

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Legal Services Commissioner v Graham* [2024] QCAT 387

PARTIES: **LEGAL SERVICES COMMISSIONER**  
(applicant)

**v**

**MICHAEL ANTHONY GRAHAM**  
(respondent)

APPLICATION NO/S: OCR 208-23

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 18 September 2024

HEARING DATE: 15 July 2024

HEARD AT: Brisbane

DECISION OF: Justice Williams

Assisted by:

Mr Richard Barnes, Practitioner Panel Member

Mr Keith Revell, Lay Panel Member

- ORDERS:
- 1. The Respondent's conduct identified in respect of each of Charges 1 to 5 in the discipline application is found to constitute professional misconduct.**
  - 2. The Respondent not be granted a practising certificate before 27 February 2026.**
  - 3. The Respondent complete the QLS Practice Management Course prior to being granted a principal's practising certificate.**
  - 4. The Respondent is publicly reprimanded.**
  - 5. The Respondent pay the LSC's costs of and incidental to the discipline application, to be assessed on the standard basis as if this were a proceeding before the Supreme Court of Queensland.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT – where the respondent was charged and convicted of various tax offences in 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014 and 2017 – where the respondent pleaded guilty and was fined for the charges for which he was convicted – where an application for disciplinary orders

against the respondent was subsequently brought by the applicant Commissioner pursuant to s 456 of the *Legal Profession Act 2007* (Qld) – where the applicant alleges that the charges against the respondent constitute unsatisfactory professional conduct or professional misconduct – whether conduct also breached Australian Solicitors Conduct Rules as likely to material degree to bring profession into dispute – whether the respondent engaged in unsatisfactory professional conduct or professional misconduct – whether disciplinary orders should be made pursuant to s 456 of the *Legal Profession Act 2007* (Qld) – practising certificate previously cancelled and period expired – payment of debt to ATO paid in full prior to hearing – evidence of remorse and rehabilitation – whether Tribunal should recommend respondent being struck from roll – whether supervision appropriate – whether the respondent should be ordered to pay the Commissioner’s costs of the application

*Australian Solicitors Conduct Rules 2012*, r 5

*Legal Profession Act 2007* (Qld), s 5, s 6, s 69, s 70, s 418, s 419, s 420, s 423, s 453, s 456, s 462, s 656

*QLS Administration Rule 2005*, r 31

*Tax Administration Act 1953* (Cth), s 8C

*Adamson v Queensland Law Society Incorporated* [1990] 1 Qd R 498

*A Solicitor v Council of the Law Society of New South Wales* [2004] HCA 1; (2004) 216 CLR 253

*Attorney-General v Bax* [1999] 2 Qd R 9

*Attorney-General & Minister for Justice Queensland v Priddle* [2002] QCA 297

*Briginshaw v Briginshaw* (1938) 60 CLR 336

*GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857; [2023] HCA 32

*Legal Services Commissioner v Brown* [2018] QCAT 263

*Legal Services Commissioner v Cain* [2009] LPT 19

*Legal Services Commissioner v Challen* [2019] QCAT 273

*Legal Services Commissioner v Donnelly* [2010] QCAT 569

*Legal Services Commissioner v Fellows* [2017] QCAT 337

*Legal Services Commissioner v Graham* [2016] QCAT 31

*Legal Services Commissioner v Hewlett* [2008] LPT; [2008] Qd R 292

*Legal Services Commissioner v Laurie* [2011] QCAT 335

*Legal Services Commissioner v Lee* [2013] QCAT 447

*M v M* (1988) 166 CLR 69

*Legal Services Commissioner v Madden (No. 2)* [2009] 1 Qd R 149

*Legal Services Commissioner v McDonald* [2018] QCAT 82

*Legal Services Commissioner v Shand* [2018] QCA 66

*Legal Services Commissioner v Smith* [2021] QCAT 345.  
*Legal Services Commissioner v Wrightway Legal* [2015] QCAT 174  
*Matthew Stirling v Legal Services Commissioner* [2013] VSCA 374  
*New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279  
*New South Wales Bar Association v Murphy* [2002] NSWCA 138; (2002) 55 NSWLR 23  
*New South Wales Bar Association v Somosi* [2001] NSWCA 285  
*New South Wales Bar Association v Young* [2003] NSWCA 228; 54 ATR 22  
*Pope v Bar Association of Queensland* [2016] QCAT 311  
*Queensland Law Society v Whitman* [2003] QCA 438  
*Watts v Legal Services Commissioner* [2016] QCA 224

**APPEARANCES &  
REPRESENTATION:**

Applicant: RK Micairan of Counsel instructed by the Legal Services Commission

Respondent: G Rice KC instructed by Gilshenan & Luton

**REASONS FOR DECISION**

- [1] This is a discipline application by the Legal Services Commissioner (**LSC**) under s 456 of the *Legal Profession Act 2007* (Qld) (**LP Act**) for disciplinary orders pursuant to s 456 of the LP Act. The discipline application raises five charges against the respondent, Mr Michael Anthony Graham (**Respondent**), of engaging in the following conduct:
- (a) Charge 1 – failure to furnish an income tax return;
  - (b) Charge 2 – failure to furnish 20 goods and services tax (**GST**) returns;
  - (c) Charge 3 – failure to give nine yearly income tax returns;
  - (d) Charge 4 – failure to give nine yearly income tax returns following notice in writing; and
  - (e) Charge 5 – failure to give 66 monthly GST returns.
- [2] The LSC and the Respondent have agreed the relevant facts in respect of the disciplinary application and the hearing proceeded on the basis of a statement of agreed facts dated 24 November 2023 (**SOAF**).<sup>1</sup>
- [3] It is not contentious between the parties that the conduct of the Respondent in respect of each charge amounts to professional misconduct. However, some of the underlying facts are contentious between the parties.

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<sup>1</sup> Hearing Book Tab 3 at pp 17-21.

- [4] Further, it is contentious between the parties what is the appropriate sanction in all of the circumstances. The LSC submits that the appropriate sanction is an order recommending that the Respondent's name be removed from the roll of legal practitioners.
- [5] The Respondent filed a further affidavit of the Respondent just prior to the hearing and relies on that evidence in respect of the appropriate sanction. The Respondent submits that, on the evidence, the Tribunal should find that the Respondent is not currently permanently unfit to practice. In particular, reliance is placed on the Respondent's conduct since 2018 to rectify and redeem the past conduct and that this shows he is of appropriate character to remain on the roll of legal practitioners.
- [6] In all of the circumstances, the Respondent contends that the Tribunal should make an order effecting a five-year suspension<sup>2</sup> which would balance the character assessment, recognition of the seriousness of past offending, the need for deterrence, protection of the public and the maintenance of professional standards.
- [7] Whilst sanction is the primary issue in dispute between the parties, it is necessary for the Tribunal to consider whether the facts of each charge are proved and whether the conduct of the Respondent in respect of each charge is properly characterised as professional misconduct.
- [8] As the Respondent relied upon affidavit evidence and was cross-examined at the hearing, it is also necessary to make some further findings of fact. This will be particularly relevant to the consideration of the appropriate sanction.
- [9] Accordingly, the following issues are to be determined by the Tribunal:
- (a) Are the facts in respect of each of Charges 1 to 5 proved?
  - (b) Is the conduct of the Respondent in respect of each of Charges 1 to 5 properly characterised as professional misconduct?
  - (c) What are the further findings of fact in respect of the Respondent's conduct?
  - (d) What is the appropriate sanction?
  - (e) What is the appropriate costs order?
- [10] Before addressing these issues, it is helpful to set out some background facts and the relevant legislative provisions.

### **Background facts**

- [11] The relevant facts in respect of each of Charges 1 to 5 are set out in the SOAF.
- [12] The relevant facts include:
- (a) The Respondent was admitted to the legal profession in Queensland on 13 December 1990 and is a local lawyer pursuant to section 5(2) of the LP Act.

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<sup>2</sup> The Respondent's unrestricted principal practising certificate was cancelled by the Queensland Law Society (QLS) effective from 26 February 2021 for a period of three years: see [12] below. The Respondent has not made an application for one since the expiration of the 3 year period and in effect has not held a practising certificate for 3.5 years. The sanction proposed is a further two year suspension, giving a total effective suspension of 5 years.

- (b) At all material times, the Respondent was an Australian legal practitioner pursuant to section 6(1) of the LP Act, having held a solicitor's unrestricted principal practising certificate from 25 February 2003 to 26 February 2021.
- (c) On 17 December 2020, the Executive Committee of the QLS, as delegate of the full Council of the QLS, met and resolved that:
  - (i) The Respondent had not shown that he continued to be a fit and proper person to hold an unrestricted principal practising certificate, so that practising certificate was cancelled under s 69(1)(b) of the LP Act; and
  - (ii) The Respondent was not entitled to apply for a practising certificate for a period of three years, pursuant to section 70 of the LP Act.
- (d) The QLS decision took effect from 5pm on 26 February 2021.

[13] The facts in relation to each charge are set out in detail in the SOAF. A summary of the five charges is as follows:<sup>3</sup>

- (a) **Charge 1:** On or about 9 October 2006, the Respondent failed to furnish to the Commissioner of Taxation, an income tax return for the year of income ending 30 June 2005, as and when required by a notice issued to the Respondent, which as a result, the Respondent was convicted on 28 June 2007 of offending contrary to section 8C(1)(a) of the *Tax Administration Act 1953* (Cth).
- (b) **Charge 2:** On various dates between on or about 24 May 2005 and on or about 22 December 2006, the Respondent failed, as and when required, to furnish 20 GST returns for monthly tax periods to the Commissioner of Taxation, which as a result, the Respondent was convicted on 28 June 2007 of offending contrary to section 8C(1)(a) of the *Tax Administration Act 1953* (Cth).
- (c) **Charge 3:** On various dates between on or about 1 July 2007 and on or about 31 October 2017, the Respondent failed as and when required, to give to the Commissioner of Taxation, nine income tax returns for the years of income ending 30 June in 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014 and 2017.
- (d) **Charge 4:** On or about 23 October 2018, the Respondent failed, as and when required by a notice in writing, to give to the Commissioner of Taxation, nine yearly income tax returns for the income years ending 30 June in 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014 and 2017, which as a result, the Respondent was convicted on 18 September 2020 of offending contrary to section 8C(1)(a) of the *Tax Administration Act 1953* (Cth).
- (e) **Charge 5:** On various dates between on or about 24 July 2012 and on or about 22 August 2018, the Respondent failed to provide GST returns to the Commissioner of Taxation, for 66 monthly tax periods as and when required, which as a result, the Respondent was convicted on 18 September 2020 of offending contrary to section 8C(1)(a) of the *Tax Administration Act 1953* (Cth).

[14] Further, in the SOAF, the Respondent accepts that as a result of the conduct set out in the SOAF:

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<sup>3</sup> The summary is contained in the SOAF at [1] under the heading "Introduction".

- (a) In respect of Charges 1, 2, 4 and 5, he has been convicted of a tax offence for the purposes of section 420(1)(c)(ii) of the LP Act.
- (b) In respect of each of Charges 1 to 5, he has engaged in conduct that is likely to a material degree to bring the profession into disrepute, including contrary to Rule 5 of the *Australian Solicitors Conduct Rules 2012 (ASCR)*.

**Characterisation of unsatisfactory professional conduct or professional misconduct**

- [15] The LP Act came into force on 1 July 2007. Pursuant to s 423(1) of the LP Act, the discipline and complaints procedures in Ch 4 of the LP Act apply to conduct of an Australian legal practitioner whether the conduct occurred before or after the commencement of the LP Act.
- [16] Accordingly, Ch 4 of the LP Act applies to conduct in Charges 1 and 2 notwithstanding that the conduct occurred before the LP Act came into force in 2007.
- [17] Sections 418, 419 and 420 of the LP Act state as follows:

**“418 Meaning of *unsatisfactory professional conduct***

*Unsatisfactory professional conduct* includes conduct of an Australian legal practitioner happening 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.

**419 Meaning of *professional misconduct***

- (1) *Professional misconduct* includes—
  - (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
  - (b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening 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 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 to the legal profession under this Act or for the grant or renewal of a local practising certificate.

**420 Conduct capable of constituting unsatisfactory professional conduct or professional misconduct**

- (1) The following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct—
  - (a) conduct consisting of a contravention of a relevant law, whether the conduct happened before or after the commencement of this section;

*Note—*

*Under the Acts Interpretation Act 1954, section 7, and the Statutory Instruments Act 1992, section 7, a contravention in relation to this Act would include a contravention of a regulation or legal profession rules and a contravention in relation to a previous Act would include a contravention of a legal profession rule under the *Legal Profession Act 2004*.*

- (b) charging of excessive legal costs in connection with the practice of law;
  - (c) conduct for which there is a conviction for—
    - (i) a serious offence; or
    - (ii) a tax offence; or
    - (iii) an offence involving dishonesty;
  - (d) conduct of an Australian legal practitioner as or in becoming an insolvent under administration;
  - (e) conduct of an Australian legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act;
  - (f) conduct of an Australian legal practitioner in failing to comply with an order of a disciplinary body made under this Act or an order of a corresponding disciplinary body made under a corresponding law, including a failure to pay wholly or partly a fine imposed under this Act or a corresponding law;
  - (g) conduct of an Australian legal practitioner in failing to comply with a compensation order made under this Act or a corresponding law.
- (2) Also, conduct that happened before the commencement of this subsection that, at the time it happened, consisted of a contravention of a relevant law or a corresponding law is capable of constituting unsatisfactory professional conduct or professional misconduct.
- (3) This section does not limit section 418 or 419.”

[18] In considering the conduct, it is relevant that pursuant to s 420(1)(a) of the LP Act, conduct consisting of a contravention of a relevant law,<sup>4</sup> which includes the ASCR,<sup>5</sup> is conduct capable of constituting unsatisfactory professional conduct or professional misconduct.

[19] As identified above, the LSC and the Respondent agree that the Respondent contravened Rule 5 of the ASCR by the conduct in charges 1 to 5. Accordingly, the conduct is capable of constituting unsatisfactory professional conduct or professional misconduct.

[20] Rule 5 of the ASCR states as follows:

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<sup>4</sup> The term “relevant law” is defined in Schedule 2 of the LP Act to mean “this Act” and see also s 1 of the LP Act.

<sup>5</sup> Section 420(1)(a) of the LP Act includes a note that a contravention in relation to the LP Act, includes a contravention of a regulation or legal profession rules.

**“Dishonest and disreputable conduct**

5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:

5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice; or

5.1.2 bring the profession into disrepute.”

[21] Further, in respect of Charges 1, 2, 4 and 5, the Respondent has been convicted in the Magistrates Court of a tax offence for the purposes of section 420(1)(c)(ii) of the LP Act. Accordingly, the conduct is capable of constituting unsatisfactory professional conduct or professional misconduct also on this basis.

**Are the facts in respect of each of Charges 1 to 5 proven?**

[22] Pursuant to s 453 of the LP Act the Tribunal must hear and decide each allegation in the discipline application and the Tribunal is not bound by the rules of evidence and may inform itself in any way.

[23] In determining the discipline application:

(a) Pursuant to section 656C(1) of the LP Act, if an allegation of fact is not admitted or is challenged at the hearing, the Tribunal must be satisfied of the allegations against the Respondent on the balance of probabilities.

(b) Pursuant to section 656C(2) of the LP Act, satisfaction as to whether proof has been established depends upon the gravity of the allegations in question and the consequences for the Respondent.

[24] The Respondent:

(a) Admitted the allegations in [1] to [5.8] of the discipline application in the response to the discipline application dated 20 October 2023.

(b) Admitted the facts contained in the SOAF.<sup>6</sup>

[25] Without restating all of the admitted facts, it is appropriate to outline the facts in some more detail as they are particularly relevant to the characterisation of the conduct undertaken under the next heading at [36].

[26] In respect of Charge 1, failure to furnish an income tax return, the facts include as follows:

(a) The Respondent was at all material times a sole practitioner in his own name.

(b) The Respondent at all material times was required pursuant to the *Income Tax Assessment Act 1936* (Cth) and the *Tax Administration Act 1953* (Cth) (together the **Taxation Law**) to furnish to the Commissioner of Taxation within a specified period, yearly income tax returns corresponding with each year of income.

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<sup>6</sup> Which substantially included the facts and allegations in the discipline application.

- (c) In respect of the year of income ending 30 June 2005, the Respondent failed within the specified period to furnish to the Commissioner of Taxation a yearly income tax return for that year (**2005 Income Tax Return**).
- (d) The Respondent was issued a notice<sup>7</sup> to furnish the 2005 Income Tax Return to the Commissioner of Taxation before 9 October 2006 (**Notice to Furnish**).
- (e) The Respondent did not furnish the 2005 Income Tax Return to the Commissioner of Taxation as and when required by the Notice to Furnish.
- (f) On 28 June 2007, the Respondent was convicted by the Brisbane Magistrates Court for one charge of offending contrary to section 8C(1)(a) of the *Tax Administration Act* 1953 (Cth) for failing to furnish the 2005 Tax Return to the Commissioner of Taxation as and when required by the Notice to Furnish. The Respondent was fined \$700.00 (**2007 Tax Return Conviction**).

[27] In respect of Charge 2, failure to furnish GST returns, the facts include as follows:

- (a) At all material times, the Respondent:
  - (i) was a sole practitioner in his own name.
  - (ii) was registered for GST in accordance with the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) (**GST Act**).
  - (iii) Was required by the GST Act and the Taxation Law to furnish to the Commissioner of Taxation GST returns associated with the tax period applicable to the Respondent.
  - (iv) The tax period applicable to the Respondent was monthly.
  - (v) A GST return was required to be furnished on or before a specified period following the end of the monthly tax period.
  - (vi) A GST return was furnished to the Commissioner of Taxation by lodging a monthly Business Activity Statement (**BAS**) with the Australian Taxation Office (**ATO**).
- (b) The Respondent did not lodge BAS for 20 months from April 2005 to November 2006 (inclusive). As a result, the Respondent failed to furnish to the Commissioner of Taxation a total of 20 GST returns for the monthly tax periods.
- (c) On 28 June 2007, the Respondent was convicted by the Brisbane Magistrates Court for 20 charges of offending contrary to s 8C(1)(a) of the *Tax Administration Act* 1953 (Cth) for failing to furnish the GST returns the subject of this charge. The Respondent was fined \$1,800 and ordered to complete 240 hours of community service (**2007 GST Conviction**).

[28] In respect of Charge 3, failure to give yearly income tax returns, the facts include as follows:

- (a) During the material times, the Respondent held an unrestricted principal practising certificate while in the following roles:

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<sup>7</sup> On a date unknown.

- (i) 19 September 2006 to February 2021 – a sole practitioner in his own name.
  - (ii) 8 January 2016 to 19 June 2016 – the managing partner of a law practice trading as “Graham + Bull”.
  - (iii) 20 June 2017 to 10 April 2019 – the managing partner of a law practice trading as “Graham + Bull”.
  - (iv) 11 April 2019 to 27 November 2020 – a legal practitioner director of incorporated legal practice Graham & Bull Pty Ltd ACN 617 955 174 trading as ‘Global Billing Costs Lawyers’.
  - (v) From a date unknown but within the period January 2008 to 2 December 2020 – a costs assessor appointed pursuant to the *Uniform Civil Procedure Rules* 1999 (Qld).
- (b) At all material times, the Respondent was required pursuant to the Taxation Law to give to the Commissioner of Taxation, within a specified period, yearly income tax returns corresponding with each year of income.
  - (c) The Respondent did not give to the commissioner of Taxation, within the specified period, nine income tax returns for the years of income ending 30 June 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014 and 2017 (**Outstanding Tax Returns**).<sup>8</sup>

[29] In respect of Charge 4, failure to give yearly income tax returns following notice in writing, the facts include as follows:

- (a) Further to the facts in respect of Charge 3, by notice in writing dated 10 September 2018, the Deputy Commissioner of Taxation required the Respondent to give the Outstanding Tax Returns to the Commissioner of Taxation on or before 22 October 2018 (**Notice to Lodge Outstanding Returns**).
- (b) The Respondent did not give the Outstanding Tax Returns to the Commissioner of Taxation as and when required by the Notice to Lodge Outstanding Returns.
- (c) The Respondent did not lodge the Outstanding Tax Returns with the ATO until 6 August 2020.
- (d) Following lodgement of the Outstanding Tax Returns, the ATO determined that the Respondent was liable to pay \$297,606 in tax.
- (e) On 18 September 2020 the Respondent was convicted by the Brisbane Magistrates Court for nine charges of offending contrary to s 8C(1)(a) of the *Tax Administration Act* 1953 (Cth) for failing to give the outstanding tax returns as and when required by the Notice to Lodge Outstanding Returns. The Respondent was fined a total of \$75,000 for all charges resolved on that occasion (part of **2020 Conviction**).

[30] In respect of Charge 5, failure to give GST returns, the facts include as follows:

- (a) Further to the facts at [28(a)] above, at all material times:

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<sup>8</sup> 2015 and 2016 income tax returns were lodged.

- (i) The Respondent was registered for GST in accordance with the GST Act.
  - (ii) The Respondent was required by the GST Act and Taxation Law to give the Commissioner of Taxation GST returns associated with the tax period applicable to the Respondent.
  - (iii) The tax period applicable to the Respondent was monthly.
  - (iv) A GST return was required to be furnished on or before a specified period following the end of the monthly tax period.
  - (v) A GST return was furnished to the Commissioner of Taxation by lodging monthly BAS with the ATO.
- (b) The Respondent did not lodge monthly BAS for the following periods:
- (i) June 2012 to November 2013 (inclusive) – 18 monthly tax periods.
  - (ii) March 2014 to June 2015 (inclusive) – 16 monthly tax periods.
  - (iii) November 2015 to October 2016 (inclusive) – 12 monthly tax periods.
  - (iv) December 2016 to July 2018 (inclusive) – 20 monthly tax periods.
- (c) The Respondent failed to furnish to the Commissioner of Taxation a total of 66 GST returns for the individual monthly tax periods corresponding with the months for which the respondent did not lodge BAS.
- (d) The Respondent did not lodge the outstanding BAS until 19 November 2019 and on various dates in September 2020.
- (e) The ATO subsequently determined that the respondent was liable to pay \$368,144 in tax.
- (f) On 18 September 2020 the Respondent was convicted by the Brisbane Magistrates Court for 66 charges of offending contrary to s 8C(1)(a) of the *Tax Administration Act 1953* (Cth) for failing to give GST returns to the Commissioner of Taxation. The Respondent was fined a total of \$75,000 for all charges resolved on that occasion (balance of **2020 Conviction**).

[31] The concessions by the Respondent outlined at [14] above, were made in the context of these admitted facts.

[32] Following the exchange of written submissions, the LSC filed supplementary submissions which clarified the LSC's position relevantly including as follows:

- (a) None of the charges in the discipline application alleged the Respondent engaged in fraud or dishonest conduct.
- (b) The LSC does not allege that the Respondent's conduct involved fraud or dishonesty.
- (c) The sanction is not to be determined on the basis that fraud or dishonesty was involved.<sup>9</sup>

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<sup>9</sup> LSC's Supplementary Submissions dated 24 April 2024. Included behind Tab 7 of Exhibit 1 Hearing Book.

- [33] The LSC maintains that the Respondent's conduct was deliberate and the failure to lodge the tax returns in effect advanced the Respondent's interests by enabling the Respondent to have access to available funds for other purposes rather than paying a tax liability. This issue, together with the Respondent's position, will be considered further later in these reasons.
- [34] On the basis of the Respondent's admissions<sup>10</sup> and the affidavits relied upon at the hearing, the Tribunal is satisfied that the relevant facts constituting each of Charges 1 to 5 have been proved.
- [35] It is then necessary to consider the proper characterisation of the conduct of the Respondent.

**Is the conduct of the Respondent in respect of each of Charges 1 to 5 properly characterised as professional misconduct?**

- [36] It is not contentious between the parties that the proper characterisation of the Respondent's conduct in respect of each of Charges 1 to 5 is professional misconduct.
- [37] Thomas J in *Adamson v Queensland Law Society Incorporated*<sup>11</sup> described the test as to whether conduct amounts to professional misconduct as follows:

“The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency”.

- [38] As set out at [12(c)] above, the QLS resolved that the Respondent was not entitled to apply for a practising certificate for a period of three years pursuant to s 70 of the LP Act. That decision took effect from 5pm on 26 February 2021 and the three year period expired on 26 February 2024. Notwithstanding that previous decision of the QLS, the Tribunal must make its own assessment of the issue of the Respondent's fitness for practice.
- [39] As is evident from the overview of the facts, each of the charges relates to failures by the Respondent to comply with his tax obligations. There are previous Tribunal decisions where consideration has been given to legal practitioners failing to comply with their tax obligations. This provides some assistance to the characterisation of the Respondent's conduct.
- [40] In *Legal Services Commissioner v Hewlett*,<sup>12</sup> the respondent practitioner was charged with professional misconduct for failing to lodge 11 yearly income tax returns for the years from 1991 to 2001. The Tribunal found professional misconduct proved. In that case, only five of the years returned a substantial tax liability, with the remaining years resulting in only a small amount or no tax liability. However, the Tribunal held that the default was nonetheless of “substantial proportions”.<sup>13</sup>
- [41] In *Legal Services Commissioner v Cain*,<sup>14</sup> the respondent practitioner engaged in conduct for which he was convicted on 15 May 2007 of six taxation offences. The conduct was constituted by failing to lodge five income tax returns and one GST return

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<sup>10</sup> In the SOAF and the response dated 20 October 2023: see Tabs 2 and 3 of Exhibit 1 Hearing Book.

<sup>11</sup> [1990] 1 Qd R 498 at p 507.

<sup>12</sup> [2008] LPT 3; [2008] Qd R 292.

<sup>13</sup> At [20].

<sup>14</sup> [2009] LPT 19.

as required. The characterisation of the conduct as professional misconduct was admitted by the respondent practitioner.<sup>15</sup> The Tribunal found professional misconduct and further held that:

“[e]ach failure constituted unsatisfactory professional conduct and because it was repeated on so many occasions was a consistent failure to keep or reach a reasonable standard of competence and diligence so that it constituted professional misconduct.”<sup>16</sup>

- [42] In *Legal Services Commissioner v Donnelly*,<sup>17</sup> the respondent practitioner was charged that between 1 March 2003 and 30 April 2005 he engaged in conduct constituting 10 taxation offences for which he was convicted and fined \$15,000 in the Magistrate’s Court. The conduct in that case related to the respondent practitioner’s failures to lodge quarterly BAS. The respondent practitioner acknowledged that the failure to lodge the BAS and the convictions constituted professional misconduct. The Tribunal found professional misconduct and described the respondent’s concession as “appropriate”.<sup>18</sup>
- [43] In *Legal Services Commissioner v Laurie*,<sup>19</sup> the respondent, a barrister, was charged with failing to lodge income tax returns and BAS between 1997 and 2005. The respondent had been convicted in the Brisbane Magistrate’s Court for these failures. Further, these failures occurred despite regular reminders and offers of assistance from the ATO, which were met with the respondent’s “unimpressive excuses or explanations”.<sup>20</sup> Ultimately, the Tribunal held that the respondent’s conduct of prolonged and continuing failure to lodge the tax documents met the description of professional misconduct.<sup>21</sup>
- [44] Further, in *Legal Services Commissioner v Lee*,<sup>22</sup> the respondent practitioner was charged for conduct relating to failures to lodge eight income tax returns and six BAS statements. Relevantly, the charges were as follows:
- (a) Charge 1 – failure to lodge income tax returns for the years ending in 1991, 1992 and 1993 for which he was convicted in the Magistrate’s Court of three offences and fined \$1,300.
  - (b) Charge 2 – failure to lodge income tax returns for the years ending 1995 and 1996, for which he was convicted in the Magistrate’s Court of two offences and fined \$2,500.
  - (c) Charge 3 – failure to lodge an income tax return for the year ending 2004, for which he was convicted in the Magistrate’s Court and fined \$900.
  - (d) Charge 5 – in 2009 he was convicted in the Magistrate’s Court of six offences for failing to lodge BAS and fined \$6,000.<sup>23</sup>

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<sup>15</sup> *Legal Services Commissioner v Cain* [2009] LPT 19 at [2].

<sup>16</sup> At [9].

<sup>17</sup> [2010] QCAT 569.

<sup>18</sup> At [9].

<sup>19</sup> [2011] QCAT 335.

<sup>20</sup> At [4].

<sup>21</sup> At [7].

<sup>22</sup> [2013] QCAT 447.

<sup>23</sup> The additional charge, Charge 4 concerned the practitioner’s failure to notify the Bar Association of his conviction in respect of Charge 3.

[45] Ultimately the Tribunal found that the conduct amounted to professional misconduct and relevantly stated:

“In short, convictions on four separate occasions for a total of 12 taxation offences over the course of nineteen years can only fairly be described in the terms set out in s 419(1)(a) as professional misconduct arising from a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence. For these reasons, the Tribunal is persuaded that [the respondent’s] conduct in respect of Charges 1, 2, 3 and 5 should be categorised as professional misconduct...”<sup>24</sup>

[46] Lastly, in *Legal Services Commissioner v Fellows*,<sup>25</sup> the respondent practitioner, a barrister, was the subject of three charges relating to failures to lodge income tax returns for five years of income and three BAS over three periods. The relevant charges were as follows:

- (a) Charge 1 – failure to lodge income tax returns for years ending in 1998 and 1999, for which he was convicted in the Magistrate’s Court for two offences and fined \$2,000.
- (b) Charge 2 – failure to lodge income tax returns for the years ending in 2002, 2003 and 2004, for which he was convicted in the Magistrate’s Court for three offences and fined \$5,000.
- (c) Charge 3 – failure to lodge three BAS for September and December quarter in 2010 and the March quarter in 2011, for which he was convicted in the Magistrate’s Court for three offences and fined \$15,000.

[47] Ultimately, the Tribunal held that the respondent had engaged in professional misconduct.<sup>26</sup>

[48] Relevantly, the Tribunal stated as follows:

“Indeed, whether the lodgment failures are considered together or alone, each constituted a fundamental breach of the respondent’s civic obligations. Further, given the close relationship between his default in each instance and the income the respondent generated in his practice as a barrister, there could be little doubt that the respondent’s conduct is capable of constituting professional misconduct ... the failure to comply with such an important statutory obligation, shared as it is by all income-earning members of society, comfortably meets the common law definition of conduct that may reasonably be regarded as disgraceful or dishonourable by fellow practitioners of good repute and competency. It also involved, in the language of the statutory test, a substantial failure to maintain a reasonable standard of competence and diligence. The feature that the practitioner in this case was guilty of repeated defaults of the same type only reinforces the conclusion that he consistently failed to maintain that standard.”<sup>27</sup>

[49] A review of these decisions clearly shows that there is a general consensus in disciplinary proceedings that failures, in particular, repeated failures, by practitioners to furnish income tax returns or GST returns amounts to professional misconduct.

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<sup>24</sup> *Legal Services Commissioner v Lee* [2013] QCAT 447 at [40].

<sup>25</sup> [2017] QCAT 337.

<sup>26</sup> At [19].

<sup>27</sup> At [18].

[50] It is also relevant to consider the comments of Spigelman CJ in *New South Wales Bar Association v Somosi*,<sup>28</sup> in considering a case involving a barrister who was removed from the roll in New South Wales for tax offending, the Chief Justice stated as follows:

“He took advantage of the full range of public services made available by taxation, not least the provision of the court system in which he earned his income. He left the burden of all of this to his fellow citizens. Furthermore, for a period of almost two decades he engaged in what I described in *Cummins* as the hypocrisy of putting himself in a position, as a legal practitioner, in which he advocated that other people should perform.”

[51] The particular features of the Respondent’s conduct placing it in the category of professional misconduct include:

- (a) The Respondent’s conduct involved multiple failures by him to provide his yearly income tax returns and GST returns, being a total of 10 yearly income tax returns for various financial years and a total of 86 GST returns.
- (b) The conduct was prolonged in that it spread over a 12 year period between 2005 and 2017.
- (c) The Respondent’s conduct involved repeated failures over consecutive years.
- (d) The Respondent’s conduct continued despite notices in 2006 and 2018 from the Commissioner of Taxation requiring him to furnish the returns and also convictions imposed in 2007.
- (e) It can be inferred from the facts that the Respondent’s default escalated after the 2007 Tax Return Conviction and the 2007 GST Conviction.
- (f) The Respondent’s conduct attracted a total of 96 convictions.

[52] In characterising the conduct, the following features are also relevant:

- (a) The conduct in each of Charges 1 to 5 is a contravention of Rule 5 of the ASCR in that the conduct is likely to a material degree to bring the profession into disrepute.
- (b) By the conduct in each of Charges 1, 2, 4 and 5 the Respondent has been convicted of a tax offence for the purposes of section 420(1)(c)(ii) of the LP Act.

[53] The Respondent has a disciplinary history, including:

- (a) On 4 March 1997 the Respondent pleaded guilty before the QLS Statutory Committee to one charge of forging a document and one charge of uttering a false document. The charges related to forging the signature of a partner at the firm at which he was employed on a sales receipt for alcohol which he purchased without the firm’s knowledge or authority. The conduct was found to be professional misconduct and the Respondent was censured.<sup>29</sup>
- (b) On 17 November 2011 a discipline application was filed against the Respondent alleging five charges. Three charges proceeded to final hearing. On 16

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<sup>28</sup> [2001] NSWCA 285 at [68].

<sup>29</sup> See [4(a)] of the affidavit of Bradley Mark Fitzgerald affirmed 14 December 2023, Tab 4 Exhibit 1 Hearing book. See also Exhibit “BMF-01” to the affidavit.

December 2013 the Tribunal found that the Respondent had engaged in unsatisfactory conduct with respect to two charges: namely, failure to maintain reasonable standards of competence and diligence in relation to the preparation of a costs statement and failure to abide by an agreement to refund money upon failing to provide the costs statement by nominated dates. The Respondent was publicly reprimanded, ordered to pay a pecuniary penalty of \$1,500 and pay the applicant's costs.<sup>30</sup>

- (c) Following an appeal by the Respondent as to the findings of unsatisfactory professional conduct by the Tribunal,<sup>31</sup> on 28 November 2014 the Court of Appeal dismissed the appeal with costs.<sup>32</sup>
- (d) On 27 January 2012, a discipline application was filed against the Respondent alleging one charge that between 4 June 2009 and 1 June 2011 the Respondent failed to maintain reasonable standards of competence and diligence in relation to his conduct of a costs assessment. On 2 February 2016 the Tribunal found that the Respondent had engaged in unsatisfactory professional conduct. The Respondent was publicly reprimanded, ordered to pay a pecuniary penalty of \$1,500 and the applicant's costs.<sup>33</sup>

[54] The Respondent had a number of “wake-up calls” that should have put him on notice that failing to exercise vigilance in respect of his own personal tax affairs was conduct that could subject him to disciplinary proceedings, including:

- (a) the Notice to Furnish;
- (b) the 2007 Tax Return Conviction;
- (c) the 2007 GST Conviction; and
- (d) the Notice to Lodge Outstanding Returns.

[55] Further, the disciplinary proceedings outlined above, in particular the findings of unsatisfactory professional conduct on 16 December 2013 and 2 February 2016 occurred within the periods relevant to Charges 3, 4 and 5 and should have been a further “wake-up call”.

[56] Consistent with the comments in *Legal Services Commissioner v Fellows*, the Tribunal agrees that regardless of whether the failures are considered together or alone, each constitutes a fundamental breach of the Respondent's civic obligations.

[57] Further, the Respondent's conduct displayed a substantial or consistent failure by him to maintain a reasonable standard of competence and diligence.<sup>34</sup>

[58] Accordingly, the Tribunal is satisfied that Charges 1 to 5 can appropriately be characterised as professional misconduct pursuant to s 419(1)(a) of the LP Act. The

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<sup>30</sup> See [4(b)], [4(c)], and [4(d)] of the affidavit of Bradley Mark Fitzgerald affirmed 14 December 2023, Tab 4 Exhibit 1 Hearing book. See also *Legal Services Commissioner v Graham* [2013] QCAT 552 and *Legal Services Commissioner v Graham* [2014] QCAT 223.

<sup>31</sup> The appeal included whether the conduct happened “in connection with the practice of law”.

<sup>32</sup> *Graham v Legal Services Commissioner (No 1)* [2014] QCA 306.

<sup>33</sup> See [4(f)] and [4(g)] and Exhibit “BMF-03” of the affidavit of Bradley Mark Fitzgerald affirmed 14 December 2023, Tab 4 Exhibit 1 Hearing book. See also *Legal Services Commissioner v Graham* [2016] QCAT 31 and *Legal Services Commissioner v Graham* [2017] QCAT 170.

<sup>34</sup> This is also consistent with the approach in *Legal Services Commissioner v Lee*.

Respondent's conduct falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.

- [59] The Tribunal finds that the conduct identified in respect of each of Charges 1 to 5 in the discipline application constitutes professional misconduct.

**What are the further findings of fact in respect of the Respondent's conduct?**

- [60] As identified previously, there are contentious factual issues between the parties that need to be resolved. This requires consideration of the affidavit material filed in the discipline application and the Respondent's oral evidence at the hearing where he was cross-examined at length.

- [61] Factual findings are required in two key respects:

- (a) In respect of Charges 1 to 5, whether the Respondent's conduct was deliberate to avoid tax liability or was negligent.
- (b) The Respondent paying the balance of the outstanding debt to the ATO in full just prior to the hearing.

- [62] It is convenient to deal with the second issue at the outset.

***Further evidence of payment in full of the tax debt owed to the ATO***

- [63] At the hearing, the Respondent relied on a further affidavit of the Respondent that had been sworn on 11 July 2024, being the week before the hearing.<sup>35</sup> The Respondent's affidavit included the following further evidence:

- (a) As at 22 January 2024:
  - (i) The Respondent owed approximately \$767,000 to the ATO.
  - (ii) The Respondent also had a mortgage of \$788,000 on his apartment at Newstead.
- (b) The Newstead apartment was purchased in August 2017 for \$1.245 million, with a mortgage of approximately \$980,000.
- (c) The mortgage had increased to approximately \$870,000 due to redrawing on excess payments.
- (d) A valuation of the property indicated that the property was now worth approximately \$2.5 million.
- (e) The Respondent and his wife applied to refinance the property, which was subsequently approved.
- (f) On 5 July the balance of the amount owed to the ATO, being approximately \$579,000 was paid to the ATO.
- (g) Exhibits 'MAG-01' and 'MAG-02' show that the Respondent was consequently in credit with the ATO in the amount of \$3,670.

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<sup>35</sup> Leave was granted to read and file the affidavit and a copy was added to Tab 8 of Exhibit 1 Hearing Book.

(h) Refinancing the apartment had enabled the Respondent to finalise his debt with the ATO as he always intended.

[64] This further evidence establishes that the Respondent has now repaid to the ATO his tax liabilities in full, together with any interest and penalties imposed by the ATO.

[65] This needs to be considered in the context of the earlier evidence from the Respondent that:

- (a) He took responsibility for repayment of the debt owed to the ATO.
- (b) He did not declare bankruptcy.
- (c) He entered into a payment arrangement with the ATO and was paying the tax debt off by instalments as required by the terms of the agreement with the ATO.

[66] These factual circumstances are particularly relevant to the appropriate sanction and are discussed further below.

***Whether conduct was deliberate to avoid tax liability or was negligent***

[67] Whether the Respondent's conduct was deliberate to avoid tax liability or was negligent is contentious between the parties.

[68] The Respondent submits that the Respondent's evidence<sup>36</sup> shows that:

- (a) The failures to furnish the income tax returns and the GST returns were as a result of negligence and not an attempt by him to avoid paying tax.<sup>37</sup>
- (b) The Respondent did not engage in fraud by way of intentionally concealing income in order to avoid exposure to tax liability.
- (c) The Respondent did not set out to avoid payment of tax and provided an explanation in his affidavit.<sup>38</sup>
- (d) The Respondent's explanation is that his focus and dedication to his work meant that he was negligent to other aspects of his life including his health and taxation affairs.<sup>39</sup>
- (e) The Respondent had a disposition for problem avoidance in aspects of his life and was unable to discipline himself, as he should have, to make the necessary lodgements and meet his tax obligations in a timely manner.<sup>40</sup>
- (f) The Respondent gave evidence that he had a mental barrier towards addressing his taxation obligations and each year the problem grew bigger and administratively more difficult. His record keeping was in disarray and spread "indiscriminately" over five different storage premises.<sup>41</sup>
- (g) The Respondent relevantly shows insight by his evidence that:

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<sup>36</sup> Both the Respondent's affidavit sworn 29 January 2024 and his oral evidence at the hearing.

<sup>37</sup> See for example affidavit at paragraphs [83], [75], [126], [142], [180] and [181].

<sup>38</sup> Respondent's affidavit at [116] – [119], [124], [126], [131], [133] – [137], [139], [141] – [142] and [179] at Tab 5 of Exhibit 1 Hearing Book.

<sup>39</sup> Respondent's affidavit at [52].

<sup>40</sup> Respondent's affidavit at [107].

<sup>41</sup> Respondent's affidavit at [135] and [148].

“In hindsight, my focus and dedication to my work has at times been to my detriment and meant that I was neglecting other aspects of my life. Significantly, this has been true for both my health and my taxation affairs”.<sup>42</sup>

- (h) The Respondent’s financial position collapsed from 2008 and his assets were liquidated to pay down debt.<sup>43</sup> This included the loss of the family home in 2014.<sup>44</sup> The Respondent’s focus on his practice at the expense of other priorities is to be considered in this context.<sup>45</sup>
  - (i) The Respondent was a sole practitioner at the relevant times and his practice involved high volume cost assessment work. On reflection the Respondent accepts he may have taken on too much work.<sup>46</sup>
  - (j) The Respondent accepts the gravity of his conduct, has shown remorse and insight into the effect on the profession’s standing.<sup>47</sup>
  - (k) The Respondent ultimately did deal with the 9 annual income returns and 66 monthly BAS, which took approximately 18 months to locate, compile and sort records and professional accounting fees of \$18,000.<sup>48</sup> This task took longer than the 6-weeks given in the final notice but was completed prior to the Respondent’s appearance in court.
  - (l) The Respondent did not avoid the payment of tax by entering bankruptcy but rather entered into a very long and onerous long term repayment agreement with the ATO relating to all tax outstanding and interest.<sup>49</sup>
  - (m) At the time of the written submissions the Respondent had met all his obligations under the agreement and gave evidence that he would continue to do so.<sup>50</sup>
  - (n) The Respondent has put in place arrangements to prevent similar lapses reoccurring and had been compliant with tax obligations from the 2018 financial year onwards, namely for 5 years.<sup>51</sup>
  - (o) The Respondent has cooperated in respect of these proceedings, accepting “guilt” and looking to bring them to an expeditious conclusion.
- [69] The Respondent also points to health issues, including his substantial skin cancer problem over a long period. In particular, the Respondent points to the evidence that:
- (a) The Respondent had a tendency to avoid problems and this resulted in inertia where there were growing issues.

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<sup>42</sup> Respondent’s affidavit at [52] at Tab 5 of Exhibit 1 Hearing Book.

<sup>43</sup> Respondent’s affidavit at [64] and [66] – [71].

<sup>44</sup> Respondent’s affidavit at [67] – [68].

<sup>45</sup> Respondent’s affidavit at [75] and [106].

<sup>46</sup> Respondent’s affidavit at [134] and [166].

<sup>47</sup> Respondent’s affidavit at [53].

<sup>48</sup> Respondent’s affidavit at [148] – [150].

<sup>49</sup> Respondent’s affidavit at [177] – [178].

<sup>50</sup> Respondent’s affidavit Exhibits “MAG-05” and “MAG-06” at Tab 5 of Exhibit 1 Hearing Book.

<sup>51</sup> Respondent’s affidavit at [145] and Exhibit “MAG-04” at Tab 5 of Exhibit 1 Hearing Book.

- (b) This included his own health, where the Respondent manifested inertia over a long period.
  - (c) Despite daily pain and embarrassment, the Respondent remained unable to prioritise his own health.
  - (d) As a result of neglect to his own health, the Respondent faced a treatment program of some magnitude.<sup>52</sup>
- [70] The Respondent also points to his mother’s illness from February 2017 as another “distraction” from regularising his affairs.<sup>53</sup>
- [71] The LSC submits that the Tribunal ought to find that the Respondent engaged in a deliberate course of conduct and that the Respondent’s conduct was not due to negligence but rather it was intended to avoid tax liability.
- [72] In respect of the explanations given by the Respondent for his conduct, the LSC notes that these explanations include the following:
- (a) The Respondent had undertaken a course of investing in ventures and businesses which saw him placed in a good financial position with his assets worth approximately \$7 million in 2007 with debt of approximately \$3.5 to \$4.5 million.
  - (b) The Respondent points to the Global Financial Crisis (**GFC**) of 2008 together with poor financial advice which resulted in his assets and business being adversely affected and that this in turn “exacerbated [his] ‘business before everything’ mindset” and contributed to him neglecting his health and taxation affairs.<sup>54</sup>
  - (c) The Respondent was suffering a number of health stressors, predominantly around skin cancers in the form of basal cell carcinomas (**BCCs**).<sup>55</sup>
  - (d) The Respondent deposes to treatment in 2007 and 2008, the further development of BCCs between 2008 and 2009 which were likely left untreated until 2019.<sup>56</sup>
  - (e) Further, the Respondent deposes to a fall in 2017 which resulted in a fractured right proximal humerus and a tear to his rotator cuff.<sup>57</sup> The Respondent deposes to this injury significantly limiting his ability performing tasks including administrative tasks until June 2018.<sup>58</sup>
  - (f) The Respondent also deposes to the diagnosis of his mother with pancreatic cancer in February 2017 and her passing in September 2017.<sup>59</sup>
  - (g) Further, the Respondent deposes to the fact that once he fell behind with his tax obligations, he came to realise that he needed to devote a significant amount of

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<sup>52</sup> Respondent’s affidavit at [67] – [70], [81] and Exhibit “MAG-02” at Tab 5 of Exhibit 1 Hearing Book.

<sup>53</sup> Respondent’s affidavit at [139] at Tab 5 of Exhibit 1 Hearing Book.

<sup>54</sup> Respondent’s affidavit at [78] and [79].

<sup>55</sup> Respondent’s affidavit at [78] and [79].

<sup>56</sup> Respondent’s affidavit at [80] and [81].

<sup>57</sup> Respondent’s affidavit at [102].

<sup>58</sup> Respondent’s affidavit at [103].

<sup>59</sup> Respondent’s affidavit at [139] – [141].

time to rectify the issues and was overwhelmed. He claims that in those circumstances his reaction was one of avoidance rather than action.<sup>60</sup>

- (h) These circumstances were apparently exacerbated by:
  - (i) For reasons unknown to him, when the Respondent had initially registered for GST he nominated his returns to be provided on a monthly basis;<sup>61</sup> and
  - (ii) Prior to the convictions the subject of Charges 4 and 5, his financial documentation was in hard copy, poorly ordered, and held in various boxes in five storage sheds. The Respondent claims that this made the task of addressing the outstanding tax returns very overwhelming.<sup>62</sup>
- (i) Some of these factors were taken into account by the Court in sentencing the Respondent on 18 September 2020.<sup>63</sup>

[73] The sentencing Magistrate on 18 September 2020 accepted that the Respondent's conduct was due to inattention and negligence as a result of his workload. The LSC submits that the material before this Tribunal and the matters deposed to by the Respondent in his affidavit are contrary to what was accepted by the sentencing Magistrate.

[74] In respect of the health stressors relied upon by the Respondent, the LSC submits that these are insufficient to explain the Respondent's conduct. The LSC submits that the Respondent's own evidence is not that his work was hindered by his health, but rather it was the other way around and that his work led to the detriment of his health.

[75] The LSC also contends that the Respondent's negligence of his own health due to being focused on his work, is not analogous and cannot be equated to his abrogation of the duty to furnish his tax returns. That is, there is an inherent link between the income earned through his work and his need to declare his income by furnishing his tax returns.

[76] The LSC also points to the decision of the Tribunal on 2 February 2016 in respect of the previous disciplinary proceedings where the Tribunal made reference to an affidavit sworn by the Respondent on 17 August 2015.<sup>64</sup> That affidavit outlines certain health issues relied upon by the Respondent to explain his conduct in respect of that disciplinary application. The relevant health issues relied upon include:

- (a) In December 2010 he was hospitalised due to a major cellulitis infection in his left leg;
- (b) He underwent surgery from late February 2011 to early March 2011 to remove skin cancers;
- (c) He suffered from hypertension for a number of years; and

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<sup>60</sup> Respondent's affidavit at [107],[118],[119] and [136] at Tab 5 of Exhibit 1 Hearing Book.

<sup>61</sup> Respondent's affidavit at [117] – [119] and [131].

<sup>62</sup> Respondent's affidavit at [135].

<sup>63</sup> See sentencing remarks of Magistrate Ghatt (as the Deputy Chief Magistrate then was) exhibited to the affidavit of Bradley Mark Fitzgerald at Exhibit BMF-06.

<sup>64</sup> *Legal Services Commissioner v Graham* [2016] QCAT 31 at [11].

- (d) He suffered “significant anxiety and worry” at the end of 2010 and the beginning of 2011 due to his health concerns and hospitalisation.<sup>65</sup>

[77] In the affidavit filed in the current disciplinary application, the Respondent does not depose to any of these health issues outlined in the earlier affidavit in the separate disciplinary proceedings. Ultimately, in these circumstances the LSC contends that the Tribunal should be circumspect as to the weight it can place on the Respondent’s references to his health and its connection to the conduct the subject of this current discipline application.

[78] Further, the LSC makes particular reference to several further features.

[79] Firstly, in the years leading up to and during the conduct, it is submitted that the Respondent undertook a course of investing in various ventures and properties. The investments undertaken by the Respondent include:

- (a) In about 2004 or 2005, the Respondent invested in Great Southern Plantation to the amount of about \$600,000 to \$700,000.<sup>66</sup>
- (b) In about 2004 or 2005, the Respondent opened a financial planning business with his financial advisor.<sup>67</sup>
- (c) Between 2004 and 2007, the Respondent entered into a partnership, or a business involved in providing short term loans, which the Respondent described as being “very successful and generated approximately \$1,000,000 in revenue”.<sup>68</sup>
- (d) Between 2004 and 2011, the Respondent purchased investments properties at Mooloolaba, New Farm and Clontarf.<sup>69</sup>
- (e) From about 2003 and 2004, the Respondent invested in shares with a managed fund which by about 2010 and 2011 grew to the value of approximately \$1.3 million and generated \$80,000 to \$90,000 per annum in income.<sup>70</sup>

[80] The LSC notes that this last point appears to be in conflict with other evidence by the Respondent in his affidavit that the 2008 GFC led to the share portfolio and managed funds being liquidated.<sup>71</sup> The LSC relies on this evidence to support the contention that the Respondent was motivated by enrichment and financial advancement.

[81] It is from this, that the LSC submits that it is open to infer that any exposure by the Respondent to tax liability, such as furnishing his returns, would be a low priority (if at all).

[82] The LSC also points to a number of other matters which it submits support the conclusion that the Respondent’s conduct was deliberate and not negligent, including as follows:

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<sup>65</sup> *Legal Services Commissioner v Graham* [2016] QCAT 31 at [13].

<sup>66</sup> Respondent’s affidavit at [62(i)] at Tab 5 of Exhibit 1 Hearing Book.

<sup>67</sup> Respondent’s affidavit at [62(ii)].

<sup>68</sup> Respondent’s affidavit at [62(iii)].

<sup>69</sup> Respondent’s affidavit at [57].

<sup>70</sup> Respondent’s affidavit at [56].

<sup>71</sup> Compare Respondent’s affidavit at [65(ii)] and [56].

- (a) Prior to the 2008 GFC, the Respondent was adept at handling his finances. Whilst the LSC accepts that the 2008 GFC affected his net worth, the LSC submits that the evidence supports the conclusion that the Respondent was intent on recovering his financial position as it was prior to the 2008 GFC. It is submitted that this renewed focus forms the basis for an inference that his exposure to tax liability, such as furnishing his returns, would also be a low priority.
- (b) The LSC also submits that the explanation of the 2008 GFC also only goes so far in explaining the Respondent's conduct. Charges 1 and 2 occurred prior to the 2008 GFC.
- (c) Further, the ultimate tax liability to the ATO of approximately \$1.1 million dollars (prior to 27 October 2020)<sup>72</sup> evidences that the Respondent was in fact able to financially recover from the effects of the 2008 GFC.
- (d) In respect of the Respondent's evidence that his financial documents were in such disarray that he was overwhelmed, the LSC submits that there are some inconsistencies with this evidence.
  - (i) On the Respondent's evidence, at least in the period for Charges 1 and 2, the task for the Respondent in gathering his financial documents would have been minimal and unlikely to have been "overwhelming".
  - (ii) Further, the Respondent had been dealing with the accounting and business advisory firm Thompson Partners for some time, having been engaged by the Respondent since 2007. Despite having the assistance of Thompson Partners, the LSC submits that the Respondent continued to abrogate his duty to furnish tax returns.

[83] It is in these circumstances that the LSC submits that it is open to draw an inference that the Respondent deliberately chose not to furnish his returns.

[84] The LSC also contends that it is reasonable to accept that the Respondent would have been aware and under constant reminder of his tax obligations. This includes the notices issued by the Commissioner of Taxation and his convictions in 2007 for tax offences. Further, it is noted that for a substantial period of the relevant date range for the charges, the Respondent was a costs assessor, a managing partner of a law practice and from about 2004 or 2005 involved in a financial planning business.

[85] Another significant feature relied upon by the LSC is that the conduct the subject of Charge 3, namely failing to furnish the income tax return for the income year ending 2007, commenced almost immediately after his conviction by the Magistrate's Court on 28 June 2007. This is despite the fact that the convictions in the Magistrate's Court should have been a "wake-up call" to the Respondent of the need to comply with tax obligations. As part of the sentence, the Magistrate made orders that the Respondent's outstanding tax return and BAS be lodged by 24 August 2007.

[86] The LSC contends that the convictions in 2007 should have been a point in time when the Respondent put his tax affairs in order to ensure future compliance with his tax obligations. This could have included converting his BAS lodgements from monthly to quarterly. However, the Respondent immediately continued to fail in furnishing his

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<sup>72</sup> Respondent's affidavit at [172] at Tab 5 of Exhibit 1 Hearing Book.

returns. The LSC submits that this supports the conclusion that his conduct was deliberate not to do so.

[87] Further, the LSC contends that:

- (a) The Respondent's explanations do not support that he was prevented or so hamstrung from addressing his failures. Rather, the material points to the many opportunities the Respondent had to address his conduct and yet he continued to withhold the furnishing of his tax returns.
- (b) The Respondent's tax debt following the eventual furnishing of his outstanding income tax returns and BAS was substantial. This shows the amount denied to the Commonwealth revenue but also supports the motivation for the Respondent not to furnish his returns.

[88] Overall, the LSC contends that the Respondent's conduct was protracted over a lengthy period of time and was composed of consecutive failures. Further, it was carried out while he was subject to disciplinary proceedings for two other matters and continued even after those other matters were dealt with.<sup>73</sup>

[89] Acknowledging the *Briginshaw*<sup>74</sup> standard applies, the LSC contends that the standard is met when all the circumstances are viewed as a whole and the only reasonable conclusion to be reached is that the Respondent's failures were deliberate and intended to conceal his income in order to avoid exposure to tax liability.

### ***Consideration***

[90] The Tribunal must be satisfied of the allegations against the Respondent on the balance of probabilities, depending upon the gravity of the allegations in question and the consequences for the Respondent. Here the consequences are potentially a finding of permanent unfitness to practice and removal from the roll of legal practitioners. These are serious consequences, and this impacts the level of satisfaction required.

[91] Whilst these are disciplinary proceedings, they are civil proceedings and:

- (a) the LSC bears the persuasive onus of proof in respect of this allegation; and
- (b) given the nature of the allegation,<sup>75</sup> the higher evidentiary standard as articulated in *Briginshaw v Briginshaw*,<sup>76</sup> and as more recently explained in *M v M*,<sup>77</sup> is required to be satisfied.

[92] The starting point is the case of *Briginshaw v Briginshaw*<sup>78</sup> where the High Court considered the standard of proof in divorce proceedings on the ground of adultery. Dixon J's reasons for judgment state the relevant principle:

“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

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<sup>73</sup> Those matters were decided on 16 October 2013 and 2 February 2016.

<sup>74</sup> (1938) 60 CLR 336.

<sup>75</sup> And the potential consequences.

<sup>76</sup> (1938) 60 CLR 336.

<sup>77</sup> (1988) 166 CLR 69.

<sup>78</sup> (1938) 60 CLR 336.

question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences”.<sup>79</sup>

[93] Dixon J went on later in the reasons to state:

“This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues ... But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.”<sup>80</sup>

[94] In the recent High Court decision in *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore*,<sup>81</sup> the majority of the High Court recognised that the adversarial system requires a plaintiff to prove its case and that “the gravity of the fact sought to be proved is relevant to ‘the degree of persuasion of the mind according to the balance of probabilities’”.<sup>82,83</sup>

[95] Further:

“[b]y this approach, the common law, in accepting but one standard of proof in civil cases (the balance of probabilities), ensures that ‘the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved’.<sup>84,85</sup>

[96] Particularly relevant to the current context are the comments of the majority of the High Court as follows:

“[60] A court is not bound to accept uncontradicted evidence. Uncontradicted evidence may not be accepted for any number of reasons including its inherent implausibility, its objective unlikelihood given other evidence, or **the trier of fact simply not reaching the state of ‘actual persuasion’ which is required before a fact may be found**<sup>86</sup>. ‘To satisfy an onus of proof on the balance of probabilities is not simply a matter of asking whether the evidence supporting that conclusion has greater weight than any opposing evidence ... It is perfectly possible for there to be a scrap of evidence that favours one contention, and no countervailing evidence, but for the judge to not regard the scrap of evidence as enough to persuade him or her that the contention is correct.’<sup>87</sup> **The evidence must ‘give**

<sup>79</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362.

<sup>80</sup> At 362-363.

<sup>81</sup> (2023) 97 ALJR 857; [2023] HCA 32.

<sup>82</sup> *Rejtek v McElroy* (1965) 112 CLR 517 at 521.

<sup>83</sup> Whether at common law or pursuant to s 140(2)(c) of the *Evidence Act 1995* (NSW): *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857; [2023] HCA 32 at [57].

<sup>84</sup> *Rejtek v McElroy* (1965) 112 CLR 517 at 521, citing, amongst other cases, *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362.

<sup>85</sup> *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857; [2023] HCA 32 at [57].

<sup>86</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361.

<sup>87</sup> *Brown v New South Wales Trustee and Guardian* (2012) 10 ASTLR 164 at 176 [51].

**rise to a reasonable and definite inference’ to enable a factual finding to be made; mere conjecture based on ‘conflicting inferences of equal degrees of probability’ is insufficient<sup>88</sup>. As Dixon CJ said in *Jones v Dunkel*<sup>89</sup>, the law:**

**‘does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied’.**” (emphasis added in bold)

- [97] Accordingly, for the Tribunal to be satisfied that the LSC has proved the allegation on the balance of probabilities, the Tribunal:
- (a) is required to take into account, among other things, the gravity of the matters alleged; and
  - (b) there must be an ‘actual persuasion’ as to the occurrence of those matters before they can be accepted to be proved.
- [98] Relevant considerations include:
- (a) The Respondent provided a lengthy affidavit and made himself available to be cross examined at the hearing.
  - (b) The LSC cross-examined the Respondent on a range of relevant issues, including testing the evidence contained in the Respondent’s affidavit.
  - (c) The Respondent’s evidence was largely consistent with, and did not differ in any significant way from, his affidavit evidence.
  - (d) The Respondent’s evidence at the hearing did not raise any serious issues going to his credit.
- [99] While the LSC does point out some inconsistencies between the Respondent’s evidence and previous or other evidence, these alone do not support a conclusion that the Tribunal should not accept the Respondent’s evidence.
- [100] The LSC submits that the Respondent’s conduct was deliberate. The conduct of not putting in the relevant tax and GST returns could be considered as deliberate in that the Respondent was aware of the obligation to file the returns and that the returns were not filed. It was not an accident such that it was an unwilling act of the Respondent.
- [101] However, what is inherent in the LSC’s position is that the failure to lodge the returns was a conscious decision by the Respondent with the intention to avoid tax liability. There is no direct evidence to support this conclusion.
- [102] The LSC submits that that inference is open on the facts. To enable a factual finding to be made, the evidence must ‘give rise to a reasonable and definite inference’. The Respondent has given evidence that he did not have the intention to avoid his tax liability. In all of the circumstances, there is no basis not to accept the evidence of the Respondent in this regard.

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<sup>88</sup> *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5.

<sup>89</sup> (1959) 101 CLR 298 at 305.

- [103] There are parts of the Respondent's explanation that are, for a responsible and competent practitioner or member of the community, difficult to rationalise. Simply getting organised and on top of his taxation affairs at an early stage was a practical solution for the Respondent. However, it appears from the Respondent's evidence that a form of procrastination set in such that he in effect found himself paralysed and unable to get it done. Then there was a compounding effect such that as time passed getting it done became more insurmountable.
- [104] The Respondent did meet his tax obligations in respect of trust entities<sup>90</sup> and for the 2015 and 2016 financial years. The Respondent's evidence was that the information required for the trust entities was readily available and for the two years he was able to do it.<sup>91</sup> However, for the balance of the years, only he could go through the boxes and work out what needed to be given to the accountants. This was no doubt complicated by the various investments that the Respondent was involved in outside of his professional practice. Plus, the evidence is that the records were in disarray and stored in various locations.
- [105] Again, this is consistent with the Respondent's evidence that he was focussed on work, rather than his personal affairs. The difficulty with this is that as a legal practitioner, conduct in a personal capacity may give rise to disciplinary action as is evident in this proceeding.
- [106] Here, the facts support a conclusion that the Respondent's conduct was as a result of a confluence of factors that lead to his inaction. It was an abrogation of responsibility of his personal taxation affairs for an extended period of time. Whilst it occurred during the period when the Respondent was trying to re-establish himself financially following the impact of the GFC, there is not a sufficient basis to draw the inference that the conduct was done with the deliberate intention of avoiding his tax liabilities.
- [107] The Respondent gave evidence that he knew he would ultimately have to meet his tax obligations, despite his inaction.<sup>92</sup> When that did occur, he entered into an agreement to pay the tax debt by instalments and has ultimately paid in full the tax debt to the ATO. This includes interest and penalties, as well as the fines imposed by the Magistrates Court.
- [108] Considering all of the evidence, and the gravity of the matters alleged, the Tribunal is unable to reach the appropriate level of satisfaction to conclude that the Respondent's conduct was deliberate to avoid tax liability.
- [109] Accordingly, the Tribunal:
- (a) Is not satisfied that the Respondent's conduct was deliberate to avoid his tax liability.
  - (b) Finds that the Respondent's failures to act were as a result of repeated and on-going negligence in respect of his personal taxation affairs.

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<sup>90</sup> T1-31 lines 37 to 49.

<sup>91</sup> T1-32 lines 1 to 2.

<sup>92</sup> T1-35 lines 23 to 40.

**What is the appropriate sanction in all of the circumstances?**

[110] Having made the findings as to professional misconduct, the discretion in s 456 of the LP Act arises.

[111] Section 456 of the LP Act states:

**“456 Decisions of tribunal about an Australian legal practitioner**

- (1) If, after the tribunal has completed a hearing of a discipline application in relation to a complaint or an investigation matter against an Australian legal practitioner, the tribunal is satisfied that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct, the tribunal may make any order as it thinks fit, including any 1 or more of the orders stated in this section.
- (2) The tribunal may, under this subsection, make 1 or more of the following in a way it considers appropriate—
  - (a) an order recommending that the name of the Australian legal practitioner be removed from the local roll;
  - (b) an order that the practitioner’s local practising certificate be suspended for a stated period or cancelled;
  - (c) an order that a local practising certificate not be granted to the practitioner before the end of a stated period;
  - (d) an order that—
    - (i) imposes stated conditions on the practitioner’s practising certificate granted or to be issued under this Act; and
    - (ii) imposes the conditions for a stated period; and
    - (iii) specifies the time, if any, after which the practitioner may apply to the tribunal for the conditions to be amended or removed;
  - (e) an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner;
  - (f) an order that no law practice in this jurisdiction may, for a period stated in the order of not more than 5 years—
    - (i) employ or continue to employ the practitioner in a law practice in this jurisdiction; or
    - (ii) employ or continue to employ the practitioner in this jurisdiction unless the conditions of employment are subject to conditions stated in the order.
- (3) The tribunal may, under this subsection, make 1 or more of the following—
  - (a) an order recommending that the name of the Australian legal practitioner be removed under a corresponding law from an interstate roll;
  - (b) an order recommending that the practitioner’s interstate practising certificate be suspended for a stated period or cancelled under a corresponding law;

- (c) an order recommending that an interstate practising certificate not be, under a corresponding law, granted to the practitioner until the end of a stated period;
  - (d) an order recommending—
    - (i) that stated conditions be imposed on the practitioner’s interstate practising certificate; and
    - (ii) that the conditions be imposed for a stated period; and
    - (iii) a stated time, if any, after which the practitioner may apply to the tribunal for the conditions to be amended or removed.
- (4) The tribunal may, under this subsection, make 1 or more of the following—
- (a) an order that the Australian legal practitioner pay a penalty of a stated amount, not more than \$100,000;
  - (b) a compensation order;
  - (c) an order that the practitioner undertake and complete a stated course of further legal education;
  - (d) an order that, for a stated period, the practitioner engage in legal practice under supervision as stated in the order;
  - (e) an order that the practitioner do or refrain from doing something in connection with the practitioner engaging in legal practice;
  - (f) an order that the practitioner stop accepting instructions as a public notary in relation to notarial services;
  - (g) an order that engaging in legal practice by the practitioner is to be managed for a stated period in a stated way or subject to stated conditions;
  - (h) an order that engaging in legal practice by the practitioner is to be subject to periodic inspection by a person nominated by the relevant regulatory authority for a stated period;
  - (i) an order that the practitioner seek advice from a stated person in relation to the practitioner’s management of engaging in legal practice;
  - (j) an order that the practitioner must not apply for a local practising certificate for a stated period.
- (5) To remove any doubt, it is declared that the tribunal may make any number of orders mentioned in any or all of subsections (2), (3) and (4).
- (6) Also, the tribunal may make ancillary orders, including an order for payment by the Australian legal practitioner of expenses associated with orders under subsection (4), as assessed in or under the order or as agreed.
- (7) The tribunal may find a person has engaged in unsatisfactory professional conduct even though the discipline application alleged professional misconduct.”

[112] The discretion to make any order the Tribunal thinks fit is a wide discretion and is exercised primarily in the protection of the public.<sup>93</sup> Principles of personal and general deterrence are also relevant.<sup>94</sup>

[113] The maintenance and enforcement of proper standards in the profession is a further aim. Accordingly, it is relevant to consider the need to deter other practitioners from engaging in similar conduct and also to protect the public by enforcing standards upon which the public can rely.<sup>95</sup>

[114] In the particular circumstances of this case, the objectives in arriving at the appropriate sanction are:

- (a) To maintain and enforce proper standards in the profession;
- (b) Personal deterrence for the Respondent; and
- (c) General deterrence by reminding practitioners that they must exercise vigilance in respect of their tax affairs, including their own personal tax affairs.

[115] The LSC acknowledges that:

- (a) The making of a finding of professional misconduct does not automatically warrant striking off a practitioner from the roll.<sup>96</sup>
- (b) The reason for this is that a finding of professional misconduct may not necessarily indicate unfitness to practice as at the present time.<sup>97</sup>

[116] The Tribunal in *Legal Services Commission v Fellows*<sup>98</sup> recognised that sanctions imposed for professional misconduct based on a failure to lodge income tax returns varied “as widely as the reasons for those failures”.

[117] In that case, the Tribunal commented on the wide variety of sanctions as follows:

“At one end of the spectrum are cases where the default was found to be purposeful in the sense that returns were not lodged to avoid disclosure of income and the consequent liability to pay income tax. In those cases, of which *Legal Services Commissioner v Hewlett* [2008] 2 Qd R 292 is but one example, the name of the practitioner was struck from the roll, and it will be a rare case where that does not follow almost as a matter of course from such proved, dishonesty and fraud on the revenue. At the other end of the spectrum are cases where the practitioner’s default was explained by administrative breakdown (see, eg, *Legal Services Commissioner v Cain* [2009] LPT 19), psychological issues (see, eg, *Legal Services Commissioner v Donnelly* [2010] QCAT 569; *Legal Services Commissioner v Laurie* [2011] QCAT 335) or a mix of extraneous factors (see, eg, *Legal Services Commissioner v Lee* [2013] QCAT 447). In such cases, the sanction ranges from a public reprimand, with (eg, *Donnelly, Laurie*) or without (eg, *Lee*) a fine, to the placement of supervisory and/or limiting conditions on the practising certificate for the practitioner (eg, *Cain, Lee*).”

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<sup>93</sup> *Legal Services Commissioner v Madden (No. 2)* [2009] 1 Qd R 149 at [122].

<sup>94</sup> *Attorney-General v Bax* [1999] 2 Qd R 9 at [22].

<sup>95</sup> *Legal Services Commissioner v Wrightway Legal* [2015] QCAT 174 at [28].

<sup>96</sup> *Legal Services Commissioner v Shand* [2018] QCA 66 at [77].

<sup>97</sup> *Legal Services Commissioner v Hewlett* [2008] 2 Qd R 292 at [22].

<sup>98</sup> [2017] QCAT 337 at [22].

[118] The LSC has helpfully in submissions undertaken a review of the sanctions imposed in respect of these cases, which can be summarised as follows:

- (a) In *Legal Services Commissioner v Hewlett*, the Tribunal ordered that the practitioner's name be removed from the roll. The practitioner had been censured on two previous occasions regarding a failure to follow instructions on one matter, and in another for failures regarding his trust accounts. The Tribunal found that the practitioner knew that he was abrogating his tax responsibilities, and deliberately did so, preferring to use his resources to meet debts other than that due to the ATO. It was also significant to the Tribunal that the respondent in that case continued to not comply with his obligations for a substantial period of about five years after his financial position improved.
- (b) In *Legal Services Commissioner v Cain*, the Tribunal made orders which included a public reprimand and a prohibition from engaging in legal practice as a principal for three years. In that case, the Tribunal found that the conduct appeared to arise from his being overwhelmed by circumstances rather than because of any dishonesty. There were no previous adverse findings against the practitioner. The Tribunal also took into account the practitioner's personal circumstances, including the loss of his wife and caring for three children as well as an administrative breakdown involving an "errant" bookkeeper.
- (c) In *Legal Services Commissioner v Donnelly*, the Tribunal ordered that the practitioner be publicly reprimanded. In that case, the Tribunal determined that on the scale of tax offences by barristers (particularly New South Wales barristers), the defaults were very much the lower end. Further, the practitioner had no disciplinary history and the Tribunal found that his conduct was not motivated by greed but rather by psychological issues which were addressed at length in a psychological report.
- (d) In *Legal Services Commissioner v Laurie*, the Tribunal ordered that the practitioner be publicly reprimanded. In that case the Tribunal referred to the practitioner's psychological issues and life stressors for which he was getting treatment from a psychiatrist. Ultimately, the Tribunal accepted that the offending did not involve dishonesty and that the conduct occurred in the face of challenging personal circumstances and ongoing problems associated with the property settlement proceedings arising from his failed marriage, to pay the debt and maintain his practice.
- (e) In *Legal Services Commissioner v Lee*, the Tribunal imposed orders requiring conditions on his practising certificate which had previously been imposed by the Bar Association be continued for a further three years, and a pecuniary penalty of \$5,000. Various factors had been referred to by the respondent practitioner in that case including the 2008 GFC, personal business problems, personal health problems and the death of his mother, proceedings brought against him by his bank, his involvement with a number of public and charitable activities and bad service provided by his former accountant over a period of 35 years has contributing factors to his lapse of compliance with his tax obligations. Ultimately, the Tribunal noted that the practitioner had an unblemished record, that there was no dishonesty aspect in his conduct and his conduct was not calculated or deliberate.

- (f) In *Legal Services Commissioner v Fellows*, the Tribunal ordered that the respondent practitioner be publicly reprimanded and to pay a fine in the sum of \$6,000. In that case there was no suggestion that the conduct was deliberate or done so as to avoid his tax responsibilities. The practitioner had previously been dealt with for unprofessional conduct for misappropriation, but the Tribunal held that the history was irrelevant, dated and the charge was a misnomer. Further, the practitioner had been subject to the regime of conditions imposed by the Bar Association for a continuous period of over five years and he had complied with each of the conditions over that time. The Tribunal found there was no further need for supervision.

[119] In the current case, the LSC submitted (based on her contention that the Respondent's conduct was deliberate to avoid tax liability) that the current charges are:

- (a) more serious than those in *Legal Services Commissioner v Cain*, *Legal Services Commissioner v Donnelly*, *Legal Services Commissioner v Laurie*, *Legal Services Commissioner v Lee* and *Legal Services Commissioner v Fellows*. In particular both the frequency and number of failures and also the antecedents of the Respondent make this case more serious.
- (b) more comparable to the circumstances in *Legal Services Commissioner v Hewlett*.

[120] However, this now needs to be considered in light of the Tribunal's findings set out above.

[121] The relevant test as to whether the Respondent should be removed from the local roll of legal practitioners has two components:

- (a) Whether the Respondent is a fit and proper person at the time of the hearing;<sup>99</sup> and
- (b) Whether "the probability is that the [Respondent] is permanently unfit to practice."<sup>100</sup>

[122] The Queensland Court of Appeal in *Legal Services Commissioner v Shand*,<sup>101</sup> relevantly stated:

"The protection of the public, of course, is a purpose also served by an order which affects an existing or future practising certificate. By an order affecting a practising certificate, the public is immediately protected from the risks of which those who would encounter an unfit person would be exposed. ... the community needs to have confidence that only fit and proper persons are able to practice as lawyers and if that's standing, and thereby that confidence, is diminished, the effectiveness of the legal profession, in the service of clients, the Courts, and the public is prejudiced. The Court's Roll of practitioners is an endorsement of the fitness of those who are enrolled."

[123] The LSC acknowledges:

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<sup>99</sup> *Legal Services Commissioner v Madden (No. 2)* [2008] QCA 301 at [132].

<sup>100</sup> *Watts v Legal Services Commissioner* [2016] QCA 224 at [46] citing of *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320.

<sup>101</sup> [2018] QCA 66.

- (a) That the conduct of the Respondent in these proceedings is also relevant to sanction.<sup>102</sup>
- (b) The Respondent has accepted his conduct in relation to the charges, has expressed regret and accepted that the conduct was inconsistent with the standards expected of a legal practitioner, was likely to bring the profession into disrepute and undermines the standing of the profession.<sup>103</sup>
- (c) The Respondent has provided positive references, entered into an arrangement with the ATO to pay his debt and provided evidence in respect of changes made to the practice as outlined in the affidavit of Mr Short. In respect of this last point, this includes new processes to keep records up to date, and also that the appointed accountants will continue to have unrestricted access to the Xero software and data files.

[124] Ultimately, the LSC submitted:

- (a) The Respondent engaged in a deliberate course of conduct and that the Respondent's conduct was not due to negligence but rather it was intended to avoid tax liability. It is in these circumstances that the LSC contended that:
  - (i) the Tribunal ought to be satisfied that the Respondent is permanently unfit to practice; and
  - (ii) the appropriate sanction is that the Respondent's name be removed from the local roll.
- (b) Even if some element of negligence was involved in the Respondent's failures to comply with his tax obligations, it was not necessarily due to disorganised tax record keeping but rather his inability to manage his work and priorities. In this regard, it is submitted that there is little evidence before the Tribunal that this trait has been or will be overcome. The LSC goes as far as to submit that the Respondent's track record speaks otherwise.

[125] In this regard, reference is made to the Tribunal decision in the 2016 disciplinary proceedings by reference to the Respondent's affidavit sworn 17 August 2015 in those proceedings and states as follows:<sup>104</sup>

“In relation to the changes to procedures Mr Graham outlines various mechanisms he has put in place to ensure that all forms of communication are promptly brought to his attention, dealt with, and actioned. These include a management system that involves an independent diary and checklist framework that captures each stage of the assessment process which is updated to ensure that nothing is overlooked. Mr Graham also refers to the fact that since September 2011, he has limited the number of cost assessments and cost consulting work performed by him to ensure that work is done in a timely way.”

[126] Considering the Respondent's affidavit filed in the current discipline application, the LSC submits that the Respondent's inability to manage and balance his work has persisted despite the assertions in the earlier affidavit and earlier disciplinary proceedings.

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<sup>102</sup> *Queensland Law Society v Whitman* [2003] QCA 438.

<sup>103</sup> Respondent's affidavit at [53] at Tab 5 of Exhibit 1 Hearing Book.

<sup>104</sup> *Legal Services Commissioner v Graham* [2016] QCAT 31 at [14].

[127] In *Pope v Bar Association of Queensland*,<sup>105</sup> the Tribunal considered the views of Moffitt P in *Johns v Law Society of New South Wales*.<sup>106</sup> In respect of the views of Moffitt P, the Tribunal stated:

“... that the substance of the question is whether it appears that there is material before the Court to lead it to conclude that the past proved unfitness has been changed to fitness. The ultimate onus is on the Law Society, but where there is admitted professional misconduct and a claim of rehabilitation or of fitness replacing unfitness, the court will look to what evidence there is to establish this change and will expect the practitioner to point to the evidence of improvement”.<sup>107</sup>

[128] In the circumstances of this case, the LSC contends that the Tribunal should find that the Respondent’s material in mitigation does not sufficiently overcome his permanent unfitness to practice.

[129] Further, in light of the seriousness of the Respondent’s conduct and insufficient rehabilitative factors, the LSC further submits that the Respondent has demonstrated unfitness to practice. The protection of the public and the reputation of the profession is overall best served by an order recommending the removal of the Respondent’s name from the local roll.

[130] The LSC also points to the comments of McMeekin J in *Legal Services Commissioner v Smith*,<sup>108</sup> whilst acknowledging that that matter was not a tax matter. In that case, his Honour noted the remarks in the earlier decision of *Barristers’ Board v Darveniza*<sup>109</sup> as follows:

“Generally speaking the quality most likely to result in striking off is conduct which undermines the trustworthiness of the practitioner, or which suggests a lack of integrity or that the practitioner cannot be trusted to deal fairly within the system which he or she practises.”

[131] Further, dealing specifically with defaults in tax obligations, the Tribunal in *Legal Services Commissioner v Hewlett* stated:<sup>110</sup>

“One of the substantial obligations of a legal practitioner is to uphold the law, and to ensure the due application of the law in furthering his or her clients’ affairs. The practitioner’s capacity and commitment in those regards will be thrown into question where the practitioner is himself or herself guilty of a substantial contravention of the law, knowingly and deliberately, and for his or her own financial advancement.”

[132] The LSC also refers to the New South Wales Court of Appeal decision in *New South Wales Bar Association v Young*.<sup>111</sup> In that case the Court of Appeal was considering an appeal by a practitioner whose name had been removed from the roll for failing to lodge tax returns for 16 years and pay tax for 20 years. These failures were despite a record of altruism, a personal life involving two failed marriages and the tragic death

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<sup>105</sup> [2016] QCAT 311.

<sup>106</sup> [1982] 2 NSWLR 1.

<sup>107</sup> At [51].

<sup>108</sup> [2021] QCAT 345.

<sup>109</sup> [2000] QCA 253 at [33].

<sup>110</sup> [2008] LPT 3; [2008] 2 Qd R 292.

<sup>111</sup> [2003] NSWCA 228; 54 ATR 22.

of a child, no sign of a lavish lifestyle or accumulated wealth and impressive testimonials. Ultimately, the Court of Appeal upheld the decision and stated:

“They are irrelevant because they do not alter the essential facts of the case. These are, quite simply, that for years and years Mr Young failed to file income tax returns when he knew he should have. Deliberately to ignore one’s obligations in this matter bespeaks a lack of integrity, particular if one is not ignorant of the consequence, and a lack of integrity justifies removal of Mr Young’s name from the roll.”<sup>112</sup>

[133] Ultimately, the LSC contends that it is necessary for the protection of the public and the maintenance of professional standards that the Respondent’s name be removed from the roll. Accordingly, the LSC seeks an order pursuant to s 456(2)(a) of the LP Act recommending that the name of the Respondent be removed from the local roll of legal practitioners.

[134] In contrast, the Respondent contends that there is evidence of the changes made by the Respondent with a view to addressing inappropriate prioritization of work over tax affairs. This evidence includes the following:

- (a) Mr Short joined the practice in September 2017 and became a co-director of the incorporated company in November 2018. This in effect split the workload and there are 12 employees to delegate to.<sup>113</sup>
- (b) For six months from September 2020, Mr Short and the Respondent engaged in formal minuted meetings directed towards implementing an arrangement for electronic records to be automatically available to the accountants.<sup>114</sup>
- (c) Mr Short has been a positive influence towards ongoing compliance and will remain so.
- (d) For each financial year since 2018, the accountants are exercising oversight towards compliance. In particular, the mechanism for oversight effectively eliminates the “root” of the Respondent’s previous problems by automating the retention of records necessary to maintain his ongoing compliance with taxation returns, together with the provision of that material to his accountants.<sup>115</sup>
- (e) The Respondent is now paying tax on a PAYG basis, meaning his personal returns are simple and there is no requirement to lodge BAS. The Respondent’s personal returns for 2019 to 2022 resulted in refunds as a result of offsetting against his debt.<sup>116</sup>
- (f) The Respondent’s engagement with the repayment plan is evidence of a concerted effort to remediate past failures.

[135] In light of this evidence, the Respondent submits that the Tribunal should find the following matters:

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<sup>112</sup> *New South Wales Bar Association v Young* [2003] NSWCA 228; 54 ATR 22 at [9] per Meagher J.

<sup>113</sup> Short’s affidavit at [2]-[7] at Tab 6 of Exhibit 1 Hearing Book.

<sup>114</sup> Respondent affidavit at [153]-[156] and Exhibit MAG-03 and 04 at Tab 5 of Exhibit 1 Hearing Book; See also Short’s affidavit at [9]-[10].

<sup>115</sup> Respondent’s affidavit at [153], [159] and Exhibit MAG-04.

<sup>116</sup> Respondent’s affidavit at [157].

- (a) With the support of a partner since November 2018, the Respondent's work demands are much better managed than in the past.
- (b) The Respondent has turned non-compliant behaviour into compliant routines and business practices.
- (c) The Respondent genuinely intends to remedy past behaviour and maintain compliance.
- (d) There is no realistic prospects of imperilment of the revenue in the future, or repetition of past failures.

[136] In respect of the previous disciplinary matters, the Respondent acknowledges that he has been reprimanded by the Tribunal twice previously. It is submitted that each of those matters involved delays in the conduct of cost assessments. The Respondent maintains the position that these lapses need to be considered against the high volume work practice over many years.

[137] The Respondent also relies on:

- (a) The references given to him which speak to his commitment to work, professionalism and the respect he enjoys in the profession. The Respondent particularly relies upon the following:
  - (i) Mr Morgan's reference in respect of the Respondent's professionalism, integrity and reliability. Mr Morgan also notes the Respondent's commitment to his work "at the expense of his health and attending to his own affairs".<sup>117</sup>
  - (ii) Ms Feeney's view of the Respondent as a "valued colleague and advisor" is not diminished by the present charges. She also notes his contributions to the profession including two family scholarships for the QUT learning potential fund.<sup>118</sup>
  - (iii) Mr Biggar refers to the Respondent having put the needs of clients at work ahead of the needs of his own affairs.<sup>119</sup>
- (b) The evidence of Mr Short, including as to his previous services to the profession including provision of CLE programs, pro bono advice to solicitor's firms and acting as a QLS practice management course facilitator.<sup>120</sup>

[138] In submissions, the Respondent also undertakes a consideration of the comparable cases. In particular, the Respondent submits that the observations of Burns J in *Legal Services Commissioner v Fellows*<sup>121</sup> is particularly relevant to the assessment of sanction in cases involving failing to meet tax obligations.

[139] The Respondent acknowledges the first category of cases referred to by Burns J as being those where the conduct involved conduct that was "purposeful in the sense that

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<sup>117</sup> Respondent's affidavit Exhibit MAG-07 at pp 29-30 at Tab 5 of Exhibit 1 Hearing Book.

<sup>118</sup> Respondent's affidavit Exhibit MAG-07 at pp 32-33.

<sup>119</sup> Respondent's affidavit Exhibit MAG-07 at pp 34-35.

<sup>120</sup> Short's affidavit at [12] at Tab 6 of Exhibit 1 Hearing Book.

<sup>121</sup> [2017] QCAT 337.

returns were not lodged to avoid disclosure of income and the consequent liability to pay income tax” and which involved “proved dishonesty and fraud on the revenue”.

- [140] It is submitted that it is likely his Honour had in mind the New South Wales cases decided in the early 2000’s where a number of practitioners were removed from the roll for serious tax indiscretions. These cases were referred to as a group in *Legal Services Commissioner v Hewlett*.<sup>122</sup> In *Hewlett*, de Jersey CJ characterised these cases as involving conduct that was “motivated purely by greed”.
- [141] The Respondent submits that the current case is not in that category. Accordingly, the Respondent submits that great care should be taken when making any comparison between this case and any cases in that group of New South Wales cases.
- [142] The Respondent also contends that *Legal Services Commissioner v Hewlett* may not be a relevant comparator as submitted by the LSC. In support of this proposition, the Respondent points to the comments of Burns J in *Legal Services Commissioner v Fellows* where his Honour described *Hewlett* as “but one example” of the purposeful, dishonest conduct in the first category described. The Respondent submits that feature can be distinguished from the current case.
- [143] Further points of distinction in this case include:
- (a) Hewlett attempted to negotiate a settlement with the ATO for less than the amount of taxation owing, which was regarded as “significant” by de Jersey CJ.<sup>123</sup>
  - (b) When that attempted negotiation failed Hewlett went into bankruptcy, which served to “limit forever the amount recoverable by the ATO”.
- [144] The Respondent submits that there are few cases such as the present case where a practitioner has mitigated large amounts of tax owing through non-lodgement by entering an agreement with the ATO for repayment in full.
- [145] Relevantly, of the Queensland decisions, the Respondent notes:
- (a) In *Legal Services Commissioner v Cain*<sup>124</sup> the Respondent owed about \$70,000 which he proposed to repay from the sale of property.
  - (b) In *Legal Services Commissioner v Donnelly*<sup>125</sup> the Respondent repaid some tax before going into bankruptcy.
- [146] In the New South Wales decisions, there is no mention in the judgments of *Somosi* and *Young* of repayment of any tax. In *Cummins* the Respondent opted for bankruptcy.<sup>126</sup>
- [147] It is submitted that the significance of the Respondent’s repayment commitment is not merely monetary. It is submitted that it is a reflection of true character, that shows insight and remorse and importantly to make a fulsome effort to remediate past neglect so that the ATO is not, in the end, out of pocket.

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<sup>122</sup> [2008] LPT 3; [2002] 2 Qd R 292.

<sup>123</sup> At [19].

<sup>124</sup> [2009] LPT 19.

<sup>125</sup> [2010] QCAT 569.

<sup>126</sup> See [2001] NSWCA 285, [2003] NSWCA 228 and (2001) 52 NSWLR 279 respectively.

- [148] The Respondent submits that while it is acknowledged that the Respondent’s civic obligations were neglected over a long period of time in the circumstances outlined, his conduct shows that they have not been abandoned.
- [149] Further, it is submitted that circumstances of neglectful conduct or procrastination did not result in orders for the removal from the roll in cases such as *Legal Services Commissioner v Bouhalis (Legal Practice)*,<sup>127</sup> *Legal Services Commissioner v Cain*,<sup>128</sup> *Legal Services Commissioner v Donnelly*,<sup>129</sup> *Law Society of Tasmania v Schouten*,<sup>130</sup> *Legal Services Commissioner v Lee*,<sup>131</sup> and *Legal Services Commissioner v Fellows*.<sup>132</sup>
- [150] Ultimately, the Respondent contends that the Tribunal should make an order prohibiting the Respondent from applying for a practising certificate for a further two years. This would result in an effective de facto suspension from practice for five years as a result of the decision by the QLS to cancel the Respondent’s practising certificate in January 2021 for a period of three years.
- [151] The Respondent relies upon the decision in *Attorney-General & Minister for Justice Queensland v Priddle*<sup>133</sup> not as a comparable authority on the facts but rather for the comments of the Court in relation to the sanction of suspension. In that case the Court of Appeal stated:

“[9] Suspension from practice rather than striking from the Roll of Solicitors is an appropriate order in cases of unprofessional conduct where a legal practitioner’s behaviour has fallen below the high standards expected of such a practitioner but not in such a way as to indicate that the practitioner is lacking the necessary attributes of someone entrusted with the important responsibilities of a legal practitioner: In *re a Practitioner* (1984) 36 SASR 590, 593; King CJ with whom Zelling and Jacobs JJ agreed at 593, and *Barristers’ Board v Darveniza* [2000] QCA 253, [38]. In *Attorney-General v Kehoe* [2001] 2 Qd R 351, 357, Thomas JA, with whom the Chief Justice and Ambrose J agreed, observed:

‘Experience suggests that orders for striking off a practitioner are appropriate where the conduct reveals a practitioner to be a person unfit to exercise the powers and privileges afforded to solicitors. Suspension may be regarded as the next most serious level of punishment. It is appropriate in cases of relatively serious misconduct where the Tribunal or the court considers that suspension from practice for a designated period is called for and where it has reason to think that at the expiry of such period the practitioner will have learnt his or her lesson and will be of appropriate character to resume practise. It is recognised that orders for striking off or for suspension carry with them a strong element of disgrace and a serious element of economic loss through deprivation of the capacity to practise the profession for which the practitioner has been trained.’”

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<sup>127</sup> [2015] VCAT 254.

<sup>128</sup> [2009] LPT 19.

<sup>129</sup> [2010] QCAT 569.

<sup>130</sup> [2003] TASSC 143.

<sup>131</sup> [2013] QCAT 447.

<sup>132</sup> [2017] QCAT 337.

<sup>133</sup> [2002] QCA 297.

[152] The Respondent submits that the conduct in the present case is not in the category of proved dishonesty and fraud and the Tribunal should find that the Respondent is not currently permanently unfit to practice. This is particularly so given that events subsequent to the misconduct are relevant in deciding upon appropriate disciplinary orders.<sup>134</sup>

[153] In this regard, the Respondent points to conduct since 2018 to rectify and redeem past lapses as showing he is of appropriate character to remain on the roll of legal practitioners. It is in these circumstances that it is submitted that an order effecting a five-year suspension would appropriately balance the character assessment with recognition of the seriousness of past offending, the need for deterrence, protection of the public and the maintenance of professional standards.

[154] In reaching this conclusion, the Respondent relies upon:

- (a) The relevant test for removal of a solicitor from the roll is as the High Court articulated in *A Solicitor v Council of the Law Society of New South Wales*<sup>135</sup>:

“Where an order for removal from the Roll is contemplated, the ultimate issue is whether the practitioner is shown not to be a fit and proper person to be a legal practitioner of the Supreme Court upon whose roll the practitioner’s name presently appears.”<sup>136</sup>

- (b) The issue is to be determined at the time of the hearing.<sup>137</sup>

- (c) Every fact that can throw any light on the issue must be considered.<sup>138</sup>

[155] As to the exercise of assessing fitness, the Respondent refers to the comments of Giles JA in *New South Wales Bar Association v Murphy*.<sup>139</sup> In that case Giles JA at [113] stated as follows:

“Fitness to hold a practising certificate is to be assessed having in mind the high standards required of legal practitioners in the practice of their profession. The standards are required because the relationship between legal practitioner and client, between legal practitioners, and between legal practitioner and court is one of trust in the performance of professional functions, and because there must be confidence in the public and in those engaged in the administration of justice that legal practitioners would probably perform those functions.”

[156] Relevantly, the Court of Appeal has accepted that “an order removing a practitioner’s name from the roll should only be made when the probability is that the practitioner is permanently unfit to practice”: *Watts v Legal Services Commissioner* [2016] QCA 224 at [46]; *Attorney-General of the State of Queensland v Legal Services Commissioner & Anor*; *Legal Services Commissioner v Shand* [2018] QCA 66 at [57];

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<sup>134</sup> *Attorney-General for the State of Queensland v Legal Services Commissioner & Anor*; *Legal Services Commissioner v Shand* [2018] QCA 66 at [20].

<sup>135</sup> [2004] HCA 1; (2004) 216 CLR 253.

<sup>136</sup> At [15]. See also *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 297-298 and in *Re Davis* (1947) 75 CLR 409 at 422.

<sup>137</sup> *A Solicitor v Council of the Law Society of New South Wales* [2004] HCA 1; (2004) 216 CLR 253 at [21] and see *Watts v Legal Services Commissioner* [2016] QCA 224 at [45].

<sup>138</sup> *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 288 and *Watts v Legal Services Commissioner* [2016] QCA 224 at [47]-[48].

<sup>139</sup> [2002] NSWCA 138; (2002) 55 NSWLR 23.

See also *Ex parte Lenehan* (1948) 77 CLR 409 at 423 where three Judges referred to “probable permanent unfitness” as the basis of removal from the roll.

[157] The Respondent contends that justice also requires that a sanction be no more severe than is necessary to achieve the policy objectives. In this regard, reference is made to the comments of Carmody J in *Legal Services Commissioner v McDonald* as follows:<sup>140</sup>

“Based on the rule that it is unjust to impose the most severe penalty when a lesser one is just as appropriate on the facts and otherwise adequately meets all relevant policy purposes (the so called parsimony principle) the Queensland Court of Appeal held in *Chandra v Queensland Building and Construction Commission* and *Watts v Legal Services Commissioner* that removal should not be ordered (or recommended by the tribunal) without a specific finding of probable permanent (or, at least, indefinite) not just past or even current unfitness being made. It follows that lifetime bans are to be reserved for the limited category of cases where nothing less than banishment will provide adequate and appropriate public protection or preserve the profession’s reputation for integrity in the eyes of the public.” (citations omitted)

[158] At the hearing the Respondent also relied on the Victorian Court of Appeal decision in *Matthew Stirling v Legal Services Commissioner*.<sup>141</sup> This case is particularly relevant to considering the appropriate disciplinary orders in circumstances where a tax debt has been paid prior to the date of the imposition of the sanction.

[159] At first instance, the Tribunal found the appellant, a barrister, guilty of one charge of professional misconduct and one charge of unsatisfactory professional conduct. The conduct involved a failure to comply with tax obligations for eight years between 1996 and 2005.

[160] The Tribunal suspended the appellant for three years and made other orders placing restrictions on future practising certificates. The appellant appealed the period of the suspension.

[161] The relevant conduct of the appellant included:

- (a) Admitted that he had failed to lodge a number of tax returns and BAS.<sup>142</sup>
- (b) Was convicted for an offence under s 8C(1)(a) of the *Tax Administration Act* 1953 (Cth) for failing to lodge by 1 April 2003 an income tax return for the financial year ending 30 June 2001.
- (c) Upon lodging the income and provisional tax returns, was assessed as owing \$419,727.36 income tax and \$45,363 in provisional tax.
- (d) Had proceedings commenced against him by the ATO for recovery of the amount of \$518,155.26 plus interest and costs.

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<sup>140</sup> [2018] QCAT 82 at [55].

<sup>141</sup> [2013] VSCA 374.

<sup>142</sup> Failure to disclose on time income earned 1 July 1996 to 30 June 2004, failing to make provision and pay on time income tax on income earned 1 July 1996 to 30 June 2005, failure to make provision for and pay provisional tax from 1 July 1998 to 30 June 2000 and failure to make provision for and pay GST from 1 July 2000 to 30 June 2005.

- (e) Had default judgment entered against him in the Supreme Court of Victoria in the amount of \$488,155.18 plus interest of \$22,053.68 and costs of \$1,043.10.
- (f) On 4 March 2008 made a statement of affairs stating that he was insolvent, owing the ATO \$713,812. He also signed a declaration under the *Bankruptcy Act* 1966 (Cth) appointing a Controlling Trustee.
- (g) Disclosed that he was insolvent and under administration to the Victorian Bar Ethics Committee.
- (h) On 2 May 2008, he entered into his first Personal Insolvency Agreement (**First Agreement**) whereby he agreed to pay \$728,000 to his controlling trustee, with an initial payment of \$200,000 and then monthly payments of \$12,000. An amount of \$210,000 was paid before the First Agreement was terminated as the appellant had not complied with the payment plan.
- (i) On 2 September 2009, he entered into the second Personal Insolvency Agreement (**Second Agreement**). The Second Agreement encompassed all tax debts and had the effect of stopping the accrual of interest on the debt owed.

[162] By the time of the hearing before the Tribunal at first instance the appellant had repaid a total of \$736,070.74. Between the Tribunal hearing and the appeal hearing a further payment of \$405,387.25. Overall, \$1,141,457.99 was repaid to the ATO and at the time of the end of the hearing of the appeal he owed a further amount of approximately \$600,000.<sup>143</sup>

[163] The Legal Services Commissioner had undertaken an investigation and there was an issue as to whether the appellant had cooperated with the investigation, including whether he had failed to respond to requests. There was also an issue as to whether the Legal Services Commissioner had played a role in the delay.

[164] The investigation resulted in the disciplinary proceedings and ultimately the appellant accepted two statutory charges resulting in the findings of professional misconduct and unsatisfactory professional conduct.

[165] In arriving at the three-year suspension, the Tribunal considered a number of features including:

- “- The failure to lodge and make provision for tax showed a lack of integrity and constituted hypocrisy and inconsistency in purporting to uphold the law;
- The appellant had paid back a significant amount which displayed some level of rehabilitation, though his failure to lodge on time and pay more contemporary tax obligations undermined that process;
- The appellant’s remorse, while strongly evidenced by a number of character witnesses was not supported by evidence from the appellant himself;
- The significant delay between the beginning of the investigation was a strong mitigating factor, but its effect was lessened by the cause of that delay (both the appellant and the respondent), and there was no evidence of the strain it had caused the appellant;

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<sup>143</sup> It appears that the amount of \$664,252.80 was said to be owed but the respondent/appellant believed it to be \$598,257.80.

- It accepted the appellant was of good character and a competent barrister, however it was concerned about his failure to give evidence as to his own character and his gross failure indicated that he was not currently and within the immediate future a fit and proper person to practise;
- The appellant's lifestyle of living beyond his means and ignoring his tax burden shows a disregard for his civic obligations and displayed the need for the public to be protected from his actions; and
- Finally, the Tribunal was concerned with the appellant's failure to give evidence, particularly in light of the evidence he attempted to lead to show that he had turned his life around."<sup>144</sup>

[166] The appeal raised whether the Tribunal had imposed a double penalty in respect of the two charges. That was found to be the case, giving rise to the sentencing discretion being re-exercised by the Court of Appeal.

[167] The appeal also raised whether the three-year suspension was manifestly excessive having regard to particular matters, including the "very considerable payment of tax liability by the applicant at the date of the proceeding". The Court of Appeal recognised that as the first ground was made out it was not necessary to decide the manifestly excessive ground. However, the Court of Appeal did undertake the analysis and concluded that the penalty imposed by the Tribunal was "outside the range and manifestly excessive".

[168] The Court of Appeal found this conclusion resulted from a consideration of the comparative authorities and the features of significant remorse and rehabilitation, along with "no indication of a deliberate attempt to defraud the Commonwealth."<sup>145</sup> In resentencing the respondent/appellant the Court considered the features of:

- (a) Remorse;
- (b) Conduct of the investigation and hearing;
- (c) Repayment and future commitment to repay;
- (d) Financial ruin and family situation;
- (e) Bankruptcy; and
- (f) Behaviour of the appellant.

[169] Relevantly, the Court of Appeal considered features including as follows:

- (a) In respect of Remorse:
  - (i) Various character references were relied on, together with the guilty plea. Further, the agreements with the ATO and continuing to pay the debt were relied upon as evidence of the respondent/appellant being a fit and proper person to practice.
  - (ii) Conversely, the Legal Services Commissioner pointed to the failure of the appellant to give evidence.

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<sup>144</sup> *Matthew Stirling v Legal Services Commissioner* [2013] VSCA 374 at [40].

<sup>145</sup> At [113].

- (iii) The Court of Appeal recognised that a failure to give evidence can diminish the extent of remorse, they concluded that the “extensive character evidence cannot be ignored”. In effect, the indirect evidence of remorse was not enhanced by a direct explanation and apology.
  - (iv) Overall, the Court of Appeal considered that remorse was established, particularly due to the decision to accept full responsibility for the debt rather than the legally available option of bankruptcy.<sup>146</sup>
- (b) In respect of conduct of the investigation and hearing:
- (i) There were delays due to failures of both parties.
  - (ii) The delay period had in effect been utilised for the appellant to pay the outstanding tax debt.
  - (iii) The Court of Appeal concluded that the delay having occurred, it was relevant what the appellant did in that period. The appellant made the choice to attempt to repay the debt and the delay enabled that to be implemented.<sup>147</sup>
- (c) In respect of repayment and future commitment to repay:
- (i) The Court of Appeal recognised that the Tribunal did not give due weight to the significant repayment by the appellant.<sup>148</sup>
  - (ii) Further, the Tribunal’s overall analysis of the repayment and rehabilitation was characterised by the Court of Appeal as being “unduly harsh”.<sup>149</sup>
  - (iii) The Court of Appeal considered that the repayments were “a much more significant factor than the Tribunal recognised”. The magnitude of the undertaking of the repayment of the tax debt was significant. The facts suggested “imperfect rehabilitation, not a failure to rehabilitate at all”.<sup>150</sup>
  - (iv) The commitment to making restitution for past conduct was “a relevant, and significantly favourable factor” in assessing whether the appellant was a fit and proper person.<sup>151</sup>
- (d) In respect of bankruptcy:
- (i) The Court of Appeal observed that the decision to declare bankruptcy was misunderstood by the Tribunal.
  - (ii) The ongoing future commitment to clear the large tax debt consequent on the decision not to clear the debt by bankruptcy was “properly characterised... as conduct undertaken to expunge the effects of his wrongdoing.”<sup>152</sup>

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<sup>146</sup> *Matthew Stirling v Legal Services Commissioner* [2013] VSCA 374 at [115] – [119].

<sup>147</sup> At [128].

<sup>148</sup> At [131].

<sup>149</sup> At [131].

<sup>150</sup> At [133].

<sup>151</sup> At [133].

<sup>152</sup> At [141].

- (iii) A decision to repay and continue to pay “represents a more honourable course of action”.<sup>153</sup>
  - (iv) Further, “the continued spectre of a tax debt must equally be seen as weighing on the decision” and the course of action represented “both a willingness to atone for previous conduct as well as maximising the return to creditors”.<sup>154</sup>
  - (v) A factor in the appellants favour was working hard to ensure the maximum return to creditors.<sup>155</sup>
- (e) In respect of the behaviour of the appellant:
- (i) The Court of Appeal observed that the failure to give evidence did diminish the appellant’s claims of rehabilitation and remorse but did not eliminate those matters.
  - (ii) There was a weight of other evidence including character references and the appellant’s conduct in repaying the ATO debt.
  - (iii) The facts also established that the appellant had led a lavish lifestyle with wilful non-compliance with taxation obligations and frivolous spending. These were aggravating factors.<sup>156</sup>

[170] The Court of Appeal in resentencing expressly noted that protection of the community was not called for. Rather, the key issue was whether the appellant was at that time a fit and proper person to practice as a barrister. They concluded that the appellant was not, taking into account:

- (a) His failure to comply with his obligations;
- (b) His refusal to cooperate with the respondent;
- (c) Continuing issues with tax compliance; and
- (d) Failure to give an account of his failings to the Tribunal.<sup>157</sup>

[171] It was in those circumstances, that the Court of Appeal concluded that a suspension was warranted and that conditions should govern his future practice to assist in rehabilitation.<sup>158</sup> The appeal was allowed and the Court ordered:

- (a) On charge 1, a suspension from practice for a period of 30 months, with a period of 24 months suspended for a period of five years.
- (b) On charge 3, a reprimand.
- (c) The practising certificate issued to the appellant be subject to conditions, including engaging an accountant to prepare his BAS and tax returns, report to the respondent when he had lodged his income tax returns, creation of a separate

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<sup>153</sup> *Matthew Stirling v Legal Services Commissioner* [2013] VSCA 374 at [141].

<sup>154</sup> At [141].

<sup>155</sup> At [141]. See also *LSC v Moore* [2010] VCAT 742 at [41].

<sup>156</sup> At [159] and [160].

<sup>157</sup> At [162].

<sup>158</sup> At [162].

bank account for provisioning for tax, attend counselling and maintain acceptable accounting principles.<sup>159</sup>

[172] In arriving at this penalty, the Court of Appeal recognised the need for a balanced approach of the various factors, including the protective purpose of disciplinary proceedings, the need to ensure public confidence in the profession, and the rehabilitation of the appellant.<sup>160</sup>

[173] The Respondent relies upon the decision and reasoning of the Victorian Court of Appeal in *Matthew Stirling v Legal Services Commissioner*<sup>161</sup> in support of the submission that:

- (a) The Respondent is not permanently unfit to practice; and
- (b) The appropriate penalty is a period of suspension, rather than a recommendation that the Respondent be removed from the roll of legal practitioners.

[174] There are also a number of distinguishing features in the Respondent's favour in comparison to the facts in *Matthew Stirling v Legal Services Commissioner*, including:

- (a) Here, the Respondent gave evidence and made himself available for extensive cross-examination by the LSC.
- (b) The Respondent had repaid the tax debt, including penalties and interest, before the Tribunal hearing.
- (c) The Respondent was compliant with the agreement to repay the ATO by instalments and was not in default at any stage.
- (d) There is no outstanding non-compliances with tax obligations.
- (e) The ATO did not have to take the step of obtaining default judgment in respect of the outstanding tax debt and the Respondent did not take any steps under the bankruptcy legislation.
- (f) There is no evidence that the Respondent led a lavish lifestyle.

[175] Further, while the Respondent has been able to use the increase in the value of his apartment to re-finance the mortgage to make a final payment to clear the tax debt, the magnitude of the undertaking of the repayment of the tax debt remains significant as the amount will still need to be repaid under the mortgage.

[176] These features also need to be considered in the context that there are no allegations of dishonesty or fraud, and the Respondent's conduct has been found not to be deliberate to avoid his tax liability but rather to be as a result of repeated and on-going negligence by the Respondent in respect of his personal taxation affairs.

[177] The particular relevance of the Victorian Court of Appeal decision in *Matthew Stirling v Legal Services Commissioner* is the weight to be given to the Respondent giving evidence at the Tribunal hearing and repaying the outstanding tax debt in full. It is clear from the Court of Appeal's reasoning that the repayment of the tax debt was a

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<sup>159</sup> *Matthew Stirling v Legal Services Commissioner* [2013] VSCA 374 at [164] – [168].

<sup>160</sup> At [165].

<sup>161</sup> [2013] VSCA 374.

significant factor in respect of rehabilitation and remorse. Here also, the Respondent giving evidence meant that these features were “enhanced” by the explanation provided by the Respondent for his conduct and a direct expression of his insight and remorse.

[178] In respect of the current discipline application, it is relevant to consider the following features:

- (a) The Respondent has repaid the outstanding tax debt in full, together with penalties and interest. This shows significant rehabilitation and remorse.
- (b) The Respondent cooperated with the LSC and admitted the charged conduct at the earliest stage, in the response to the discipline application dated 20 October 2023.
- (c) The Respondent has been compliant with his tax obligations since 2018.
- (d) The Respondent has put in place processes and procedures to minimise the risk of similar conduct occurring in the future.
- (e) The business structure now in place with Mr Short means that the workload is being shared and there are people to delegate to, which also means that the risk of similar conduct occurring in the future is minimised.
- (f) The Respondent gave evidence at the hearing and was subjected to lengthy cross-examination.

[179] Considering the evidence as a whole and in particular the features identified above, the Tribunal finds that the Respondent is not permanently unfit to practice.

[180] In arriving at the appropriate disciplinary orders, the Tribunal needs to balance various factors, including:

- (a) the protective purpose of disciplinary proceedings;
- (b) the need to ensure public confidence in the profession;
- (c) the rehabilitation and remorse of the Respondent;
- (d) the character assessment of the Respondent;
- (e) the seriousness of the current conduct and past offending; and
- (f) the need for deterrence, protection of the public and the maintenance of professional standards.

[181] Balancing these various factors in the particular circumstances, the Tribunal is satisfied that the appropriate penalty is a period of suspension, rather than a recommendation that the Respondent be removed from the roll of legal practitioners.

[182] An order that a legal practitioner be suspended from legal practice may be structured in two ways under s 456(2) of the LP Act, namely:

- (a) section 456(2)(b): an order that the practitioner’s local practising certificate be suspended for a stated period or cancelled.
- (b) section 456(2)(c): an order that a local practising certificate not be granted to the practitioner before the end of a stated period.

- [183] Given the cancellation of the Respondent’s unrestricted principal’s practising certificate effective from 26 February 2021 for a period of three years and that the Respondent has now not held a practising certificate for 3.5 years, an order in the form of s 456(2)(c) of the LP Act is the most appropriate structure. This avoids any uncertainty about the cumulative nature of the order following on from the QLS decision. It also avoids any uncertainty as to when the Respondent may apply to the QLS, as the order is in relation to the temporal limitation on a grant of a practising certificate.
- [184] Accordingly, the Tribunal considers that it is appropriate to order that the Respondent not be granted a practising certificate before 27 February 2026. This is an effective five-year suspension from legal practice and is a further period of approximately 18 months from date of the Tribunal hearing.
- [185] An order publicly reprimanding the practitioner may be imposed pursuant to s 456(2)(e) of the LP Act. The Respondent concedes that a public reprimand is an appropriate order.
- [186] The impact of a public reprimand has been recognised previously by the Tribunal. In *Legal Services Commissioner v Challen* [2019] QCAT 273, the Tribunal said:
- “[39] First, there will be an order that the respondent be publicly reprimanded. The respondent conceded that this was an appropriate order in this case. The impact of such an order being made cannot be understated, particularly when it is made against a practitioner of significant seniority and an otherwise unblemished professional record. As this Tribunal has previously said:<sup>162</sup>
- The making of a public reprimand is a serious step by the Tribunal and not one which should be taken or regarded lightly. The public reprimand is and will continue to be a permanent public blemish on the respondent’s professional record. It is and will continue to stand as a permanent reminder to the respondent, to the profession and to the public at large that there are adverse personal consequences when one engages in professional misconduct of this kind.”
- [187] In the current case, an order that the Respondent be publicly reprimanded is appropriate.
- [188] Section 456(4)(a) of the LP Act provides that the Tribunal may make “an order that the Australian legal practitioner pay a penalty of a stated amount, not more than \$100,000.” The payment of a pecuniary penalty is directed at general deterrence rather than as a punishment.
- [189] In the circumstances where the Respondent has already had imposed and paid fines, interest and penalties, the imposition of a further pecuniary penalty in the circumstances is not appropriate.
- [190] An order that a legal practitioner must undertake a course such as a QLS remedial ethics course may be ordered pursuant to s 456(4)(c) of the LP Act. Such an order is directed at both the protection of the public and maintaining professional standards. While an order may be appropriate for conduct such as that in Charges 1 to 5, neither party contended for such an order.

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<sup>162</sup> *Legal Services Commissioner v Brown* [2018] QCAT 263 at [42].

[191] Given the Respondent will not have practiced as a principal for an effective five-year period, the Respondent should be required to undertake the QLS Practice Management Course again in relation to obtaining a principal's practising certificate. Rule 31 of the *QLS Administration Rule 2005* may require the Respondent to undertake the QLS Practice Management Course again as part of any application for a principal's practising certificate.<sup>163</sup>

[192] To provide certainty in this regard, the Tribunal considers that it is appropriate to make an order requiring the Respondent complete the QLS Practice Management Course prior to being granted a principal's practising certificate.

### **What is the appropriate order as to costs?**

[193] Section 462(1) of the LP Act states:

#### **“462 Costs**

- (1) A disciplinary body must make an order requiring a person whom it has found to have engaged in prescribed conduct to pay costs, including costs of the commissioner and the complainant, unless the disciplinary body is satisfied exceptional circumstances exist.”

[194] No exceptional circumstances are identified that would justify any departure from an order in accordance with s 462(1) of the LP Act.

[195] Accordingly, the Tribunal is satisfied that it is appropriate to order that the Respondent pay the LSC's costs of and incidental to the disciplinary application to be assessed.

[196] For the purpose of s 462(5)(b) of the LP Act, it is appropriate that costs be assessed on the standard basis as if this were a proceeding before the Supreme Court of Queensland.

### **Orders**

[197] For the reasons stated above, the Tribunal orders that:

1. The Respondent's conduct identified in respect of each of Charges 1 to 5 in the discipline application is found to constitute professional misconduct.
2. The Respondent not be granted a practising certificate before 27 February 2026.
3. The Respondent complete the QLS Practice Management Course prior to being granted a principal's practising certificate.
4. The Respondent is publicly reprimanded.
5. The Respondent pay the LSC's costs of and incidental to the discipline application, to be assessed on the standard basis as if this were a proceeding before the Supreme Court of Queensland.

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<sup>163</sup> However, given the wording of the Rule there may be some uncertainty as to how it operates.