

For a practitioner, in the course of his or her practice, intentionally to mislead anyone is a serious breach of the practitioner's professional duty. But the finding in the present case that the appellant intentionally misled the court is of particular significance. It goes to the very heart of a practitioner's duty as an officer of the court and therefore to the proper administration of justice. We would respectfully adopt what was said in that respect by the Queensland Court of Appeal in *The Council of the Queensland Law Society Inc v Wright* [2001] QCA 58, a case involving a solicitor who (among other things) intentionally misled a court in relation to an affidavit relied upon to resist a summary judgment application and as to the availability of a witness. The court said:

A practitioner's duty to the court arises out of a practitioner's special relationship with the court; it overrides the duties owed by a practitioner to clients or others ... The lawyer's duty to the court includes candour, honesty

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<sup>166</sup> Original emphasis.

and fairness ... The effective administration of the justice system and public confidence in it substantially depends on the honesty and reliability of practitioners' submissions to the court. This duty of candour and fairness is quintessential to the lawyer's role as officer of the court; the court and the public expect and rely upon it, no matter how new or inexperienced the practitioner. Breaches such as this are hard to detect and once established to the requisite standard are deserving of condign punishment, not only as a deterrent but also to reassure the public that such conduct on the part of lawyers will not be tolerated. ... (Footnotes omitted).

As we have observed, it is a matter of the utmost seriousness for a practitioner intentionally to mislead a court. The effective administration of the justice system and public confidence in the system depends upon the absolute and unconditional discharge by practitioners of their duty of honesty and candour to the court. It is a duty so fundamental that factors such as relative inexperience and lack of supervision do not weigh so heavily in mitigation as they might in other situations. ...

149 After setting out this statement, the Tribunal, in *Legal Profession Complaints Committee and Segler* [2010] WASAT 135 (*Segler 2*), held at [69] as follows:

Complete truthfulness and absolute candour with courts and tribunals is, as these authorities show, an essential and fundamental incident of being a member of the legal profession. It is no less the case when a member of the legal profession is engaged in court or tribunal proceedings in an individual capacity as when he or she represents a client. In striking off a legal practitioner for having misled the Family Court of Western Australia in relation to his assets in proceedings between himself and his wife, the Supreme Court of Western Australia (Full Bench) observed and held in *Legal Practitioners Complaints Committee v Dixon* [2006] WASCA 27 at [10] as follows:

This was therefore a case of a practitioner who must have known that he had a duty to disclose his ownership of funds which would have a material impact upon the orders to be made by the Family Court in respect of the property settlement and maintenance. The evidence amply supported the conclusion of

very serious unprofessional conduct in failing to make the necessary disclosure by deliberately concealing the true position from his wife, who was the applicant before the Family Court and, more importantly, from the Court itself. Further, the practitioner was guilty of illegal conduct in the form of perjury committed by the deliberately false statements made in his affidavits. That was a form of perjury which related directly to the practitioner's duty as an officer of the Court and to the integrity of the proceedings before the Court. (See also GE Dal Pont *Lawyers' Professional Responsibility* (Lawbook Company, 4th Edition, 2010) at [25.140]).

- 150 In the section of *Lawyers' Professional Responsibility* referred to in *Segler 2* at [69], Professor Dal Pont states as follows:

The concern is that misleading the court in a personal capacity displays a lack of integrity that may directly translate to dishonesty in a professional environment. As explained by de Jersey CJ in *Barristers' Board v Young* [[2001] QCA 556 at [15]] in striking off a barrister who had knowingly given false evidence on oath before a Criminal Justice Commission Inquiry:

The notion of a barrister's deliberately giving false evidence on oath is utterly repugnant to the essence of what goes to make up a barrister's fitness to practise: such as to erode, if not destroy, the complete confidence which a client, a fellow practitioner, the courts and the public should be able, without hesitation, to assume. It is fanciful to think those persons would not be at least sceptical about the honesty, thence fitness and propriety, of a barrister who had so recently lied on oath on important matters before a significant Commission of Inquiry.

**It follows that the lawyer's duty of candour to a court or tribunal is not diminished where the lawyer acts in a personal capacity.** For instance, it has been doubted that there would be a case "where a practitioner who knowingly swears a false affidavit that is filed in court could be regarded as fit to practice [sic]" (*Coe v New South Wales Bar Association* [2000] NSWCA 13 (Mason P)). **The same applies as regards lawyer-litigants who deliberately conceal matters**

**that should be disclosed to the court.** [Citing the passage from *Legal Practitioners Complaints Committee v Dixon* (2006) WASCA 27 at [10] set out in the extracted passage from *Segler 2* above]. (Emphasis in bold added).

151 Finally, as the Tribunal said in *Legal Profession Complaints Committee and Skerritt* [2012] WASAT 221 at [10]:

... a lawyer's duty of "candour, honesty and fairness" to a court or tribunal extends to all aspects of his or her dealings with the court or tribunal. The proper administration of justice requires no less.

168 The Registrar of the Magistrates Court was aware that the practitioner is a lawyer and would therefore have placed significant trust and confidence in what the practitioner said at the pre-trial conferences. In the 'Details of Claim' in the Form 6 by which the complainant commenced the Magistrates Court proceedings, she said that she thought that the practitioner was 'an expert and professional lawyer and migration agent'.<sup>167</sup> Furthermore, at the second pre-trial conference on 27 September 2016, after having arrived late, the practitioner said to the Registrar words to the effect that she had been dealing with a matter in the Family Court before she said words to the effect 'I cannot speak about the matter because there is an insurer involved'.

169 Mr Walker submits on behalf of the practitioner, in relation to the PTC statements which are the subject of ground 2, that although 'such statements, if false and misleading, ... would warrant criticism and would reflect poorly on the practitioner', they:<sup>168</sup>

... would not be so egregious as to amount to – or to warrant the appellations or the adjectives disgraceful or dishonourable. It's not an appalling instance in either case of misleading someone. It's a person, albeit a practitioner, who's a litigant in person, I accept. But the actions of a practitioner as a litigant in person, still called to be assessed in the relevant way, but it is in regard to a minor claim in the Magistrates Court. If these statements were false and misleading, they would be towards the bottom and not towards the top of the scale of seriousness. Remembering how extreme many cases could be imagined, if I put it inelegantly.

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<sup>167</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) page 62 (emphasis added).

<sup>168</sup> ts 84, 13 June 2019.

170           However, as the Court of Appeal said in *Vogt v Legal Practitioners Complaints Committee* [2009] WASCA 202 at [61], for a practitioner to mislead a court 'goes to the very heart of a practitioner's duty as an officer of the court and therefore to the proper administration of justice'. As the Court of Appeal said in the same case at [70]:

As we have observed, it is a matter of the utmost seriousness for a practitioner intentionally to mislead a court. The effective administration of the justice system and public confidence in the system depends upon the absolute and unconditional discharge by practitioners of their duty of honesty and candour to the court. It is a duty so fundamental that factors such as relative inexperience and lack of supervision do not weigh so heavily in mitigation as they might in other situations. ...

171           Furthermore, as the Tribunal said in *Legal Profession Complaints Committee and Segler* [2010] WASAT 135 at [69]:

It is no less the case when a member of the legal profession is engaged in court or tribunal proceedings in an individual capacity as when he or she represents a client.

172           In our view, ground 2 is made out. The practitioner engaged in professional misconduct, within the meaning of s 403 and s 438 of the LP Act, because her conduct in terms of ground 2 would be reasonably regarded as disgraceful, that is bringing or deserving disgrace, shameful and disreputable, or dishonourable, that is showing lack of honour, ignoble, base and shameful, by practitioners of good repute and competence, within the first limb of the restatement of the common law concept of unprofessional conduct in *Kyle v Legal Practitioners' Complaints Committee* at [61]. By knowingly seeking to mislead the Magistrates Court and the complainant, so as to defer or delay the Magistrates Court proceedings, the practitioner breached her fundamental ethical duties of candour and fairness to the Court and to the complainant. As the authorities referred to in *Legal Profession Complaints Committee and A Legal Practitioner* at [148]-[151] show, courts and tribunals necessarily place significant trust and confidence in legal practitioners in order to be able to administer justice effectively and efficiently. Knowingly seeking to mislead a court (and the other party to litigation), whether in a professional or personal capacity, strikes at the very heart of, and is an anathema to, a legal practitioner's core ethical duties as an officer of the court and fundamentally undermines the trust and confidence between court and practitioner which is essential to the administration of justice. The practitioner's

conduct in terms of ground 2 is therefore most serious professional misconduct.

173 In the circumstances, it is unnecessary to determine whether the practitioner's conduct would also constitute professional misconduct on the alternative basis contended by the Committee in terms of the statutory definition of the term in s 403(1)(b) of the LP Act. However, as the authorities show, knowingly seeking to mislead a court, whether in a professional or personal capacity, displays a lack of integrity, which is a basic requirement for the privilege of legal practice.

***Ground 3 - Without reasonable excuse, failing to respond to three notification letters and two summonses.***

### **Ground 3**

174 As indicated earlier, ground 3 alleges professional misconduct against the practitioner in the following terms:<sup>169</sup>

That the practitioner, on and after 6 October 2017, following a complaint to the Legal Profession Complaints Committee (**Committee**) by [the complainant] against the practitioner arising from the practitioner's response to the Claim, her conduct in the Proceedings and her failure to pay the Judgment sum (**Complaint**), engaged in professional misconduct within the meaning of [s] 403, [s] 404(a) and [s] 438 of the Act in that her conduct would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence and fell short, consistently and to a substantial degree, of the standard of professional conduct observed or approved by members of the profession of good repute and competence, and further and alternatively, would justify a finding that she is not a fit and proper person to engage in legal practice, by, without reasonable excuse, failing to respond to:

1. by 5 October 2017 or at all, a letter from the Committee to the practitioner dated 15 September 2017 which formally notified her of, and requested her submissions in relation to, the Complaint (**First notification letter**), in breach of rule 50(3) of the LPCR and/or [s] 531(2) of the Act;
2. by 5 October 2017 or at all, a Summons to Produce Documents dated 14 September 2017 issued to the practitioner by the Committee pursuant to [s] 520(1)(a) of the Act (**First summons**), in breach of [s] 520(5) and [s] 532(3) of the Act;

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<sup>169</sup> Further Amended Annexure A to Application dated and filed 14 June 2019 (Exhibit 1) pages 3-4 (original emphasis).

3. by 7 November 2017 or at all, a letter from the Committee to the practitioner dated 17 October 2017 which formally notified her of, and requested her submissions in relation to, a conduct investigation commenced on the Committee's own initiative pursuant to [s] 421 of the Act in relation to the practitioner's failure to respond to the First notification letter and the First summons (**Second notification letter**), in breach of rule 50(3) of the LPCR and/or [s] 531(2) of the Act;
4. by 6 December 2017 or at all, a letter from the Committee to the practitioner dated 15 November 2017 which formally notified her of, and requested her submissions in relation to, a conduct investigation commenced on the Committee's own initiative pursuant to [s] 421 of the Act in relation to the practitioner's failure to respond to the Second notification letter, in breach of rule 50(3) of the LPCR and/or [s] 531(2) of the Act;
5. by 6 December 2017 or at all, a Summons to Produce Documents and Provide Written Information Verified by Statutory Declaration dated 15 November 2017 issued to the practitioner by the Committee pursuant to [s] 520(1)(a), (c), and (d) and [s] 520(3) of the Act, in breach of [s] 520(5) and [s] 532(3) of the Act.

### **Issues for determination in relation to ground 3**

175 The following four principal issues arise for determination in relation to ground 3:

1. Whether the practitioner received the notification letters and summonses.
2. Whether the practitioner failed to respond to the notification letters and summonses.
3. Whether the practitioner had a reasonable excuse for not responding to the notification letters and summonses.
4. Whether the practitioner engaged in professional misconduct by, without reasonable excuse, failing to respond to the notification letters and summonses.

176 We will address each of these issues in turn.

**Did the practitioner receive the notification letters and summonses?**

177 As indicated earlier, in her response to the Committee's facts and contentions, the practitioner admits that she received the notification letters and summonses. In his submissions on behalf of the practitioner, Mr Walker frankly conceded that:<sup>170</sup>

[T]here's really no dispute that the letters in question and the ... summonses in question ... were [sent] by the [C]ommittee and received by the practitioner and that there was no response to any of those letters or summonses.

**Did the practitioner fail to respond to the notification letters and summonses?**

178 As indicated earlier, the practitioner admits that she failed to respond to the notification letters and summonses.

**Did the practitioner have a reasonable excuse for not responding to the notification letters and summonses?**

179 In her response to the Committee's facts and contentions, the practitioner says that she was 'under significant stress, was emotionally labile and felt overwhelmed' by having to deal with various personal and professional issues at the time when she received the notification letters and summonses.<sup>171</sup> However, the practitioner did not give any evidence, nor did she present any evidence, to establish any of those matters. As Mr Yovich submits:<sup>172</sup>

There is no evidence whatsoever as to the practitioner's workload at the relevant time, as to her state of physical or mental health at the relevant time, [or] as to her financial circumstances at the relevant time.

180 Furthermore, and in any case, we accept the Committee's submission that:<sup>173</sup>

... in any event, as the authorities make clear, none of those can have primacy over her overriding duty to cooperate with the regulator.

181 In support of this submission, Mr Yovich refers to the reasoning and decision of the Tribunal in *Legal Profession Complaints*

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<sup>170</sup> ts 84, 13 June 2019.

<sup>171</sup> Practitioner's response to applicant's facts and contentions dated 28 August 2018 (Exhibit 2) pages 3, 10 and 11.

<sup>172</sup> ts 67-68, 13 June 2019.

<sup>173</sup> ts 68, 13 June 2019.

*Committee and Lee-Steere* [2010] WASAT 189 at [22]-[27].<sup>174</sup>  
We adopt and reiterate what the Tribunal said in that decision for the purposes of these reasons:

- 22 The reputation of the legal profession in the eyes of the public and among its members depends to a large extent upon the power and ability of the Board and the Committee to regulate effectively the activities of all legal practitioners. The purpose of the Act is expressly stated in its long title 'to provide for the regulation of legal practice in Western Australia'.
- 23 It is incumbent upon all legal practitioners to ensure that the above purpose is realised in all respects. To that end, legal practitioners are obligated to cooperate with the reasonable requests of their regulatory body to the fullest extent. It is a duty owed to the Board and the Committee in a measure not less than the duty owed by a practitioner to his or her client and to a Court or Tribunal.
- 24 In our view it is unacceptable, both to members of the public and to the profession, for a practitioner to undermine the authority of a regulatory body by ignoring its requests for information or failing to respond to those requests with alacrity and with complete honesty. To flaunt that authority is to fly in the face of the legislative intent and disables the body from executing its statutory functions. Such conduct is viewed by this Tribunal in a most serious light and will not be countenanced.
- 25 The conduct and the inaction of the practitioner described above cried out for explanations which he gave in evidence at the last hearing (the penalty hearing). He deposed amongst other things that the reason he did not respond to the various requests for information by the Board and the Committee was that he was preoccupied with the affairs of his clients and did not have sufficient time to deal with the regulatory body's requests.
- 26 We need do little more than to state that explanation in order to reject it, particularly since the unanswered requests for information extended over a period of more than two years. As we stated above, the omission to respond to requests from the Board and the Committee within a reasonable time (and the time allowable must depend on the nature and extend [sic] of the information sought) manifests a total failure to appreciate the obligation of the practitioner to the regulatory body.
- 27 As indicated above, such behaviour can only be viewed in a most serious light - a fact which counsel for the practitioner, (correctly in our view) readily conceded. In our view, any

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<sup>174</sup> See also *Legal Profession Complaints Committee and Segler* [2013] WASAT 117 at [359]-[363].

pressure of work, no matter how severe, must yield to a request for information from the regulatory body. We have no doubt that should a practitioner find himself under such intense pressure, (such as for example, being actively involved in a lengthy trial), the regulatory body would favourably consider a reasonable extension of time to comply with its request.

182 The practitioner also contends that she could not comply with the summonses because:<sup>175</sup>

[S]he is not in a position to produce [the complainant's] files as the files are not in her power[,] possession or control as they are files belonging to her employer[,] AWL[,] who provided immigration assistance to [the complainant].

183 However, even assuming that all of the documents and information required by the summonses issued to the practitioner were in files belonging to AWL, that does not provide a reasonable excuse for the practitioner's failures to comply with the requirements of the summonses. The practitioner had a legal obligation (under s 520 of the LP Act, non-compliance with which constitutes a criminal offence: s 520(5)) as well as an ethical duty (under s 532(3) of the LP Act) to obtain and provide the documents sought by the summonses. Even if all of the documents sought in the summonses were in files belonging to AWL, the practitioner had a legal obligation and ethical duty to obtain and provide them to the Committee. As the Committee submits:<sup>176</sup>

... if ... [an] employed practitioner could plead that ... they weren't the custodian of a file as an excuse for not providing it, then no employed practitioner would ever be able to be obliged to comply with the [C]ommittee's necessary regulatory powers.

184 The practitioner also 'asks the Tribunal to take into account factors unique to the practice environment which place make [sic] solo or small firm practitioners more "at risk" to falling into default'.<sup>177</sup> The practitioner contends as follows:<sup>178</sup>

Lawyers who practice [sic] in the context of a large firm or institutional practice have the practical advantage of ready access to mentors, peer support and office management systems. They usually practice under a system of built-in procedures that prevent many rule violations. This support goes a long way toward helping them avoid running afoul of the

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<sup>175</sup> Practitioner's response to applicant's facts and contentions dated 28 August 2018 (Exhibit 2) page 3.

<sup>176</sup> ts 69, 13 June 2019.

<sup>177</sup> Practitioner's response to applicant's facts and contentions dated 28 August 2018 (Exhibit 2) page 11.

<sup>178</sup> Practitioner's response to applicant's facts and contentions dated 28 August 2018 (Exhibit 2) page 11.

discipline system. Peers are available to return client calls, cover court appearances, step in when they fall ill or assist when they simply become overwhelmed. Solo practitioners such as the Practitioner lack these support systems and she was completely overwhelmed at the time.

185 The fact that the practitioner conducted a sole legal practice does not provide a reasonable excuse, or indeed any excuse, for her sustained and repeated failures to comply with the Committee's requests for submissions and the summonses for production of documents and provision of information. If practising on one's own or in a small firm would provide a reasonable excuse, or any excuse, for failure to respond to a letter from the Committee requesting submissions from a practitioner in relation to a complaint made about the practitioner or a summons issued by the Committee to the practitioner, it would mean that practitioners would be subject to differential ethical obligations depending on the manner in which they choose to practise law. This proposition needs only to be stated to be seen as untenable. Furthermore, the practitioner could have sought assistance from a barrister, without cost, in responding to the notification letters and summonses. Each of the notification letters included the following statement:<sup>179</sup>

Assistance in answering complaints is also available from the WA Bar Association in appropriate cases. For more information regarding this assistance please refer to the Pro Bono section at [www.wabar.asn.au](http://www.wabar.asn.au) and click on Representation of Practitioners.

186 On the evidence before the Tribunal, we find that the practitioner did not have any reasonable excuse for failing to respond to the notification letters and summonses.

**Did the practitioner engage in professional misconduct by, without reasonable excuse, failing to respond to the notification letters and summonses?**

187 Mr Walker acknowledges that 'the failure to respond at all to the two summonses is really quite serious' and '[q]uite a serious failure'.<sup>180</sup> However, Mr Walker submits that the practitioner's failure to respond to the three notification letters is less serious, because of 'some aspects of the letters',<sup>181</sup> which have the consequence that the letters fall:<sup>182</sup>

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<sup>179</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) pages 107, 112 and 118.

<sup>180</sup> ts 89, 13 June 2019.

<sup>181</sup> ts 84, 13 June 2019.

<sup>182</sup> ts 86, 13 June 2019.

... somewhere in the no-man's land, I would submit, between a clear direction or forceful request and a polite indication that, look, we've got a complaint about you. You might want to tell us what you think about it or have to say about it. So, again, I don't say it's of no significance, but it's that kind of failure.

188 In support of this submission, Mr Walker refers to the expression in the letters that the practitioner has 'the right to make submissions to the Committee about the complaint and you are requested to do so' and that the practitioner was requested to '[p]lease provide your submissions, including such facts and explanations as will enable the Committee to give consideration to the complaint' by the specified time and date.

189 However, in our view, the fact that the letters refer to the practitioner's 'right' to make submissions and 'request' that her submissions be made by a specified time and date does not in any way reduce the seriousness of the practitioner's failures to respond to the letters within the periods specified, or subsequently. Immediately after the parts of the first notification letter and the third notification letter referred to by Mr Walker, those letters state as follows:<sup>183</sup>

With your submissions, you are reminded that:

- You must be open and candid in your dealings with the Legal Profession Complaints Committee: Rule 50(2) of the Conduct Rules.
- You must provide a full and accurate account of your conduct: Rule 50(3) of the Conduct Rules.

190 As the Committee submits, this part of the letter makes it clear (if there could have been any doubt at all) that, notwithstanding the reference to her 'right' to make submissions and however politely the 'request' for submissions was couched, the practitioner, being a legal practitioner, had a mandatory professional duty to respond to the regulatory authority. The words '[y]ou *must* provide a full and accurate account of your conduct'<sup>184</sup> can leave no room for doubt as to the mandatory nature of the practitioner's obligation to respond to the letter and provide information to the regulatory authority for the purposes of its assessment of the complaint. Furthermore, as indicated earlier, r 50 of the Conduct Rules, to which the first notification letter and the third notification letter expressly referred, states as follows:

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<sup>183</sup> Legal Profession Complaints Committee book of documents (Exhibit 3) pages 106 and 118.

<sup>184</sup> Emphasis added.

- (1) In this rule —
- regulatory authority* means a local regulatory authority and an interstate regulatory authority.
- (2) A practitioner must be open and candid in his or her dealings with a regulatory authority.
- (3) A practitioner who is requested by a regulatory authority to provide comments or information in relation to the practitioner's conduct or professional behaviour must —
- (a) respond to the request within a reasonable time and in any event within 14 days (or such extended time as the regulatory authority may allow); and
  - (b) provide in writing a full and accurate account of his or her conduct in relation to the matters covered by the request.

191 The terms of r 50(3) of the Conduct Rules that '[a] practitioner who is requested by a regulatory authority to provide comments or information in relation to the practitioner's conduct or professional behaviour *must ... respond to the request ...*'<sup>185</sup> plainly imposes a mandatory ethical duty to respond to the three notification letters sent by the Committee to the practitioner in this case. As the Committee submits:<sup>186</sup>

The fact that it is couched as a request does not mean that it can be ignored; that it is permitted to be ignored. It was the practitioner's professional obligation under the [C]onduct [R]ules to comply.

192 Furthermore, as the Committee submits:<sup>187</sup>

... if there were any ambiguity about it, the second [notification] letter ... makes it clear that the [C]ommittee, as a consequence of the failure to respond to the first [notification] letter, was now investigating, as possible unsatisfactory professional conduct or professional misconduct, [the practitioner's] failure to respond to the first [notification] letter.

193 Thus, there could be no misunderstanding on the part of the practitioner as to her ethical duty to respond to the Committee's notification letters.

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<sup>185</sup> Emphasis added.

<sup>186</sup> ts 94, 13 June 2019.

<sup>187</sup> ts 94, 13 June 2019.

194 Nor could there have been any misunderstanding on the part of the practitioner as to her legal obligation and ethical duty to comply with the summonses. The summonses issued by the Committee to the practitioner each contain a note referring to s 520(5) of the LP Act. Section 520(5) of the LP Act imposes a legal obligation to comply with a summons issued by the Committee as follows:

A person who is subject to a requirement under subsection (1), (2) or (3) must comply with the requirement.

Penalty: a fine of \$5 000

195 Furthermore, s 532(3) of the LP Act imposes an ethical duty to comply with a summons issued by the Committee as follows:

An Australian lawyer who is subject to —

- (a) a requirement under section 520; or
- (b) a requirement under provisions of a corresponding law that correspond to that section,

must not, without reasonable excuse, fail to comply with the requirement.

196 The practitioner breached her ethical duty under r 50(3) of the Conduct Rules to respond to each of the notification letters and her ethical duty under s 532(3) of the LP Act and her legal obligation under s 520(5) of the LP Act to comply with each of the summonses.

197 As indicated earlier, the Committee contends in [1], [3] and [4] of ground 3 that, without reasonable excuse, the practitioner's failures to respond to the notification letters involved a breach not only of r 50(3) of the Conduct Rules, but also, or alternatively, of s 531(2) of the LP Act. As indicated earlier, s 531 of the LP Act states as follows:

- (1) In this section —

*obstruct* includes hinder, delay, resist or attempt to obstruct.

- (2) A person must not, without reasonable excuse, obstruct or mislead an investigator exercising a power under this Act.

Penalty: a fine of \$10 000.

198 Neither party made any submissions as to whether the practitioner's conduct falls within the scope of s 531(2) of the LP Act, in particular whether it involves 'obstruct[ing] or mislead[ing] an

investigator exercising a power under [the LP] Act'. We therefore make no determination in this regard.

199 Mr Walker submits that the practitioner's conduct which is the subject of ground 3 should properly be characterised as follows:<sup>188</sup>

It's remarkably stupid, apart from anything else, to ignore the cascading series of requests, including two summonses, and it's creating enormous trouble for yourself and it is seriously discourteous to not respond to the correspondence and the summonses, and it is to be criticised. And yet, I submit, it may be that it is not so appalling, not so striking as to be properly described as either disgraceful or dishonourable.

200 In our view, the practitioner's conduct which is the subject of ground 3 falls within both the first limb of the restatement of the common law concept of unprofessional conduct in *Kyle v Legal Practitioners' Complaints Committee* at [61] ('conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence') and also within the second limb of that restatement ('conduct 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', and did so, as the Committee contends, 'consistently'), and rises to the level of 'professional misconduct' rather than (merely) unsatisfactory professional conduct under the LP Act, for the following three reasons.

201 First, the practitioner's failures, without reasonable excuse, to respond to the notification letters and summonses were sustained and repeated over three stages of investigation by the Committee. As the Committee submits, even when the Committee formally advised the practitioner of, and requested her submissions in relation to, a conduct investigation commenced on the Committee's own initiative, under s 421 of the LP Act, in relation to the practitioner's failure to respond to the first notification letter and the first summons (and subsequently formally notify the practitioner of, and requested her submissions in relation to, a further conduct investigation commenced on the Committee's own initiative, under s 421 of the LP Act, in relation to the practitioner's failure to respond to the second notification letter), the practitioner still failed to respond within the time specified in the second notification letter (and within the time specified in the third notification letter), or subsequently.

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<sup>188</sup> ts 90-91, 13 June 2019.

202 Secondly, the practitioner not only failed to respond to the  
notification letters and to comply with the summonses within the  
periods specified in those documents, but has failed to do so, now, for  
over one-and-a-half years.

203 Finally, the practitioner never sought an extension nor engaged at  
all with the Committee in relation to the investigation of the  
complainant's complaint about the practitioner and the subsequent  
conduct investigations resulting from the practitioner's failures to  
respond to notification letters. For a legal practitioner to fail to engage  
at all with, and to simply ignore correspondence from, and summonses  
issued by, the Committee, which is investigating a complaint of  
unsatisfactory professional conduct or professional misconduct against  
the practitioner, is manifestly unacceptable, because it fundamentally  
undermines the authority of the Committee and its capacity to  
effectively investigate complaints about legal practitioners and thereby  
to seek to protect members of the public in their dealings with lawyers  
and to maintain the proper standards of the legal profession.

204 In the circumstances of this case, we find that the practitioner  
engaged in professional misconduct by, without reasonable excuse,  
failing to respond to the first notification letter, the first summons, the  
second notification letter, the third notification letter and the second  
summons, in that her conduct would be reasonably regarded as  
disgraceful or dishonourable by practitioners of good repute and  
competence and fell short, consistently and to a substantial degree, of  
the standard of professional conduct observed or approved by members  
of the profession of good repute and competence.

205 In the circumstances, it is unnecessary to determine whether,  
further and alternatively, the practitioner's conduct would justify a  
finding that she is not a fit and proper person to engage in legal  
practice.

### ***Conclusion***

206 We have determined that the practitioner engaged in professional  
misconduct in terms of each of the three grounds alleged by the  
Committee. The matter should now proceed to consideration of the  
appropriate professional disciplinary consequence of the practitioner's  
conduct, and the issue of costs.

*Findings of professional misconduct and orders*

207 The Tribunal makes the following findings of professional misconduct against Christina Marie Chang (practitioner):

(1) Between 23 June 2016 and 7 July 2016, in the course of corresponding with a former client, the complainant, in response to a letter of demand from the complainant dated 2 June 2016 for a refund of \$10,000 for fees paid by the complainant in relation to an unsuccessful visa application the practitioner had prepared and lodged on behalf of the complainant and her family on 16 October 2015 (claim), the practitioner engaged in professional misconduct, within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA), in that her conduct would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, by preparing and sending:

1. an email to the complainant dated 23 June 2016 in which she stated 'I will notify my Insurers and will await their response. Once I have that I can then respond to you in detail';
2. an email to the complainant dated 29 June 2016 in which she stated 'Hi the way insurance works is that all claims must be reported to the insurers and I am required by my insurers not to discuss the claim with you directly'; and
3. an email to the complainant dated 7 July 2016 in which she stated 'Hi I am waiting for [a] reply from my insurer[.] I should hear by next week. They know its [sic] urgent';

(together, the email statements),

in circumstances where:

- (a) the email statements were false and misleading, as, in truth, at no time between 23 June 2016 and 7 July 2016 did the practitioner notify, or correspond with, any insurer or insurers regarding the claim; and

- (b) the practitioner knew the email statements were false and misleading and intended that the complainant be misled by the email statements, so as to defer or delay the complainant from commencing proceedings against the practitioner in respect of the claim.
- (2) Between 23 August 2016 and 27 September 2016, in the course of defending Magistrates Court proceedings lodged by the complainant against the practitioner on 25 July 2016 in respect of the claim, by which the complainant sought the sum of \$10,118.20 (including allowable Court fees) (proceedings), the practitioner engaged in professional misconduct, within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA), in that her conduct would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence by:
1. at a pre-trial conference before a registrar of the Court (Registrar) on 23 August 2016, saying words to the effect 'I cannot disclose any details because the matter is in the insurer's hands. I will discuss it as soon as I have more information on what they are going to do'; and
  2. at a further pre-trial conference before the Registrar on 27 September 2016, saying words to the effect 'I cannot speak about the matter because there is an insurer involved';

(together, the PTC statements),

in circumstances where:

- (a) the PTC statements were false and misleading as, in truth, at no time prior to 23 August 2016, and between 23 August 2016 and 27 September 2016, did the practitioner notify, or correspond with, any insurer or insurers regarding the claim or the proceedings; and
- (b) the practitioner knew the PTC statements were false and misleading and intended that the

Court and the complainant be misled by the PTC statements, so as to defer or delay the proceedings.

- (3) On and after 6 October 2017, following a complaint to the Legal Profession Complaints Committee (Committee) by the complainant against the practitioner arising from the practitioner's response to the claim, her conduct in the proceedings and her failure to pay the judgment sum (complaint), the practitioner engaged in professional misconduct, within the meaning of s 403, s 404(a) and s 438 of the *Legal Profession Act 2008* (WA), in that her conduct would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence and fell short, consistently and to a substantial degree, of the standard of professional conduct observed or approved by members of the profession of good repute and competence, by, without reasonable excuse, failing to respond to:
1. by 5 October 2017 or at all, a letter from the Committee to the practitioner dated 15 September 2017 which formally notified her of, and requested her submissions in relation to, the complaint (first notification letter), in breach of r 50(3) of the *Legal Profession Conduct Rules 2010* (WA);
  2. by 5 October 2017 or at all, a Summons to Produce Documents dated 14 September 2017 issued to the practitioner by the Committee under s 520(1)(a) of the *Legal Profession Act 2008* (WA) (first summons), in breach of s 520(5) and s 532(3) of the *Legal Profession Act 2008* (WA);
  3. by 7 November 2017 or at all, a letter from the Committee to the practitioner dated 17 October 2017 which formally notified her of, and requested her submissions in relation to, a conduct investigation commenced on the Committee's own initiative, under s 421 of the

*Legal Profession Act 2008* (WA), in relation to the practitioner's failure to respond to the first notification letter and the first summons (second notification letter), in breach of r 50(3) of the *Legal Profession Conduct Rules 2010* (WA);

4. by 6 December 2017 or at all, a letter from the Committee to the practitioner dated 15 November 2017 which formally notified her of, and requested her submissions in relation to, a conduct investigation commenced on the Committee's own initiative, under s 421 of the *Legal Profession Act 2008* (WA), in relation to the practitioner's failure to respond to the second notification letter, in breach of r 50(3) of the *Legal Profession Conduct Rules 2010* (WA); and
5. by 6 December 2017 or at all, a Summons to Produce Documents and Provide Written Information Verified by Statutory Declaration dated 15 November 2017 issued to the practitioner by the Committee under s 520(1)(a), (c) and (d) and s 520(3) of the *Legal Profession Act 2008* (WA), in breach of s 520(5) and s 532(3) of the *Legal Profession Act 2008* (WA).

208 The Tribunal makes the following orders:

1. By 1 October 2019 the applicant is to file and serve its submissions in relation to penalty and costs together with a schedule of the amount of costs and disbursements it seeks and supporting accounts.
2. By 22 October 2019 the respondent is to file and serve her submissions in relation to penalty and costs and any evidence, including character references, on which she relies.
3. By 29 October 2019 the applicant is to file and serve a statement of the names of the authors of any character references filed in accordance with the preceding order

who are required for cross-examination at the hearing in relation to penalty and costs.

4. The issues of penalty and costs are listed for hearing to commence at 10.00 am on 4 November 2019 for half a day.

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

MF

Associate to the Honourable Judge Parry

9 SEPTEMBER 2019