

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : VOCATIONAL REGULATION

ACT : LEGAL PROFESSION ACT 2008 (WA)

CITATION : LEGAL PROFESSION COMPLAINTS
COMMITTEE and O'HALLORAN
[2013] WASAT 105

MEMBER : JUDGE D R PARRY (DEPUTY PRESIDENT)
MS R MOORE (MEMBER)
MR H DEMBO (SENIOR SESSIONAL MEMBER)

HEARD : 10 MAY 2013

DELIVERED : 5 JULY 2013

FILE NO/S : VR 176 of 2012
VR 30 of 2013

BETWEEN : LEGAL PROFESSION COMPLAINTS
COMMITTEE
Applicant

AND

PAUL JOHN O'HALLORAN
Respondent

Catchwords:

Vocational regulation - Legal practitioners - Professional misconduct - Fees - Gross overcharging - Four cases - Multiple other findings of professional misconduct in relation to fees - Personal injuries cases - Penalty - Previous findings of professional misconduct in respect of four cases of gross overcharging for which practitioner suspended for six months - Course of conduct - Vulnerable clients - Lack of insight - Whether report should be made

and transmitted to the Supreme Court (full bench) with a recommendation that the name of the practitioner be removed from the Roll of Practitioners - Whether Tribunal has power to make a compensation order where it makes and transmits a report to the Supreme Court (full bench)

Legislation:

Legal Practice Act 2003 (WA), s 215

Legal Profession Act 2008 (WA), s 28(1), s 260, s 260(1)(j), s 262(1), s 267, s 411, s 438(1), s 438(2)(a), s 438(2)(b), s 438(4), s 438(4)(b), s 439, s 439(a), s 440, s 441, s 448, s 448(1), s 448(2)(c), Pt 10, Pt 13

Motor Vehicle (Third Party Insurance) Act 1943 (WA), s 27A

State Administrative Tribunal Act 2004 (WA), s 87(2)

Result:

Report on Tribunal's findings made and transmitted to Supreme Court (full bench) with recommendation that the name of the practitioner be removed from the roll of persons admitted to the legal profession under the *Legal Profession Act 2008 (WA)*

The practitioner is to pay the Legal Profession Complaints Committee's costs in terms of disbursements in the amount of \$27,861.20 within four weeks of the publication of this decision

Summary of Tribunal's decision:

Mr Paul John O'Halloran, a legal practitioner, admitted that he engaged in professional misconduct in multiple respects concerning fees in four personal injuries cases. The professional misconduct included charging fees that were grossly excessive in each case. The fees charged exceeded reasonable fees by between 39.7% and 130.1% (alternatively 138.4%).

The Tribunal determined that Mr O'Halloran has been shown not to be a fit and proper person to be a legal practitioner. The Tribunal therefore made a report to the Supreme Court (full bench) on the findings of professional misconduct with a recommendation that Mr O'Halloran's name be removed from the Roll of Practitioners.

Mr O'Halloran was also ordered to pay the Legal Profession Complaints Committee's costs of the proceedings assessed in the amount of \$27,861.20.

Category: B

Representation:

Counsel:

Applicant : Ms PE Cahill SC with Ms PE Le Miere
Respondent : Mr GMG McIntyre SC

Solicitors:

Applicant : Law Complaints Officer
Respondent : Philip Lafferty

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

Legal Practitioners Complaints Committee v Lashansky [2007] WASC 211
Legal Practitioners Complaints Committee v Pepe [2009] WASC 39
Legal Profession Complaints Committee and in de Braekt [2012]
WASAT 58 (S)
Legal Profession Complaints Committee and O'Halloran [2011] WASAT 95
Legal Profession Complaints Committee and O'Halloran [2011] WASAT 95 (S)
Legal Profession Complaints Committee v in de Braekt [2013] WASC 124
O'Halloran v Legal Profession Complaints Committee [2013] WASCA 59
Re Maraj (a Legal Practitioner) (1995) 15 WAR 12
Veghelyi v The Law Society of New South Wales (Unreported, 40257 of 1991,
6 October 1995)

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 Mr Paul John O'Halloran (practitioner), a legal practitioner, has admitted that he engaged in professional misconduct in multiple respects concerning fees in four motor vehicle personal injuries matters. The clients in these matters were Ms R and Mr B (VR 176 of 2012) and Ms F and Mr T (VR 30 of 2013).

2 The admitted professional misconduct includes charging fees that were grossly excessive in each case. The fees charged to the clients exceeded reasonable fees by \$9,759.93 or 47.1% (Ms R), \$7,080.90 or 39.7% (Mr B), \$34,186.54 or 104.6% (Ms F), and \$39,031.41 (or alternatively \$39,957.32) or 130.1% (or alternatively 138.4%) (Mr T).

3 On the basis of the practitioner's admissions, and his agreement to the facts and contentions asserted by the Legal Profession Complaints Committee (Committee), which are set out below, the Tribunal made findings in each case that the practitioner has engaged in professional misconduct pursuant to s 438(1) of the *Legal Profession Act 2008* (WA) (LP Act), in terms which are also set out below.

4 The practitioner is currently suspended by the Tribunal from practise for six months for professional misconduct in charging fees that were grossly excessive in four other matters: see *Legal Profession Complaints Committee and O'Halloran* [2011] WASAT 95 (*O'Halloran No 1*) and *Legal Profession Complaints Committee and O'Halloran* [2011] WASAT 95 (S) (*O'Halloran No 1 (penalty)*); see also *O'Halloran v Legal Profession Complaints Committee* [2013] WASCA 59 in which the Court of Appeal dismissed the practitioner's appeal against the Tribunal's decision in *O'Halloran No 1*. In these proceedings, the Committee seeks an order that the Tribunal make and transmit a report to the Supreme Court (full bench) pursuant to s 438(2)(a) of the LP Act with a recommendation that the practitioner be struck off the Roll of Practitioners. Alternatively, the Committee seeks an order pursuant to s 439(a) of the LP Act that the practitioner's practising certificate be cancelled or suspended and compensation orders pursuant to s 441(c) of the LP Act.

5 The practitioner contends that the admitted professional misconduct in terms of gross overcharging which is the subject of these proceedings is, in the words of Mr GMG McIntyre SC, who appeared for him, 'really part of an ongoing substratum of facts' (T:55.2, 10.05.13) which also

resulted in the findings of professional misconduct in *O'Halloran No 1*. Mr McIntyre submitted that the appropriate disciplinary consequence of the findings of professional misconduct in these proceedings should be determined as follows:

What we do suggest is that really you need to look globally at both what the tribunal did last time and what you ought now to do in the context of these further four matters and that the period of suspension ought to reflect those additional matters, bearing in mind some overlap in time. So I may not have precisely said so, but the likely consequence of that is that you would consider a period of suspension which would be additional to what [the practitioner] is currently undergoing. (T:55.3, 10.05.13).

6 For the reasons which follow, we consider that the findings in the present proceedings, the agreed facts and contentions, and the evidence presented, demonstrates that the practitioner is not a fit and proper person to remain a legal practitioner and should be struck off the Roll of Practitioners. We therefore consider that it is appropriate to make and transmit a report on the findings of professional misconduct to the Supreme Court (full bench) with a recommendation that the name of the practitioner be removed from the local roll.

7 Of course, the Court is not bound to follow the Tribunal's recommendation and may impose an alternative disciplinary consequence for the practitioner's professional misconduct: *Legal Profession Complaints Committee v in de Braekt* [2013] WASC 124 (*in de Braekt*) at [31].

Findings of professional misconduct

8 Proceeding VR 176 of 2012, concerning professional misconduct by the practitioner in relation to Ms R's and Mr B's matters, was commenced by the Committee on 24 October 2012. On 10 December 2012, the practitioner filed a Response to the Committee's grounds in which he denied each of the allegations of professional misconduct and, in particular, denied that the fees he charged the clients were grossly excessive and denied that he charged the clients contrary to the costs agreements with them. However, by a written agreement dated 19 March 2013, the practitioner admitted the professional misconduct alleged by the Committee and admitted the Committee's statements of facts and contentions (set out in the next section of these reasons) and that the contents of the Committee's Book of Documents filed on 28 February 2013 is evidence of and relevant to the practitioner's conduct

the subject of this proceeding. The parties also agreed to the following consent orders which were made by the Tribunal on 19 March 2013:

Being satisfied by reason of the practitioner's admissions that proper cause exists for disciplinary action against the practitioner, and in order to give effect to the agreed terms of settlement of the proceedings, it is on 19 March 2013 ordered pursuant to s.56(1) of the *State Administrative Tribunal Act 2004* (WA) that:

1. The practitioner engaged in professional misconduct in the course of acting on behalf of Ms R in respect of her claim for damages arising from a motor vehicle accident:
 - (a) between about 4 April 2011 and 11 July 2011 by charging fees that were grossly excessive;
 - (b) between about 4 April 2011 and 11 July 2011 by:
 - (i) charging fees on a basis that was contrary to the terms of a costs agreement made with Ms R and which resulted in Ms R being charged for certain items of work in excess of the amounts chargeable pursuant to the costs agreement;
 - (ii) charging fees on a basis that was contrary to the basis upon which the practitioner had disclosed to Ms R pursuant to a costs disclosure statement fees would be charged and which resulted in Ms R being charged for certain items of work in excess of the amounts chargeable in accordance with the costs disclosure statement;
 - (iii) rendering additional charges to which the practitioner was not entitled;
 - (c) between about December 2010 and 4 March 2011 by:
 - (i) contravening [s] 260 of the [LP Act];
 - (ii) further to the above, making a written disclosure to Ms R for the purposes of [s] 260 of the [LP Act] that was materially incomplete or misleading;
 - (iii) on about 15 October 2009 sending Ms R a letter that was misleading, or had the potential to mislead her, as to the content and effect of the costs agreement she had made;
 - (iv) further; contravening [s] 267 of the [LP Act];

- (d) on about 8 April 2011 by seeking payment from the Insurance Commission of Western Australia on behalf of the defendant of Ms R's costs in an amount in excess of that in fact charged to and incurred by her.
2. The practitioner engaged in professional misconduct in the course of acting on behalf of Mr B in respect of his claim for damages arising from a motor vehicle accident:
- (a) between about 5 April 2011 and 11 July 2011 [by] charging fees that were grossly excessive;
 - (b) between about 5 April 2011 and 11 July 2011 by:
 - (i) charging fees on a basis that was contrary to the terms of a costs agreement made with Mr B and which resulted in Mr B being charged for certain items of work in excess of the amounts chargeable pursuant to the costs agreement;
 - (ii) charging fees on a basis that was contrary to the basis upon which the practitioner had disclosed to Mr B pursuant to a costs disclosure statement fees would be charged and which resulted in Mr B being charged for certain items of work in excess of the amounts chargeable in accordance with the costs disclosure statement;
 - (iii) rendering additional charges to which the practitioner was not entitled.
 - (c) between about 10 September 2009 and 1 October 2009 by:
 - (i) contravening [s] 260 of the [LP Act];
 - (ii) further to above, making a written disclosure to Mr B for the purposes of [s] 260 of the [LP Act] that was materially incomplete or misleading;
 - (iii) on about 1 October 2009 sending Mr B a letter that had the potential to mislead him, as to the content and effect of the costs agreement he had made;
 - (d) on about 8 April 2011 by seeking payment from the Insurance Commission of Western Australia on behalf of the defendant of Mr B's costs in an amount in excess of that in fact charged to and incurred by him.

9 Proceeding VR 30 of 2013, concerning professional misconduct by the practitioner in relation to Ms F's and Mr T's matters, was commenced

on 11 February 2013. The practitioner did not contest the Committee's allegations of professional misconduct made against him in this proceeding. By a written agreement dated 2 April 2013, the practitioner admitted the professional misconduct alleged by the Committee and admitted the Committee's statements of facts and contentions (set out in the next section of these reasons). The parties also agreed to the following consent orders which were made by the Tribunal on 10 May 2013:

Being satisfied by reason of the practitioner's admissions that proper cause exists for disciplinary action against the practitioner, and in order to give effect to the agreed terms of settlement of the proceedings, it is on 10 May 2013 ordered pursuant to s.56(1) of the *State Administrative Tribunal Act 2004* (WA) that:

1. The practitioner PAUL JOHN O'HALLORAN (the practitioner) engaged in professional misconduct in the course of acting on behalf of Ms F in respect of her claim for damages arising from a motor vehicle accident (the claim):
 - (a) between about 29 November 2006 and 15 July 2011 by charging fees that were grossly excessive;
 - (b) on about 29 November 2006, by entering into a written costs agreement with Ms F:
 - (i) which purported to allow him to charge Ms F more than that allowed by the *Motor Vehicle (Third Party Insurance) Act 1943* (WA) (MV Act) and the relevant costs determinations in force from time to time during the practitioner's retainer, for legal costs subject to the MV Act and those determinations[;] and/or
 - (ii) the terms of which were unreasonable.
 - (c) between about 15 September 2008 and 4 July 2011 by billing Ms F for legal services rendered in respect of the claim contrary to the manner in which the practitioner had represented or agreed he would do so when he commenced acting for Ms F;
 - (d) in March 2009 by misleading Ms F as to the basis upon which the practitioner had represented or agreed that he would bill for legal services provided by the practitioner in respect of the claim;
 - (e) in November 2006 by failing to provide Ms F with information about party and party costs before she entered

into a costs agreement, contrary to a representation made by the practitioner to Ms F that he would do so.

2. The practitioner engaged in professional misconduct in the course of acting on behalf of Mr T in respect of his claim for damages arising from injuries he received from being struck by a motor vehicle (the claim):
 - (a) between about 15 September 2005 and 29 July 2009 by charging fees that were grossly excessive;
 - (b) between about 15 September 2005 and 29 July 2009 by charging fees on a basis that was contrary to the terms of a costs agreement made with Mr T and which resulted in Mr T being charged for certain items of work in excess of the amounts chargeable pursuant to the costs agreement;
 - (c) on about 15 September 2005 by providing misleading information to Mr T in a costs disclosure statement about when the practitioner was entitled to, or would, render bills to Mr T for legal services;
 - (d) between about 5 October 2007 and 29 July 2009 by rendering interim bills to Mr T more frequently than the practitioner had previously represented he would.

Agreed facts and contentions

10 The facts and contentions agreed by the parties are as follows:

Agreed facts in relation to all matters (VR 176 of 2012 and VR 30 of 2013)

- (1) The practitioner was admitted to legal practice in Western Australia on 23 December 1980.
- (2) At all relevant times the practitioner held a current practising certificate.
- (3) At all relevant times:
 - (a) until 18 November 2010 the practitioner practised on his own account under the name Paul O'Halloran & Associates;
 - (b) after 18 November 2010 the practitioner practised on his own account under the name O'Halloran Legal.

Agreed facts in relation to Ms R's matter (VR 176 of 2012)

- (4) On about 10 September 2009, Ms R:
 - (a) retained the practitioner to act on her behalf in relation to a litigious matter being her claim for damages arising from a motor vehicle accident (the matter);
 - (b) entered into a costs agreement with the practitioner in respect of that retainer (costs agreement);
 - (c) signed a document provided to her on behalf of the practitioner entitled 'Costs Statement';
 - (d) signed by way of acknowledgement a letter from the practitioner to Ms R purporting to be a disclosure for the purposes of Rule 18 of the Law Society's Professional Conduct Rules (the Law Society costs disclosure).
- (5) At the time of entering into the costs agreement, Ms R was also provided on behalf of the practitioner with a document entitled 'Costs Disclosure Statement relating to the Legal Profession Act 2008' (costs disclosure statement).
- (6) The costs disclosure statement was provided to Ms R for the purpose of the practitioner complying with his obligations under s 260 of the LP Act.
- (7) Relevantly, both the costs agreement and the costs disclosure statement provided in substance and effect that all legal services rendered by or on behalf of the practitioner would be charged on the basis of time spent performing those legal services in increments of six minute units.
- (8) The costs agreement did not permit the practitioner to render a charge to Ms R in respect of the printing of documents.
- (9) In respect of the matters required to be disclosed pursuant to s 260(1)(c) and (f) of the LP Act:

- (a) the costs disclosure statement contained the following:

'Estimates

This practice estimates your total costs of providing legal services at:

\$10,000-\$20,000

The costs you may recover are estimated at \$5,000-\$15,000

The costs you may have to pay are estimated [at] \$10,000-\$20,000'

- (b) the Law Society costs disclosure contained the following:

'Costs Estimate

It is impossible to give a quote of the total professional fees and disbursements the matter will likely cost. Costs are subject to GST. However, based on your instruction to date, we can provide a range of estimates of the likely cost of the matter completing that part of the work on your matter up to pre-trial conference.

Please be aware that situations can and do arise in the course of your matter which means that our estimates may be revised. It is advisable to ask for updated estimates as the work proceeds.

Estimates of professional fees: Between \$10,000 and \$20,000

Estimates of cost recoverable: Between \$5000 and \$15,000

Estimates of costs payable: Between \$10,000 and \$20,000'

- (10) In respect of the matters required to be disclosed pursuant to s 260(1)(j) of the LP Act, the costs disclosure statement contained the following:

'Any time limits that apply to the taking of any action referred to in the preceding paragraph;

- (i) the time limit for seeking costs assessment under Division 8 is one year and extension of that limit may be sought by application to the Court;
- (ii) an application to the Supreme Court to set aside a costs agreement may be made an (sic) any time within 6 years of making the agreement but delay in making application may be taken into account against you;

- (iii) a complaint must be made within 6 years of the alleged conduct unless the Legal Practitioner's [sic] Complaints Committee otherwise determines (s 411)
- (11) By a letter to Ms R dated 15 October 2009 the practitioner, in substance, represented that the costs agreement permitted him to charge a minimum standard charge of two tenths of an hour per page for outgoing correspondence, court documents, statements, proofs and the like.
- (12) Between about 10 September 2009 and 28 June 2011, the practitioner, both directly and through his employees, rendered legal services to and on behalf of Ms R in relation to the matter.
- (13) The matter:
 - (a) was routine in nature;
 - (b) did not involve any factual or legal issues that were complex or difficult;
 - (c) did not require any greater amount or different type of legal services, than would normally be expected to be required for a routine motor vehicle accident claim.
- (14) Prior to September 2010 unbilled charges for legal services had been recorded by or on behalf of the practitioner in respect of the matter totalling in excess of \$10,000.
- (15) Prior to December 2010 unbilled charges for legal services had been recorded by or on behalf of the practitioner in respect of the matter totalling in excess of \$20,000.
- (16) On about 23 March 2011 the matter was settled on terms that included, relevantly and in effect, that the Insurance Commission of Western Australia (Insurance Commission) would pay to Ms R:
 - (a) the sum of \$37,500 by way of agreed damages;

- (b) her costs of the action to be taxed.
- (17) On about 4 April 2011 the practitioner received on behalf of Ms R from the Insurance Commission the sum of \$37,385.35 which was, on about that date, paid into the practitioner's trust account.
- (18) On about 5 April 2011 the practitioner rendered to Ms R a tax invoice (the 5 April tax invoice) for legal services rendered by the practitioner in relation to the matter comprised of:
- (a) professional fees of \$24,783 (exclusive of GST);
 - (b) GST on professional fees of \$2,478.28;
 - (c) disbursements of \$1,030.20 (exclusive of GST);
and
 - (d) GST on disbursements of \$103.02.
- (19) The 5 April tax invoice included standard charges of two six minutes units or two tenths of an hour per page for certain items of outgoing correspondence, rather than charges based on the time spent (in increments of six minute units or one tenth of an hour) in preparing and settling that correspondence.
- (20) The charging of two six minutes units or two tenths of an hour per page for items of outgoing correspondence:
- (a) was contrary to the provisions of the costs agreement;
 - (b) was contrary to the basis upon which the practitioner had disclosed to Ms R pursuant to the costs disclosure statement fees would be charged;
and
 - (c) resulted in Ms R being charged amounts for those items of outgoing correspondence in excess of the amount chargeable in accordance with the costs agreement and/or the costs disclosure statement.

- (21) The 5 April tax invoice also included a 'disbursement' charge of \$658.24 (inclusive of GST) for 'Printing'.
- (22) On about 5 April 2011 the practitioner caused:
- (a) an amount of \$28,394.30 to be paid from the monies held in the practitioner's trust account on behalf of Ms R to the practitioner's general account in payment of the practitioner's invoice dated 5 April 2011;
 - (b) an amount of \$6,991.05 to be paid from the monies held in the practitioner's trust account on behalf of Ms R, to Ms R;
 - (c) the balance of the monies held in the practitioner's trust account on behalf of Ms R, in the amount of \$2,000, to be retained in the trust account.
- (23) On about 8 April 2011, the practitioner sent or caused to be sent to the solicitors for the Insurance Commission a draft bill of costs for taxation in respect of the matter in the amount of \$42,442.60, for the purpose of seeking payment from the Insurance Commission of that amount as Ms R's costs incurred up to that date.
- (24) On about 11 April 2011 the practitioner rendered to Ms R a tax invoice for legal services rendered by the practitioner in relation to the matter comprised of:
- (a) professional fees of \$1,744 (exclusive of GST);
 - (b) GST on professional fees of \$174.40.
- (25) On about 11 April 2011 the practitioner caused an amount of \$1,918.40 to be paid from the monies held in the practitioner's trust account on behalf of Ms R to the practitioner's general account in payment of the practitioner's invoice dated 11 April 2011.
- (26) On about 28 June 2011, Ms R's costs of the matter were agreed to be paid by the Insurance Commission in the amount of \$21,276 (inclusive of GST) comprised of:
- (a) costs of \$17,500;

- (b) disbursements of \$3,776.
- (27) On about 6 July 2011 the practitioner received on behalf of Ms R from the Insurance Commission the sum of \$21,276 which was, on about that date, paid into the practitioner's trust account.
- (28) On about 11 July 2011 the practitioner caused to be paid from the monies held in the practitioner's trust account on behalf of Ms R:
- (a) the amount of \$3,776 to the Legal Aid Commission of WA for reimbursement of funding provided to Ms R for disbursements incurred in respect of the matter;
 - (b) the amount of \$1,310.89 to the practitioner's general account for the payment of professional fees in the amount of \$1,293.84 (inclusive of GST) and disbursements of \$17.05 (inclusive of GST) rendered by the practitioner in relation to the matter;
 - (c) the amount of \$16,189.11 to be paid to Ms R.
- (29) The amount paid to the practitioner's general account for disbursements included charges \$4.62 (inclusive of GST) for 'Printing'.
- (30) Accordingly, the practitioner rendered to Ms R and received from her:
- (a) professional fees in relation to the matter totalling \$30,490.57, inclusive of GST but exclusive of disbursements;
 - (b) 'disbursement' charges of \$1,130.27, inclusive of GST.
- (31) A reasonable charge for the provision of the legal services rendered by the practitioner to Ms R in respect of the matter was, inclusive of GST but exclusive of disbursements, between \$20,407.58 and \$21,053.70 and most probably \$20,730.64.

- (32) By reason of:
- (a) the fact that prior to September 2010 unbilled charges for legal services had been recorded by or on behalf of the practitioner in respect of the matter totalling in excess of \$10,000;
 - (b) the fact that prior to December 2010 unbilled charges for legal services had been recorded by or on behalf of the practitioner in respect of the matter totalling in excess of \$20,000;
 - (c) the inference to be drawn from the amounts the practitioner in fact charged Ms R that the practitioner intended to charge Ms R substantially in excess of \$10,000 to \$20,000 for legal services rendered in respect of the matter,

it is to be inferred that the practitioner was aware at some time from about September 2010, alternatively from about December 2010, that the practitioner's total costs of providing legal services to her in respect of the matter:

- (d) were likely to substantially exceed the range of \$10,000 to \$20,000; or
 - (e) were likely to be about \$30,000.
- (33) The practitioner did not at any time prior to 4 March 2011 disclose to Ms R in writing:
- (a) that the total costs of providing legal services to her in respect of the matter were likely to substantially exceed the range of \$10,000 to \$20,000; or
 - (b) that the total costs of providing legal services to her in respect of the matter were likely to be about \$30,000.

Agreed contentions in relation to Ms R's matter (VR 176 of 2012)

- (34) The fees charged and received by the practitioner for the legal services rendered by him in relation to the matter were grossly excessive because:

- (a) the practitioner charged and received the sum of \$30,490.57, inclusive of GST but exclusive of disbursements, for the legal services he rendered in relation to the matter;
 - (b) a reasonable charge for the provision of those legal services, inclusive of GST but exclusive of disbursements, was between \$20,407.58 and \$21,053.70 and most probably \$20,730.64.
- (35) The practitioner's letter to Ms R dated 15 October 2009 was misleading or had the potential to mislead Ms R as to the content and effect of the costs agreement because that letter represented, in substance, that the costs agreement permitted him to charge a minimum standard charge of two tenths of an hour per page for outgoing correspondence, court documents, statements, proofs and the like, when that was not the case.
- (36) By charging Ms R by the 5 April 2011 tax invoice standard charges of two six minutes units per page for certain items of outgoing correspondence, rather than charges based on the time spent (in increments of six minute units) in preparing and settling that correspondence, the practitioner charged Ms R on a basis that:
- (a) was contrary to the provisions of the costs agreement;
 - (b) was contrary to the basis upon which the practitioner had disclosed to Ms R pursuant to the costs disclosure statement fees would be charged; and
 - (c) resulted in Ms R being charged amounts for those items of outgoing correspondence in excess of the amount chargeable in accordance with the costs agreement and/or the costs disclosure statement.
- (37) The practitioner charged Ms R and received from her \$662.86 for the printing of documents when the practitioner was not, pursuant to the terms of the costs agreement, entitled to render that charge.

- (38) Section 260(1)(f) and s 262(1) of the LP Act together provide that if the matter is a litigious matter a law practice must disclose in writing to a client, before or as soon as practicable after the law practice is retained in the matter, an estimate of the range of costs that may be recovered if the client is successful in the litigation and an estimate of the range of costs the client may be ordered to pay if the client is unsuccessful.
- (39) In contravention of those provisions, the practitioner did not, by the cost disclosure statement or otherwise, disclose to Ms R in writing:
- (a) an estimate of the range of costs that may be recovered if she were successful in the matter; or
 - (b) an estimate of the range of costs Ms R may be ordered to pay if she were unsuccessful.
- (40) Further or alternatively, the cost disclosure statement was materially incomplete or misleading as to:
- (a) the estimated range of costs that Ms R might recover if she were successful in the matter;
 - (b) an estimate of the range of costs that Ms R may be ordered to pay if she were unsuccessful.
- (41) Section 260(1)(j) and s 262(1) of the LP Act together provide that a law practice must disclose in writing to a client, before or as soon as practicable after the law practice is retained in the matter, any time limits that apply to the taking of any action being, relevantly, making a complaint under Pt 13 of the LP Act.
- (42) Section 411 of the LP Act provides relevantly and in effect that:
- (a) a complaint may be made about the conduct of an Australian legal practitioner irrespective of when the conduct is alleged to have occurred;
 - (b) however, a complaint cannot be dealt with (otherwise than to dismiss it or refer it to mediation) if the complaint is made more than six

years after the conduct is alleged to have occurred unless the Committee determines that:

- (i) it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay; or
- (ii) the complaint involves an allegation of professional misconduct and it is in the public interest to deal with the complaint.

(43) The costs disclosure statement was materially misleading in that it represented that Ms R could not make a complaint about the practitioner more than six years after the conduct the subject of the complaint had occurred.

(44) Section 267 of the LP Act provides that a law practice must, in writing, disclose to a client any substantial change to anything included in the disclosure already made as soon as is reasonably practicable after the law practice becomes aware of that change.

(45) In contravention of that provision, the practitioner did not at any time prior to 4 March 2011 disclose to Ms R in writing:

- (a) that the total costs of providing legal services to her in respect of the matter were likely to substantially exceed the range of \$10,000 to \$20,000; or
- (b) that the total costs of providing legal services to her in respect of the matter were likely to be about \$30,000.

(46) In sending or causing to be sent to the solicitors for the Insurance Commission on about 8 April 2011 a draft bill of costs for taxation in respect of the matter in the amount of \$42,442.60, the practitioner sought payment from the Insurance Commission of Ms R's costs incurred up to that date in an amount that substantially exceeded the costs she had in fact incurred.

Agreed facts in relation to Mr B's matter (VR 176 of 2012)

- (47) On about 10 September 2009, Mr B:
- (a) retained the practitioner to act on his behalf in relation to a litigious matter being his claim for damages arising from a motor vehicle accident (the matter);
 - (b) entered into a costs agreement with the practitioner in respect of that retainer (costs agreement);
 - (c) signed a document provided to him on behalf of the practitioner entitled 'Costs Statement';
 - (d) signed by way of acknowledgement a letter from the practitioner to Mr B purporting to be a disclosure for the purposes of Rule 18 of the Law Society's Professional Conduct Rules (the Law Society costs disclosure).
- (48) At the time of entering into the costs agreement, Mr B was also provided on behalf of the practitioner with a document entitled 'Costs Disclosure Statement relating to the Legal Profession Act 2008' (costs disclosure statement).
- (49) The costs disclosure statement was provided to Mr B for the purpose of the practitioner complying with his obligations under s 260 of the LP Act.
- (50) Relevantly, both the costs agreement and the costs disclosure statement provided in substance and effect that all legal services rendered by or on behalf of the practitioner would be charged on the basis of time spent performing those legal services in increments of six minute units.
- (51) The costs agreement did not permit the practitioner to render a charge to Mr B in respect of the printing of documents.
- (52) In respect of the matters required to be disclosed pursuant to s 260(1)(c) and (f) of the LP Act:

- (a) the costs disclosure statement contained the following:

'Estimates

This practice estimates your total costs of providing legal services at:

\$10,000-\$20,000

The costs you may recover are estimated at \$5,000-\$15,000

The costs you may have to pay are estimated [at] \$10,000-\$20,000'

- (b) the Law Society costs disclosure contained the following:

'Costs Estimate

It is impossible to give a quote of the total professional fees and disbursements the matter will likely cost. Costs are subject to GST. However, based on your instruction to date, we can provide a range of estimates of the likely cost of the matter completing that part of the work on your matter up to pre-trial conference.

Please be aware that situations can and do arise in the course of your matter which means that our estimates may be revised. It is advisable to ask for updated estimates as the work proceeds.

Estimates of professional fees: Between \$10,000 and \$20,000

Estimates of cost recoverable: Between \$5000 and \$15,000

Estimates of costs payable: Between \$10,000 and \$20,000'

- (53) In respect of the matters required to be disclosed pursuant to s 260(1)(j) of the LP Act, the costs disclosure statement contained the following:

'Any time limits that apply to the taking of any action referred to in the preceding paragraph;

- a. the time limit for seeking costs assessment under Division 8 is one year and extension of that limit may be sought by application to the Court;
- b. an application to the Supreme Court to set aside a costs agreement may be made an (sic) any time within 6 years of making the agreement but delay in making application may be taken into account against you;

- c. a complaint must be made within 6 years of the alleged conduct unless the Legal Practitioner's Complaints Committee otherwise determines (s 411)'.
- (54) By a letter to Mr B dated 1 October 2009 the practitioner, in substance, represented that the costs agreement permitted him to charge a minimum standard charge of two tenths of an hour per page for outgoing correspondence, court documents, statements, proofs and the like.
- (55) Between about 10 September 2009 and 28 June 2011, the practitioner, both directly and through his employees, rendered legal services to and on behalf of Mr B in relation to the matter.
- (56) The matter:
- (a) was routine in nature;
 - (b) did not involve any factual or legal issues that were complex or difficult;
 - (c) did not require any greater amount or different type of legal services, than would normally be expected to be required for a routine motor vehicle accident claim.
- (57) On about 23 March 2011 the matter was settled on terms that included, relevantly and in effect, that the Insurance Commission would pay to Mr B:
- (a) the sum of \$30,000 by way of agreed damages;
 - (b) his costs of the action to be taxed.
- (58) On about 5 April 2011 the practitioner received on behalf of Mr B from the Insurance Commission the sum of \$30,000 which was, on about that date, paid into the practitioner's trust account.
- (59) The practitioner rendered to Mr B a tax invoice dated 5 April 2011 (the 5 April tax invoice) for legal services rendered by the practitioner in relation to the matter comprised of:

- (a) professional fees of \$20,797 (exclusive of GST);
 - (b) GST on professional fees of \$2,079.70;
 - (c) 'disbursement' charges of \$642.40 (exclusive of GST); and
 - (d) GST on disbursements of \$64.24.
- (60) The 5 April tax invoice included standard charges of two six minutes units or two tenths of an hour per page for certain items of outgoing correspondence, rather than charges based on the time spent (in increments of six minute units) in preparing and settling that correspondence.
- (61) The charging of two six minutes units or two tenths of an hour per page for items of outgoing correspondence:
- (a) was contrary to the provisions of the costs agreement;
 - (b) was contrary to the basis upon which the practitioner had disclosed to Mr B pursuant to the costs disclosure statement fees would be charged; and
 - (c) resulted in Mr B being charged amounts for those items of outgoing correspondence in excess of the amount chargeable in accordance with the costs agreement and/or the costs disclosure statement.
- (62) The 5 April tax invoice also included a 'disbursement' charge of \$491.26 (inclusive of GST) for 'Printing'.
- (63) On about 5 April 2011 the practitioner caused:
- (a) an amount of \$23,583.35 to be paid from the monies held in the practitioner's trust account on behalf of Mr B to the practitioner's general account in payment of the 5 April tax invoice;
 - (b) an amount of \$5,000 to be paid from the monies held in the practitioner's trust account on behalf of Mr B, to Mr B;

- (c) the balance of the monies held in the practitioner's trust account on behalf of Mr B, in the amount of \$1,416.65, to be retained in the trust account.
- (64) The practitioner rendered to Mr B a second tax invoice dated 5 April 2011 (the second 5 April tax invoice) for legal services rendered by the practitioner in relation to the matter comprised of:
 - (a) professional fees of \$117 (exclusive of GST);
 - (b) GST on professional fees of \$11.70.
- (65) On about 8 April 2011, the practitioner sent or caused to be sent to the solicitors for the Insurance Commission a draft bill of costs for taxation in respect of the matter in the amount of \$35,111.30, for the purpose of seeking payment from the Insurance Commission of that amount as Mr B's costs incurred up to that date.
- (66) The practitioner rendered to Mr B a tax invoice dated 18 April 2011 for legal services rendered by the practitioner in relation to the matter comprised of:
 - (a) professional fees of \$1,743 (exclusive of GST);
 - (b) GST on professional fees of \$174.30;
 - (c) 'disbursement' charges of \$18.98;
 - (d) GST on disbursements of \$1.90.
- (67) The tax invoice dated 18 April 2011 included a 'disbursement' charge of \$0.88 (inclusive of GST) for 'Printing'.
- (68) On about 18 April 2011 the practitioner caused an amount of \$1,416.65 to be paid from the monies held in the practitioner's trust account on behalf of Mr B to the practitioner's general account:
 - (a) in payment of the second 5 April tax invoice; and
 - (b) in part payment of the practitioner's invoice dated 18 April 2011.

- (69) On about 28 June 2011, Mr B's costs of the matter were agreed to be paid by the Insurance Commission in the amount of \$16,776 (inclusive of GST) comprised of:
- (a) costs of \$15,500;
 - (b) disbursements of \$1,276.
- (70) On about 6 July 2011 the practitioner received on behalf of Mr B from the Insurance Commission the sum of \$16,776 which was, on about that date, paid into the practitioner's trust account.
- (71) The practitioner rendered to Mr B a tax invoice dated 8 July 2011 for legal services rendered by the practitioner in relation to the matter comprised of:
- (a) professional fees of \$1,227 (exclusive of GST);
 - (b) GST on professional fees of \$122.70;
 - (c) 'disbursement' charges of \$12.30 (exclusive of GST);
 - (d) GST on disbursement of \$1.23.
- (72) The tax invoice dated 8 July 2011 included a 'disbursement' charge of \$3.63 (inclusive of GST) for 'Printing'.
- (73) On about 11 July 2011 the practitioner caused to be paid from the monies held in the practitioner's trust account on behalf of Mr B:
- (a) the amount of \$1,276 to the Legal Aid Commission of WA for reimbursement of funding provided to Mr B for disbursements incurred in respect of the matter;
 - (b) the amount of \$2,013.45 to the practitioner's general account in payment of:
 - (i) the balance of the invoice dated 18 April 2011;
 - (ii) the invoice dated 8 July 2011;

- (c) the amount of \$16,189.11 to be paid to Mr B.
- (74) Accordingly, the practitioner rendered to Mr B and received from him:
- (a) professional fees in relation to the matter totalling \$24,922.70, inclusive of GST but exclusive of disbursements;
 - (b) 'disbursement' charges of \$741.05, inclusive of GST.
- (75) A reasonable charge for the provision of the legal services rendered by the practitioner to Mr B in respect of the matter was, inclusive of GST but exclusive of disbursements, between \$17,607.62 and \$18,075.98 and most probably \$17,841.80.

Agreed contentions in relation to Mr B's matter (VR 176 of 2012)

- (76) The fees charged and received by the practitioner for the legal services rendered by him in relation to the matter were grossly excessive because:
- (a) the practitioner charged and received the sum of \$24,922.70, inclusive of GST but exclusive of disbursements, for the legal services he rendered in relation to the matter;
 - (b) a reasonable charge for the provision of those legal services, inclusive of GST but exclusive of disbursements, was between \$17,607.62 and \$18,075.98 and most probably \$17,841.80.
- (77) The practitioner's letter to Mr B dated 1 October 2009 was misleading or had the potential to mislead Mr B as to the content and effect of the costs agreement because that letter represented, in substance, that the costs agreement permitted the practitioner to charge a minimum standard charge of two tenths of an hour per page for outgoing correspondence, court documents, statements, proofs and the like, when that was not the case.
- (78) By charging Mr B by the 5 April 2011 tax invoice standard charges of two six minutes units per page for

certain items of outgoing correspondence, rather than charges based on the time spent (in increments of six minute units) in preparing and settling that correspondence, the practitioner charged Mr B on a basis that:

- (a) was contrary to the provisions of the costs agreement;
 - (b) was contrary to the basis upon which the practitioner had disclosed to Mr B pursuant to the costs disclosure statement fees would be charged; and
 - (c) resulted in Mr B being charged amounts for those items of outgoing correspondence in excess of the amount chargeable in accordance with the costs agreement and/or the costs disclosure statement.
- (79) The practitioner charged Mr B and received from him \$495.70 for the printing of documents when the practitioner was not, pursuant to the terms of the costs agreement, entitled to render that charge.
- (80) Section 260(1)(f) and s 262(1) of the LP Act together provide that if the matter is a litigious matter a law practice must disclose in writing to a client, before or as soon as practicable after the law practice is retained in the matter, an estimate of the range of costs that may be recovered if the client is successful in the litigation and an estimate of the range of costs the client may be ordered to pay if the client is unsuccessful.
- (81) In contravention of those provisions, the practitioner did not, by the cost disclosure statement or otherwise, disclose to Mr B in writing:
- (a) an estimate of the range of costs that may be recovered if he were successful in the matter; or
 - (b) an estimate of the range of costs Mr B may be ordered to pay if he were unsuccessful.

- (82) Further or alternatively, the cost disclosure statement was materially incomplete or misleading as to:
- (a) the estimated range of costs that Mr B might recover if he were successful in the matter;
 - (b) an estimate of the range of costs that Mr B may be ordered to pay if he were unsuccessful.
- (83) Section 260(1)(j) and s 262(1) of the LP Act together provide that a law practice must disclose in writing to a client, before or as soon as practicable after the law practice is retained in the matter, any time limits that apply to the taking of any action being, relevantly, making a complaint under Pt 13 of the LP Act.
- (84) Section 411 of the LP Act provides relevantly and in effect that:
- (a) a complaint may be made about the conduct of an Australian legal practitioner irrespective of when the conduct is alleged to have occurred;
 - (b) however, a complaint cannot be dealt with (otherwise than to dismiss it or refer it to mediation) if the complaint is made more than six years after the conduct is alleged to have occurred unless the Committee determines that:
 - (i) it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay; or
 - (ii) the complaint involves an allegation of professional misconduct and it is in the public interest to deal with the complaint.
- (85) The costs disclosure statement was materially misleading in that it represented that Mr B could not make a complaint about the practitioner more than six years after the conduct the subject of the complaint had occurred.
- (86) In sending or causing to be sent to the solicitors for the Insurance Commission on about 8 April 2011 a draft bill of costs for taxation in respect of the matter in the amount

of \$35,111.30, the practitioner sought payment from the Insurance Commission of Mr B's costs incurred up to that date in an amount that substantially exceeded the costs he had in fact incurred.

Agreed facts in relation to Ms F's matter (VR 30 of 2013)

- (87) On about 29 November 2006, Ms F:
- (a) retained the practitioner to act on her behalf in relation to a litigious matter being her claim for damages arising from a motor vehicle accident (the matter);
 - (b) entered into a written costs agreement with the practitioner in respect of that retainer (costs agreement);
 - (c) signed a document provided to her on behalf of the practitioner entitled 'Costs Statement' which the practitioner had provided in purported compliance with Rule 16A of the Law Society's Professional Conduct Rules then in force (costs disclosure statement);
 - (d) signed by way of acknowledgement a letter from the practitioner to Ms F dated 29 November 2006 containing a costs estimate and which the practitioner had also provided to Ms F in purported compliance with Rule 16A of the Law Society's Professional Conduct Rules then in force (costs estimate).
- (88) The costs agreement contained, relevantly, terms to the following effect:
- (a) the practitioner would charge Ms F a minimum charge of one tenth of an hour for all legal or clerical time spent: cl (c);
 - (b) the practitioner would charge a minimum charge of two tenths of an hour per page (or part thereof) for outgoing correspondence, court documents, statements, proofs etc and thereafter at the rate of \$330 per hour: cl (d);

- (c) the practitioner would charge \$160.00 per hour for all clerical and non-professional time spent on such things as collating and photocopying, outside deliveries and attendances, incoming and outgoing telephone conversations, messages, file notes, etc: cl (e);
- (89) The costs disclosure statement, amongst other things but relevantly, stated in effect that:
 - (a) the practitioner would invoice Ms F at the conclusion of the matter;
 - (b) the practitioner would provide Ms F, before she entered into a costs agreement, with an estimate, if reasonably possible, of the approximate amount of the solicitor and counsel fees which would be recoverable on a party and party basis from the opposing party in the event that Ms F were successful in the matter (party and party costs).
- (90) It was reasonably possible to do so, but the practitioner did not provide Ms F with an estimate of the party and party costs before Ms F entered into the costs agreement.
- (91) Between about 29 November 2006 and 15 July 2011, the practitioner, both directly and through his employees, rendered legal services to and on behalf of Ms F in relation to the matter.
- (92) The matter:
 - (a) did not involve any factual or legal issues that were complex or difficult;
 - (b) did not require any greater amount or different type of legal services, than would normally be expected to be required for an average motor vehicle accident claim.
- (93) Before the conclusion of the matter, on about 15 September 2008, the practitioner rendered to Ms F a tax invoice (the 15 September 2008 tax invoice) for legal

services rendered by the practitioner in relation to the matter comprised of:

- (a) professional fees of \$11,990.00 (exclusive of GST);
 - (b) GST on professional fees of \$1,199.00.
- (94) On about 16 September 2008 the practitioner caused an amount of \$5,400.00 to be paid from the monies held in the practitioner's trust account on behalf of Ms F to the practitioner's general account in part payment of the practitioner's 15 September 2008 tax invoice.
- (95) On each of the following dates the practitioner caused an amount of \$1,000.00 to be paid from the monies held in the practitioner's trust account on behalf of Ms F to the practitioner's general account in further part payment of the practitioner's 15 September 2008 tax invoice;
- (a) 11 February 2009;
 - (b) 27 March 2009;
 - (c) 28 April 2009;
 - (d) 28 May 2009.
- (96) By letter to Ms F dated 18 March 2009, the practitioner stated to Ms F, relevantly:
- '... [You said] that you thought that this claim would be carried until the end without payment. We do not recall ever giving you such an undertaking'
- (97) Before the conclusion of the matter, on about 30 June 2009, the practitioner rendered to Ms F a tax invoice (the 30 June 2009 tax invoice) for legal services rendered by the practitioner in relation to the matter comprised of:
- (a) professional fees of \$14,453.00 (exclusive of GST);
 - (b) GST on professional fees of \$1,445.30.

- (98) On about 21 July 2009 the practitioner caused an amount of \$14,000.00 to be paid from the monies held in the practitioner's trust account on behalf of Ms F to the practitioner's general account in part payment of the practitioner's 15 September tax invoice and in part payment of the practitioner's 30 June tax invoice.
- (99) Before the conclusion of the matter, on about 2 March 2011, the practitioner rendered to Ms F a tax invoice (the 2 March 2011 tax invoice) for legal services rendered by the practitioner in relation to the matter comprised of:
- (a) professional fees of \$42,948 less a 'discount' of \$8,589.60 (\$34,358.40) (exclusive of GST);
 - (b) GST on professional fees of \$4,294.80 less \$858.96, ie. \$3,435.84.
- (100) On about 3 March 2011 the practitioner caused an amount of \$25,000 to be paid from the monies held in the practitioner's trust account on behalf of Ms F to the practitioner's general account in payment of the practitioner's 30 June tax invoice and part payment of the 2 March 2011 tax invoice.
- (101) On about 15 July 2011 Ms F terminated the practitioner's retainer and shortly thereafter he 'wrote off' the outstanding balance of the 2 March 2011 tax invoice in the sum of \$18,481.54.
- (102) Accordingly, the practitioner:
- (a) rendered to Ms F professional fees in relation to the matter totalling \$66,881.54, inclusive of GST;
 - (b) received from Ms F in respect of those fees so rendered, a total amount of \$48,400.
- (103) A reasonable charge for the provision of the legal services rendered by the practitioner to Ms F in respect of the matter was, inclusive of GST, between \$29,425.50 and \$35,964.50 and most probably \$32,695.00.

Agreed contentions in relation to Ms F's matter (VR 30 of 2013)

- (104) The fees charged and received by the practitioner for the legal services rendered by him in relation to the matter were grossly excessive because:
- (a) the practitioner charged \$66,881.54 inclusive of GST, for the legal services he rendered in relation to the matter;
 - (b) the practitioner received from Ms F in respect of those fees so rendered, a total amount \$48,400;
 - (c) a reasonable charge for the provision of those legal services, inclusive of GST, was between \$29,425.50 and \$35,964.50 and most probably \$32,695.00.
- (105) The costs agreement purported to allow the practitioner to charge Ms F more than was permitted by the MV Act and the relevant costs determinations made, and in force, under the *Legal Practice Act 2003* (WA) (2003 Act).
- (106) At the date of the costs agreement, the MV Act provided that:
- (a) an agreement was not to be made for a legal practitioner to receive, for acting on behalf of a person claiming damages in respect of bodily injury caused by, or by the driving of, a motor vehicle, any greater reward than was provided for by a determination in force under s 215 of the 2003 Act; and
 - (b) an agreement made which was contrary to that prohibition was void: s 27A(3) of the MV Act.
- (107) As at, and from, the date of the costs agreement until 30 June 2008, the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2006* (Legal Practitioners Determination 2006):
- (a) was a determination in force under s 215 of the 2003 Act;

- (b) applied to contentious business in the District Court of Western Australia; and
 - (c) by its terms and by s 27A of the MV Act, applied to the practitioner's representation of Ms F in respect of the matter.
- (108) From 1 July 2008 until 30 June 2010, the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2008* (Legal Practitioners Determination 2008):
- (a) was a determination in force under s 215 of the 2003 Act;
 - (b) applied to contentious business in the District Court of Western Australia; and
 - (c) by its terms and by s 27A of the MV Act, applied to the practitioner's representation of Ms F in respect of the matter.
- (109) From 1 July 2010, the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010*:
- (a) was a determination in force under s 215 of the 2003 Act;
 - (b) applied to contentious business in the District Court of Western Australia; and
 - (c) by its terms and by s 27A of the MV Act applied to the practitioner's representation of Ms F in respect of the matter.
- (110) None of the costs determinations set out in the previous three paragraphs made provision for:
- (a) minimum charges as contained in cl (d) of the costs agreement;
 - (b) any charges for clerical, secretarial or administrative time such as those contained in cl (c) and cl (e) of the costs agreement.

- (111) Further or alternatively, the terms of the costs agreement were unreasonable because:
- (a) the agreement purported to allow the practitioner to charge Ms F more than was permitted by the MV Act and the relevant costs determinations made and in force from time to time under the 2003 Act;
 - (b) the agreement provided for the charging of secretarial or administrative work over and above the charges for legal services;
 - (c) the agreement provided for unreasonable minimum charges for certain tasks irrespective of the time taken to perform the task.
- (112) At the commencement of his retainer, the practitioner represented to or agreed with Ms F by the terms of the costs disclosure statement that he would invoice Ms F at the conclusion of the matter, rather than render interim bills.
- (113) Contrary to that representation or agreement, the practitioner rendered to Ms F interim bills for professional fees from time to time during the course of the retainer and prior to the conclusion of the matter.
- (114) Further, by his letter to Ms F dated 18 March 2009, the practitioner misrepresented to Ms F that he had not previously represented to her or agreed that he would invoice at the conclusion of the matter, rather than render interim bills.
- (115) By the terms of the costs disclosure statement, the practitioner also represented to Ms F that he would provide her, before she entered into a costs agreement, with an estimate, if reasonably possible, of party and party costs.
- (116) Contrary to that representation, the practitioner did not provide Ms F with such an estimate before she entered into the costs agreement, despite it being reasonably

possible to do so, either by the costs estimate or otherwise.

Agreed facts in relation to Mr T's matter (VR 30 of 2013)

(117) On about 15 September 2005, Mr T:

- (a) retained the practitioner to act on his behalf in relation to a litigious matter being his claim for damages arising from injuries he received from being struck by a motor vehicle (the damages matter);
- (b) entered into a costs agreement with the practitioner in respect of that retainer (Damages Matter Costs Agreement);
- (c) signed a document provided to him on behalf of the practitioner entitled 'Costs Statement' which the practitioner had provided to Mr T in purported compliance with Rule 16A of the Law Society's Professional Conduct Rules then in force (costs disclosure statement);
- (d) signed by way of acknowledgement a letter from the practitioner to Mr T dated 15 September 2005 containing a costs estimate and which the practitioner also provided to Mr T in purported compliance with Rule 16A of the Law Society's Professional Conduct Rules then in force (costs estimate).

(118) Relevantly, the Damages Matter Costs Agreement provided in substance and effect that:

- (a) all legal services rendered by or on behalf of the practitioner would be charged on the basis of time spent performing those legal services in increments of six minute units;
- (b) as to billing arrangements, the practitioner was entitled to render accounts from time to time during the proceedings, which would be usually monthly but less frequently at the practitioner's discretion.

(119) Relevantly, the costs disclosure statement stated that:

'Billing arrangement

We will invoice you at the conclusion of your claim. Payment is due within 7 days of the date the invoice is issued.'

(120) Between about 15 September 2005 and 28 July 2009, the practitioner both directly and through his employees rendered legal services to and on behalf of Mr T in the damages matter.

(121) On or about 17 June 2008 Mr T retained the practitioner to act on his behalf in relation to a claim by Mr T under three superannuation insurance policies held respectively with Host Plus, Motor Trades Association of Australia Superannuation Fund Pty Ltd (MTAA Super Fund) and AMP Superannuation Limited for a payment for permanent and total disability as a result of the injuries he received the subject of the damages matter (TPD Claim).

(122) Between about 17 June 2008 and February 2009 the practitioner both directly and through his employees rendered legal services to and on behalf of Mr T in respect of his TPD Claim.

(123) On or about 28 October 2008 MTAA Super Fund paid to Mr T \$2,877 in respect of the TPD Claim.

(124) On or about 25 September 2008 the practitioner received on behalf of Mr T \$483.82 from AMP Superannuation Limited in respect of the TPD Claim which sum was, on about that date, paid into the practitioner's trust account in respect of the damages matter.

(125) On or about 15 October 2008 the practitioner received on behalf of Mr T \$55,445.81 from AMP Superannuation Limited in respect of the TPD Claim, which sum was on about that date, paid into the practitioner's trust account in respect of the damages matter.

(126) On or about 11 November 2008 the practitioner received on behalf of Mr T \$70,939.40, from Host Plus in respect of the TPD Claim which sum was, on about that date,

paid into the practitioner's trust account in respect of the TPD Claim.

(127) The practitioner, on instructions from Mr T, paid from the monies held in the practitioner's trust in respect of the TPD Claim:

(a) the sum of \$3,870.09 to Mr T on or about 19 August 2009;

(b) the sum of \$60,680.51 to a Mr B on behalf of Mr T on or about 19 November 2009.

(128) Between 23 October 2008 and 30 June 2009, the practitioner rendered tax invoices to Mr T in relation to his TPD Claim totalling \$2,406.08, which were paid by deduction from the practitioner's trust account.

(129) The practitioner rendered the following invoices to Mr T that were purportedly in respect of his TPD Claim but were in fact either substantially or entirely in respect of legal services rendered in the damages matter:

(1)	04.03.2009	Inv No 2925	\$668.80
(2)	01.04.2009	Inv No 2984	\$17.60
(3)	11.05.2009	Inv No 3058	\$118.80
(4)	30.06.2009	Inv No 3141	\$118.80

(130) The damages matter was not routine in nature and did involve factual or legal issues that were complex or difficult with respect to the question of liability and in particular contributory negligence.

(131) On about 28 July 2009 Mr B on behalf of Mr T terminated the practitioner's retainer and instructed Bradley Bayly Legal to take over the conduct of the damages matter.

(132) The practitioner rendered to Mr T the following invoices in relation to the damages matter (the damages matter invoices) on about the following dates for the following amounts, inclusive of GST:

(1)	05.10.2007	Inv No 2305	\$1,842.40
(2)	25.10.2007	Inv No 2316	\$7224.80
(3)	22.10.2008	Inv No 2780	\$12,677.50
(4)	14.11.2008	Inv No 2790	\$1,544.40
(5)	01.12.2008	Inv No 2806	\$8,910.00
(6)	15.01.2009	Inv No 2856	\$1,298.00
(7)	21.01.2009	Inv No 2860	\$2,376.00
(8)	21.01.2009	Inv No 2875	\$1,564.20
(9)	09.02.2009	Inv No 2888	\$5,544.00
(10)	19.02.2009	Inv No 2907	\$871.20
(11)	11.03.2009	Inv No 2937	\$1,702.80
(12)	20.03.2009	Inv No 2957	\$1,148.40
(13)	02.04.2009	Inv No 2987	\$9,464.40
(14)	07.04.2009	Inv No 3002	\$2,455.20
(15)	01.05.2009	Inv No 3040	\$2,380.40
(16)	06.05.2009	Inv No 3050	\$4,158.00
(17)	11.05.2009	Inv No 3057	\$752.40
(18)	09.06.2009	Inv No 3105	\$316.80
(19)	30.06.2009	Inv No 3140	\$831.60
(20)	29.07.2009	Inv No 3182	\$847.00

(133) The damages matter invoices included standard charges of two six minutes units or two tenths of an hour per page for certain items of outgoing correspondence, rather than charges based on the time spent (in increments of six minute units) in preparing and settling that correspondence.

(134) The charging of two six minutes units or two tenths of an hour per page for items of outgoing correspondence:

- (a) was contrary to the provisions of the damages matter costs agreement; and
- (b) resulted in Mr T being charged amounts for those items of outgoing correspondence in excess of the

amount chargeable in accordance with the damages matter costs agreement.

(135) On about the dates the damages matter invoices and the invoices set out in paragraph (129) were issued, the practitioner caused payment of them to be made from the monies held in the practitioner's trust account on behalf of Mr T to the practitioner's general account except for Inv No 2316 which was paid by monthly instalments of approximately \$1,000 between 28 November 2007 and 6 October 2008.

(136) On or about 28 August 2009 the practitioner paid to Bradley Bayly Legal for Mr T the sum of \$5,726.58 by way of 'discount' on fees previously charged together with \$4,273.52 being the balance of money held in the practitioner's trust account making a total of \$10,000.

(137) Accordingly, the practitioner:

- (a) rendered to Mr T professional fees totalling \$68,832.32 inclusive of GST in relation to the damages matter; and
- (b) received from Mr T in that regard a total of \$63,105.74.

(138) A reasonable charge for the legal services rendered by the practitioner to Mr T in respect of the damages matter was, inclusive of GST, approximately \$29,800.91, alternatively, not more than \$28,875.00.

Agreed contentions in relation to Mr T's matter (VR 30 of 2013)

(139) The fees charged and received by the practitioner for the legal services rendered by him in relation to the damages matter were grossly excessive because:

- (a) the practitioner charged Mr T \$68,832.32 inclusive of GST;
- (b) the practitioner received the sum of \$63,105.74 for the legal services he rendered in relation to the damages matter;

- (c) a reasonable charge for the provision of those legal services, inclusive of GST, approximately \$29,800.91, alternatively, not more than \$28,875.00.
- (140) By charging Mr T by the various tax invoices set out in paragraphs (129) and (132) above standard or minimum charges of two six minutes units per page for certain items of outgoing correspondence, rather than charges based on the time spent (in increments of six minute units) in preparing and settling that correspondence, the practitioner charged Mr T on a basis that:
- (a) was contrary to the provisions of the Damages Matter Costs Agreement;
 - (b) resulted in Mr T being charged amounts for those items of outgoing correspondence in excess of the amount chargeable in accordance with the Damages Matter Costs Agreement and/or the costs disclosure statement.
- (141) By the terms of the Damages Matter Costs Agreement referred to at paragraph (118(b)) above the practitioner:
- (a) was entitled to render interim bills to Mr T from time to time in the course of the retainer;
 - (b) represented to Mr T that any interim bills would usually be rendered on a monthly basis, and if not, then less frequently.
- (142) The costs disclosure statement was misleading because it represented that the practitioner would not, or was not entitled to, render interim bills for the damages matter, when the practitioner in fact did render interim bills and was entitled to do so under the Damages Matter Costs Agreement.
- (143) Further, the practitioner during the course of the damages matter routinely rendered interim bills two or three times per month contrary to the representation in the Damages Matter Costs Agreement that any interim bills would

usually be rendered on a monthly basis, and if not, then less frequently.

Legal framework and principles

11 Section 438(2) of the LP Act provides that if, after it has completed a hearing in relation to a referral, the Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, it may:

- (a) make and transmit a report on the finding to the Supreme Court (full bench); or
- (b) make any one or more of the orders specified in section 439, 440 and 441.

12 Section 438(4) of the LP Act provides that, where appropriate, a report forwarded under s 438(2)(a) may include either or both 'a record of the evidence taken at the hearing' and 'a recommendation that the name of the practitioner be removed from the local roll'. The 'local roll' is the 'roll of persons admitted to the legal profession under [the LP] Act' (s 28(1)), commonly known as the Roll of Practitioners.

13 Section 439 of the LP Act provides that the Tribunal may, under s 438(2)(b), 'make any one or more' of the orders set out in that section, including:

- (i) an order that the practitioner's local practising certificate be suspended for a specified period or cancelled (par (a));
- (ii) an order that specified conditions be imposed on the practitioner's practising certificate granted or to be granted under the LP Act (par (c)(i)); and
- (iii) an order reprimanding the practitioner (par (d)).

14 Section 441 of the LP Act provides that the Tribunal may, under s 438(2)(b), 'make any one or more' of the orders set out in that section, including:

- (i) an order that the practitioner pay a fine to the Legal Practice Board of a specified amount not exceeding \$25,000 (par (a));
- (ii) an order that the practitioner undertake and complete a specified course of further legal education (par (b));

- (iii) a 'compensation order' (par (c));
- (iv) an order that the practitioner undertake a specified period of practise under supervision (par (f)); and
- (v) an order that the practitioner's practice be subject to periodic inspection for a specified period (par (i)).

15 A 'compensation order' is an order made to compensate an 'aggrieved person' for loss suffered because of the conduct of a practitioner the subject of a complaint by the aggrieved person or investigated by the Committee on its own initiative: s 448(1) of the LP Act. A compensation order may include 'an order that the practitioner pay to the aggrieved person, by way of monetary compensation for the loss, a specified amount': s 448(2)(c) of the LP Act.

16 In *Re Maraj (a Legal Practitioner)* (1995) 15 WAR 12 (*Re Maraj*), Malcolm CJ, with whom Kennedy and Franklyn JJ agreed, said at 25:

... The object of disciplinary proceedings is the protection of the public and the maintenance of proper standards in the legal profession, rather than punishment. It is clear from ... the authorities which have been repeatedly followed in this Court that when the question is whether a practitioner should be struck off the roll [, ...] the only question is whether the practitioner is a fit and proper person to remain a member of the legal profession. [Citations omitted]

17 In *Re Maraj*, Malcolm CJ also said, at 24, that the object of disciplinary proceedings extends to 'the protection of ... the reputation of the profession'.

18 In *Legal Practitioners Complaints Committee v Pepe* [2009] WASC 39, Murray and Beech JJ said the following at [10] - [12]:

... the purpose of the maintenance of proper standards in the legal profession for the protection of the public may require this court to consider matters, particularly the seriousness of the offending behaviour, which go beyond what might strictly be required to secure the outcome that the practitioner is appropriately punished and would be unlikely to offend in the same manner again. Not every instance of unprofessional or illegal conduct will require the extreme penalty of striking off, or even suspension from practice, but there will be cases where the seriousness of the conduct demands such a disposition because it demonstrates unfitness for practice: *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279, 298.

In the final analysis, however, the question remains that with which this discussion of the applicable principles started - easy to state, but not always so easy to apply. As it was put by the High Court in *A Solicitor v Law Society (NSW)* [2004] HCA 1; (2004) 216 CLR 253 at 265 [15]:

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.

It is plain that under the statute, the judgment of the Full Bench upon that issue is to be made as at the time when the court is called upon to exercise its disciplinary powers.

Where the choice presented is, as in this case, effectively between suspension and striking off, useful guidance can be obtained from the judgment of Thomas JA, McMurdo P and White J agreeing, in *Barristers' Board v Darveniza* [2000] QCA 253; (2000) 12 A Crim R 438 at 446 - 447 [38]:

Striking off is of course reserved for the very serious cases where the character and conduct of the practitioner is seen to be inconsistent with the privileges of further practice. Suspension is a less serious result, firstly because a limited period is specified and secondly because the right to resume practice is then preserved without any further onus upon the practitioner to prove that he or she is now a fit and proper person to practice.

The proper use of suspension is, in my opinion, for those cases in which a legal practitioner has fallen below the high standards to be expected of such a practitioner, but not in such a way as to indicate that he lacks the qualities of character and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner. (*In Re A Practitioner* (1984) 36 SASR 590 at 593 per King CJ.

(See also *in de Braekt* at [24] - [26])

- 19 The parties referred the Tribunal to a number of decisions concerning penalties imposed on legal practitioners in consequence of overcharging clients. The penalties imposed were striking off or suspension and (in one case) a reprimand. However, it is difficult and dangerous to seek guidance, except in general terms, from other disciplinary decisions, because of the differences in the factual circumstances (and sometimes in the statutory context). Ultimately, as the Tribunal recognised in *O'Halloran No 1 (penalty)* at [31]:

Those decisions demonstrate the very serious view taken by the courts or other disciplinary authorities in relation to significant overcharging by legal practitioners.

20 One of the reasons that courts and disciplinary tribunals have taken a very serious view of gross overcharging by lawyers is the knowledge and power imbalance between lawyers and their clients. As Mahoney JA said in the New South Wales Court of Appeal in *Veghelyi v The Law Society of New South Wales* (Unreported, 40257 of 1991, 6 October 1995):

Clients are, or may frequently be, in a vulnerable position vis-à-vis their solicitors; the presumption of undue influence is, I think, based at least in part upon the fact that when making decisions clients ordinarily or at least frequently place trust in their solicitors. They ordinarily are not in a position to know without investigation what work must be done and what charges are fair and reasonable; they ordinarily assume that the solicitor will make only such charges.

Solicitors are, on the other hand, informed, or in a position to inform themselves, of what work may be required and what are fair and reasonable charges. They are, in that sense, in a position of advantage and trust is placed in them. Clients are entitled to be protected against the abuse of such an advantage. It is, I am inclined to think, the fact that that advantage has been misused which may, in a particular case, warrant what the solicitor does being categorised as professional misconduct.

21 In *O'Halloran No 1 (penalty)* the Tribunal found at [54] that the clients who were grossly overcharged by the practitioner in that case were 'vulnerable by reason of their unequal bargaining position'. So too, in these proceedings, the four clients who were grossly overcharged by the practitioner, being plaintiffs in motor vehicle personal injuries cases, were in a vulnerable position relative to the practitioner, in terms of both their knowledge of the work necessary to properly prosecute their claims and of the fees that are reasonable and proportionate to do so, and their bargaining position. Furthermore, as the practitioner's practice principally involves personal injuries and workers' compensation proceedings, his clients would generally be in a similarly vulnerable position relative to him.

Appropriate disciplinary consequence of Tribunal's findings of professional misconduct

22 We accept the Committee's primary contention that the findings of professional misconduct, the agreed facts and contentions, and the evidence presented before the Tribunal, demonstrates that the practitioner is not a fit and proper person to remain a legal practitioner and that he

should be struck off the Roll of Practitioners. We, therefore, accept the Committee's submission that the Tribunal should make and transmit a report on the findings of professional misconduct to the Supreme Court (full bench), pursuant to s 438(2)(a) of the LP Act, with a recommendation that the name of the practitioner be removed from the local roll, pursuant to s 438(4)(b) of the LP Act. We have come to this unfortunate conclusion for the following reasons.

23 It is common ground, and we agree, that the penalty in these proceedings should be determined globally for the multiple findings of professional misconduct given that they all relate to dealings with clients and others in relation to fees.

24 In an address entitled 'Billable Hours - past their use-by date' given by Chief Justice Martin at the Perth Press Club during Law Week 2010, his Honour observed that:

The charges made by lawyers for their services have been a topic of community debate for centuries. I am not quite sure why this is so, as it seems lawyers' fortunes have fluctuated over the centuries. What is clearer, however, is that in the latter decades of last century some (but by no means all) lawyers' earnings placed them amongst the higher income earners in our society.

25 Legal fees reflect the significant and specialist learning, knowledge and experience of lawyers. The legal services lawyers provide are essential to the well being of society. However, the rates at which legal fees are charged are likely to be significantly greater than the rates at which most consumers of legal services earn an income or charge for their own services.

26 Legal fees and the manner in which lawyers deal with clients in relation to fees is likely to be the subject of continuing community discussion and debate. It is essential that lawyers deal with clients in relation to fees, as in all matters, fairly. It is also essential that lawyers ensure that the fees they charge their clients are reasonable and proportionate to the circumstances of each case.

27 The way the practitioner in this case dealt with his clients in relation to fees and the grossly excessive fees he charged them seriously compromised the reputation of the legal profession. The penalty imposed should clearly indicate to the profession and the public that the practitioner's professional misconduct the subject of the findings in this case is unacceptable in the profession.

28 In *O'Halloran No 1 (penalty)* the Tribunal observed, at [33], that there were a number of features of the findings of overcharging made against the practitioner in that case 'which raise serious concerns'. These included that the practice of entering into costs agreements which the Tribunal concluded would inevitably result in charges being made in a way which overstated time spent and exceeded statutory limitations, and overcharging the four clients, was a practice 'sustained over a period of approximately five years from 1999 until 2004' and was 'not, therefore, a case of a single occasion of overcharging' (at [37]).

29 So too, in these proceedings, the findings of professional misconduct in relation to gross overcharging indicate that the practitioner engaged in a course of conduct in grossly overcharging four clients over a period spanning, collectively, close to six years, from September 2005 to July 2011. It was conceded by senior counsel for the practitioner that the four cases of gross overcharging the subject of these proceedings 'involve a course of conduct' (T:58.1, 10.05.13) and, indeed, that the course of conduct was not restricted to the four cases referred to the Tribunal and the subject of the findings, but:

It's reasonable for the tribunal to take the view that the way in which [the practitioner has] conducted these four files does reflect the way in which he is inclined to run his practice generally, or was, we should say, [inclined to run his practice].

(T:58.5, 10.05.13).

30 Furthermore, it was, in effect, conceded on behalf of the practitioner that his course of conduct in gross overcharging not only reflected the way in which he was inclined to run his practice during the close to six year period from September 2005 to July 2011, but also reflected his approach to practise during the whole of the period the subject of the findings of professional misconduct in *O'Halloran No 1* and these proceedings. Collectively, the findings of professional misconduct in relation to gross overcharging in *O'Halloran No 1* and these proceedings relate to eight different clients over a period of approximately eight years, from October 2003 to July 2011. The total period during which the practitioner engaged in professional misconduct in relation to fees as found in *O'Halloran No 1* and these proceedings extended over a period of over 12 years, from April 1999 to July 2011. This 12 year period constituted close to 40% of the practitioner's period of practice.

31 Although a penalty has already been imposed in relation to the four findings of professional misconduct for gross overcharging in

O'Halloran No 1 and the practitioner cannot and should not be the subject of any further penalty in respect of those findings, those findings, and the course of conduct that they reflect, forms part of the context in which the seriousness of the findings in these proceedings and the professional disciplinary consequences of those findings are to be determined.

32 In our view, the fact that the practitioner engaged in a course of conduct of grossly overcharging a number of clients over a period of close to six years, certainly when viewed in the context that this course of conduct began at least two years before the findings in this case, in terms of actual gross overcharging, and over six years before, in terms of entering into costs agreements that would inevitably result in overcharging, demonstrates that the practitioner is not a fit and proper person to remain a member of the profession.

33 Furthermore, as found earlier, the four clients the subject of these proceedings who were grossly overcharged by the practitioner were in a vulnerable position, both because of their unequal knowledge of what legal work would be necessary to conduct their cases and their unequal bargaining position in relation to legal fees. As also found earlier, the practitioner generally practises in personal injuries and workers' compensation matters in which clients would generally be in a vulnerable position. The vulnerable position of his clients increases the seriousness of the practitioner's professional misconduct in this case and further indicates that his character and conduct is inconsistent with the privileges of legal practice.

34 Mr McIntyre submitted on behalf of the practitioner that because the findings the subject of these proceedings are 'really part of an ongoing substratum of facts' (T:55.2, 10.05.13) which also underlay the four findings of professional misconduct in terms of gross overcharging in *O'Halloran No 1*, there is some overlap in the periods of gross overcharging in *O'Halloran No 1* and these proceedings, and given that the Tribunal imposed a six month suspension in *O'Halloran No 1 (penalty)* to achieve the same disciplinary objects as are required to be achieved by the penalty in these proceedings, 'the likely consequence of that is that you would consider a period of suspension which would be additional to what [the practitioner] is currently undergoing' (T:55.4, 5.05.13).

35 However, as Ms PE Cahill SC, who appeared with Ms PE Le Miere on behalf of the Committee, submitted, '[t]hings ... are ... radically different in light of these four further instances of overcharging to which

the practitioner has admitted', both because his course of conduct appears to have extended over a period of eight years in relation to gross overcharging and 12 years in relation to professional misconduct with respect to fees generally, and because, as Ms Cahill submitted:

The field of misconduct is also broader. It now extends to misconduct in relation to the formulation of costs disclosure statements, misleading conduct in relation to that, contravention of the Legal Profession Act of 2008 in failing to update costs estimates and to divulge the information that is required at the commencement of an action, not charging in accordance with his costs agreements or as entitled, in addition of course to the gross overcharging in each case to which the practitioner has admitted. (T:50.4, 10.05.13).

36 Of arguably greatest concern amongst this litany of professional misconduct in relation to fees is that the practitioner engaged in misleading conduct in relation to fees with clients: findings (c)(ii) and (iii), agreed fact at (11) and agreed contentions at (35), (40), (42) and (43) in relation to Ms R's matter; findings (c)(ii) and (iii), agreed fact at (54) and agreed contentions at (77), (82), (84) and (85) in relation to Mr B's matter; finding (d), agreed fact at (96) and agreed contention at (114) in relation to Ms F's matter; and finding (c), agreed fact at (119) and agreed contention at (142) in relation to Mr T's matter.

37 A further matter of significant concern in relation to the 'broadening' of the field of misconduct is finding (d) in relation to each of Ms R's and Mr B's matters, that the practitioner engaged in professional misconduct by seeking payment from the Insurance Commission on behalf of those clients of costs in amounts in excess of that in fact charged to and incurred by them: agreed facts at (23) and (65) and agreed contentions at (46) and (86).

38 In his affidavit, which formed his evidence-in-chief, the practitioner sought to justify his conduct in relation to the Insurance Commission on the basis that the draft party/party bills that were sent to the Insurance Commission 'were prepared based on the work-in-progress records' and 'were a negotiating tool'. He maintained this position in cross-examination:

Do you still think that that is something that is acceptable to do? - - - Yes, provided it's supported by the WIP [work-in-progress] records, which it was. It was based on the WIP records. I certainly didn't claim for something that had not been done in order to get more from [the Insurance Commission] than would have been legitimately claimable. (T:34.9, 10.05.13).

39 However, the terms of the agreed settlement reached with the defendant in each of Ms R's and Mr B's case included payment by the defendant of the client's costs of the action to be taxed. The 'work-in-progress records' did not reflect the client's costs of the action, because those 'costs' were not charged to and incurred by the client. Furthermore, the practitioner's conduct could not possibly be justified on the basis that it was a 'negotiating tool'. A practitioner may not knowingly mislead another practitioner, or another participant in litigation, as a 'negotiating tool'. The practitioner misrepresented the amount of his clients' costs of their actions to the Insurance Commission.

40 The practitioner's misleading conduct in relation to clients and the Insurance Commission in respect of fees further demonstrates that he is not a fit and proper person to be a legal practitioner and that his character and conduct is inconsistent with the privileges of further practice.

41 In *Legal Practitioners Complaints Committee v Lashansky* [2007] WASC 211 the Supreme Court held at [35] that:

... a practitioner's failure to understand the impropriety of his [or her] conduct, may be a factor of very great importance in determining whether he or she is permitted to remain on the Roll.

42 In his written submissions, Mr McIntyre said that the practitioner's 'appreciation of the degree to which his conduct varied from professional standards has evolved over time'. Mr McIntyre submitted that the practitioner 'has now had it brought home to him fully, particularly following his appeal in [*O'Halloran No 1*], that he was not charging in a manner acceptable within the profession'.

43 The practitioner and Mr McIntyre emphasised essentially six matters in an effort to demonstrate that the practitioner has gained a sufficient degree of insight into his impropriety and that he will charge reasonably and proportionately in the future.

44 First, they emphasised the fact that, in these proceedings, the practitioner has conceded that he engaged in professional misconduct in each of the respects contended by the Committee. Although the practitioner did not do so at the first available opportunity in relation to Ms R's and Mr B's matters (VR 176 of 2012), but only after he had filed a Response in which he denied the allegations, including the allegations that the fees were grossly excessive and that he charged fees contrary to the costs agreements, the fact that he ultimately admitted the allegations and did so promptly in relation to Ms F's and Mr T's matters (VR 30 of 2013)

stands to his credit and is a factor in favour of suspension rather than striking off.

45 Secondly, the practitioner has changed his method of billing so as to charge by the minute, rather than by six minute units, and so as no longer to charge a minimum number of units for certain items of outgoing correspondence.

46 Although these changes of practise in relation to billing are likely to reduce the amount the practitioner charges, we agree with Ms Cahill's submission that 'the tribunal can have no confidence from the evidence that this practitioner can charge reasonably, proportionately and in accordance with his professional obligations in the future' (T:53.3, 10.05.13), for essentially three reasons.

47 First, under cross-examination the practitioner demonstrated a general ignorance of the provisions of Pt 10 of the LP Act concerning costs disclosure and assessment. He conceded that he has not had any occasion in recent times to look at Pt 10 of the LP Act (T:7.4, 10.05.13) and was unable to tell the Tribunal what either s 260 or s 267 of the LP Act concerns, even though he agreed to findings of professional misconduct in relation to Ms R's and Mr B's matters that he contravened those provisions. Sections 260 and 267 of the LP Act concern costs disclosure to clients and impose an ongoing obligation to disclose any substantial change to anything included in a disclosure to clients.

48 We agree with Ms Cahill's submission that:

This is a practitioner who has now been found guilty of eight separate instances of gross overcharging and numerous instances of failing to comply with professional and legal obligations in relation to costs disclosures and costs agreements. His response to that after all of this time is to not even to have gone back to the statute and carefully acquainted himself with his legal obligations. That, we say, is a very powerful indicator of his lack of insight into the seriousness of his conduct and the seriousness of the professional obligations he has in relation to these matters. (T:52.9-53.1, 10.05.13).

49 Secondly, the practitioner said in his affidavit that he 'discounted' the fees charged to Ms R and Mr B and, in particular, that the most substantial invoices in their matters were discounted by 30% 'in an attempt to take account of what might be regarded as a reasonable and proportionate fee' (Exhibit 8, paras [5] and [8]). However, the practitioner conceded in cross-examination that the 30% discount 'still left a grossly excessive charge' (T:10.6, 10.05.13), although 'I felt at the time I did my best to take

[what was a reasonable charge for these matters] into account' (T:10.9, 10.05.13). The cross-examination also included the following question and answer:

What you were endeavouring to do here, you tell the tribunal in your affidavit, was, by the 30 per cent discount, charge something that was reasonable. You accept that you were unable to make that determination accurately at that time? - - - It appears to have been the case with hindsight, yes. (T:11.6, 10.05.13).

50 The practitioner also conceded in cross-examination that he rendered a bill for \$942.70 to Ms R on 11 July 2011 after he 'probably' had the Tribunal's decision in *O'Halloran No 1* (T:16.4, 10.05.13). The cross-examination included the following questions and answers:

You've told the tribunal earlier today, in effect, that when that decision [*O'Halloran No 1*] was received, you took notice of it? - - - Yes, of course.

That gave you some insight into the fact that you had been overcharging? - - - Yes.

However, you still rendered these bills [including the bill to Ms R on 11 July 2011,] didn't you? - - - I did.

You didn't take account of the fact that you had overcharged in previous bills, Mr [B] and Ms [R]? - - - No, because I think at the time I didn't consider I'd overcharged.

So you didn't have sufficient insight at this stage, despite what the tribunal had said about the systemic practice - - - ? - - - Had I thought at the time I was overcharging, I never would have rendered the bill I rendered. (T:15.4-7, 10.05.13).

51 The practitioner's inability to determine what was a reasonable fee in this case, despite doing his 'best' to do so, casts serious doubt on his ability to charge reasonable and proportionate fees in the future.

52 Thirdly, the practitioner has not undertaken or offered to undertake any education or training to ensure that he only charges reasonable and proportionate fees in the future.

53 The third matter referred to by the practitioner and Mr McIntyre in relation to insight is that the practitioner has adopted the practice of opening separate files for clients who have both a statutory workers' compensation claim and a common law workers' compensation claim.

While this change of practice is appropriate, it does not demonstrate any significant insight into the practitioner's impropriety.

54 Fourthly, the practitioner gave evidence that:

The [C]ommittee has, I think, made a good recommendation that I try, whenever I can, to bill at the end [of a matter] and I'm trying to do that because I think that does then assist with - I haven't done it [in] every case, but in most cases I'm doing it, but it does then assist with looking at proportionality and what a reasonable fee should be, what you've recouped by way of party-party costs and so on.
(T:20.9, 10.05.13).

55 The practitioner produced a list of 121 client names which he described as 'a reasonable accurate list of the current clients, but there are some finalised claims there' (T:20.2, 10.05.13). He gave evidence that, in relation to these 121 matters, he has rendered interim bills in 24 cases and final bills in 15 cases and that 'I would prefer that we do a final bill [rather] than an interim bill' in the balance (T:44.5, 10.05.13).

56 In cross-examination, the practitioner said that 'whereas I think in years gone by I was certainly rendering far more interim accounts to far more clients ... that's reduced dramatically ... the main reason is to try and see what the result is and look at the issue of proportionality and so on at the end' (T:34.5, 10.05.13). However, he conceded that, over the last 12 months, he has, in some matters, billed monthly, fortnightly and even weekly. The practitioner then gave the following telling evidence as to why he rendered interim bills in these matters:

You did that for your own cash flow reasons, didn't you? - - - Yes, well, we've got - yes, exactly.

For your benefit? - - - Well, for the benefit of the staff, to run the business - the practice. I haven't actually been drawing very much myself at all, so it's actually been primarily to run the practice.
(T:33.3, 10.05.13).

57 It appears that, notwithstanding that the practitioner has rendered fewer interim accounts than previously, he has still rendered a substantial number of interim accounts, including some on a monthly, fortnightly or weekly basis. This increases the risk, given his past conduct, that the practitioner will not charge reasonable and proportionate fees in a substantial number of cases. Furthermore, if the practitioner requires increased cash flow to run his practice, it is likely that he will render more interim accounts, thereby increasing the risk of further significant overcharging of clients.

58 The fifth matter referred to by the practitioner and Mr McIntyre in relation to insight is that the Tribunal's order in *O'Halloran No 1 (penalty)* suspending the practitioner for six months was stayed by the Supreme Court, pending the determination of the appeal, subject to conditions including that his accounts (other than in respect of disbursements to a third party) were to be assessed by an independent practitioner with suitable experience in the area of costs assessment before being rendered to a client. It is common ground that this occurred in accordance with the Court's orders from 17 February 2012 and that all of the practitioner's accounts were approved by the assessor and sent to the Committee without any query being raised. However, the practitioner has not proposed that any such regime be put in place after he returns to practice following his suspension.

59 The final matter referred to by the practitioner and Mr McIntyre to demonstrate insight is the practitioner's evidence that 'I accept that I should repay money to the clients the subject of the current complaints' in the amounts submitted by the Committee (Exhibit 8, para [20]). Those amounts are \$9,759.93 to Ms R, \$7,080 to Mr B, \$15,705 to Ms F and \$34,230 to Mr T. However, the practitioner also said that 'I do not have a capacity to pay those amounts immediately' (Exhibit 8, para [20]) and that 'I am not presently able to say that I will be able to pay any compensation until my suspension is lifted' (Exhibit 8, para [21]). He gave evidence that 'I would expect that at that time, I will be entitled to receive sufficient funds to pay the compensation sought from the work-in-progress' in those of the 121 matters he referred to that had not yet been finalised (Exhibit 8, para [21]).

60 The practitioner also gave the following evidence:

I do not have any assets which are readily able to be liquidated. I have a building in Nottingham [in England] which I purchased with the intention of setting up a legal practice there. That did not work out, and now the building has dropped to below the value of my liability to the Mortgagee. (Exhibit 8, para [22]).

61 However, the practitioner's professed willingness to pay compensation to the clients the subject of these proceedings is hollow as he has not offered any realistic plan or proposal as to how his clients would ever be repaid their money.

62 Having agreed with the Committee in February 2012 to pay a Mr D compensation of \$20,000 by monthly instalments of \$3,000, the practitioner has not paid anything since July 2012, leaving \$5,000

outstanding. Having agreed with the Committee in July 2012 to pay a Ms M \$27,000 in compensation, at \$2,500 per fortnight commencing on 14 September 2012, the practitioner has not paid anything at all to Ms M. The practitioner conceded in cross-examination that in both cases he failed to pay the compensation that he agreed to pay, because his practice could not sustain the payments. The practitioner has also failed to pay the \$133,998 in costs to the Committee ordered in *O'Halloran No 1*, because he does not have the means to do so.

63 Given the practitioner's failure to pay \$32,000 in compensation that he agreed to pay by instalments in 2012 and his failure to pay any of the costs ordered in *O'Halloran No 1*, it is unlikely that the practitioner will pay compensation for the amounts he overcharged the four clients the subject of these proceedings from the cash flow of the firm.

64 The practitioner's evidence in relation to assets from which he could meet compensation orders was also unsatisfactory and less than frank. Under cross-examination, he conceded that his evidence that his building in Nottingham in England 'has dropped to below the value of my liability to the Mortgagee' was based not on direct evidence of the value of the property, but rather on 'the impression I've got over the period of the last few years' (T:40.5, 10.05.13) from a number of conversations with his former secretary (who worked for him for six months in about 2009 - 2010) of what the former secretary was apparently told by one or two real estate agents the property is worth. As the practitioner said in cross-examination 'so it's all third-hand at this stage' (T:39.4, 10.05.13). Furthermore, it had to be drawn from the practitioner in cross-examination that he also owns a residential property with his wife, an apartment with his wife and another commercial property on his own. Although the practitioner said that the commercial property is 'fully mortgaged' (T:41.6, 10.05.13), he volunteered no evidence about it in his evidence-in-chief and provided no detailed evidence at all.

65 We therefore accept Ms Cahill's submission that 'the practitioner is demonstrating mere lip service to those sorts of important obligations rather than any genuine attempt to make reparation' (T:53.9, 10.05.13).

66 We find that the practitioner has not demonstrated any real insight into his impropriety and we are not satisfied that he is likely to charge reasonably and proportionately if he is permitted to practise in the future.

67 Finally, although the Tribunal would have considered any extenuating or mitigating circumstances in relation to the misconduct the

subject of these proceedings, the practitioner offered little, if anything, of substance.

68 The practitioner said, in relation to Ms R's and Mr B's matters, that his invoices of 5 April 2011 charged one (rather than two) six minute units for certain outgoing letters. However, he acknowledged that, at the time, he had a 'system of charging 2 units for each outgoing letter' (Exhibit 8, para [4] and para [7]) and that 'to the extent that these charges were raised irrespective of the length of the letter [of which there are many examples], I readily acknowledge that this was improper' (Exhibit 8, para [4] and para [7]).

69 In relation to his failure to disclose to Ms R in writing that the total costs of providing legal services to her in respect of her matter were likely to substantially exceed the range of \$10,000 to \$20,000, and that total costs were likely to be about \$30,000, the practitioner said that this was because he 'did not have a system in place which would allow me to readily recognise when costs had exceeded or may exceed my original estimates' (Exhibit 8, para [9]). This is a serious admission because it reflects a systemic failure on the practitioner's part.

70 In relation to his professional misconduct in rendering interim bills to Ms F from time to time contrary to the manner in which the practitioner had represented or agreed that he would do so in the costs disclosure statement (that he would invoice her at the conclusion of the matter rather than render interim bills), and that he misled Ms F as to the basis upon which he represented or agreed that he would bill for legal services he provided, the practitioner gave evidence that 'a misunderstanding arose between Ms [F] as to whether I had represented that I would only invoice [Ms F] at the conclusion of the matter or whether I would render interim bills'. However, there was no basis for, nor was there any, 'misunderstanding' between the practitioner and his client. As the practitioner has admitted:

At the commencement of his retainer, the practitioner represented to or agreed with Ms F by the terms of the costs disclosure statement that he would invoice Ms F at the conclusion of the matter, rather than render interim bills.

Contrary to that representation or agreement, the practitioner rendered to Ms F interim bills for professional fees from time to time during the course of the retainer and prior to the conclusion of the matter.

Further, by his letter to Ms F dated 18 March 2009, the practitioner misrepresented to Ms F that he had not previously represented to her or

agreed that he would invoice at the conclusion of the matter, rather than render interim bills.

(Agreed contentions in relation to Ms F's matter at (112) - (114)).

71 The practitioner said that 'in any case Ms [F] agreed to pay the interim accounts and did so'. However, the fact that Ms F paid the accounts does not excuse the practitioner's conduct in billing contrary to his representation or agreement, much less in misleading his client as to the basis upon which he represented or agreed that he would bill her.

72 The practitioner also said that although it was his 'initial intention to try and carry Ms [F] for the entire length of the retainer without sending out a bill ... as matters progressed it became more and more apparent that this was a far more complicated case than I was first led to believe'. However, as the practitioner has admitted:

The matter:

- (a) did not involve any factual or legal issues that were complex or difficult;
- (b) did not require any greater amount or different type of legal services, than would normally be expected to be required for an average motor vehicle accident claim.

(Agreed facts in relation to Ms F's matter at (92)).

73 In relation to his professional misconduct in rendering interim bills to Mr T more frequently than he had previously represented he would, the practitioner said that he was 'devastated' by the passing of his father on 9 August 2005 and of his mother on 2 September 2005 and said that he 'may have lacked the requisite level of attention to detail at the time and for a period sometime thereafter' (Exhibit 8, para [12]). However, although the Damages Matter Costs Agreement was entered into with Mr T on or about 15 September 2005, shortly after the practitioner's parents passed away, the multiple monthly bills (two in October 2007, three in January 2009, two in February 2009, two in March 2009, two in April 2009, three in May 2009 and two in June 2009) were rendered between two and almost four years after those events.

74 Finally, the practitioner referred to adverse publicity to which he has been subject as a result of these proceedings. However, as the Tribunal said in *O'Halloran No 1 (penalty)* at [51]:

It is no doubt damaging to Mr O'Halloran's professional reputation, and a source of considerable embarrassment to him, that the outcome of these proceedings has been the subject of publicity. That is an inevitable result of disciplinary proceedings which, as observed above, fulfil a function of warning to the profession and notice to the public. Publicity in the ordinary course does not significantly affect the appropriate penalty to be imposed.

75 We accept that the question of penalty should be approached on the basis that, in a practice now of over 32 years, the practitioner has only once previously been found guilty of professional misconduct or unsatisfactory professional conduct, that is, in *O'Halloran No 1*. However, in light of the earlier discussion, we do not consider that the fact that the practitioner has only been found guilty of professional misconduct in *O'Halloran No 1* and in these proceedings, nor the matters referred to by him and on his behalf, render a further suspension from practise together with a compensation order an adequate penalty to reflect the seriousness of the findings of professional misconduct for gross overcharging in this case, when viewed in the context of the findings in *O'Halloran No 1*, the agreed facts and contentions, and the evidence presented in this case.

76 We consider that the practitioner has been shown not to be a fit and proper person to be a legal practitioner and that he should be struck off the Roll of Practitioners. We therefore make and transmit a report on the findings to the Supreme Court (full bench) with our recommendation that Mr O'Halloran's name be removed from the Roll of Practitioners. Of course, whether that occurs, or some other penalty is imposed, is a matter entirely for the Supreme Court.

Compensation Order

77 It appears that the Tribunal does not have power, in circumstances where it makes and transmits a report on a finding to the Supreme Court (full bench), to also make a compensation order under s 441(c) of the LP Act (or any other order specified in s 439, s 440 and s 441 of the LP Act). This is because s 438(2) of the LP Act uses the disjunctive 'or' between paras (a) and (b) and the language of this provision can be contrasted with the expression 'any one or more of the following orders' in s 439, s 440 and s 441.

78 Had the Tribunal had power to make a compensation order, we would have made the orders sought by the Committee, and agreed by the practitioner, pursuant to s 441(c) and s 448 of the LP Act, that the practitioner pay by way of monetary compensation for their loss:

- (a) Ms R the sum of \$9,759.93;
- (b) Mr B the sum of \$7,080;
- (c) Ms F the sum of \$15,705; and
- (d) Mr T the sum of \$34,230.

79 The amounts in the preceding paragraph are the differences in each case between the amount received by the practitioner and the reasonable charge (as now agreed).

Costs

80 The Committee sought an order for the payment by the practitioner of counsel fees, expert fees and other disbursements incurred in the proceedings in the amount of \$27,861.20.

81 The Tribunal's practice in relation to the exercise of its discretion as to costs under s 87(2) of the *State Administrative Tribunal Act 2004* (WA) in vocational disciplinary proceedings was summarised in ***Legal Profession Complaints Committee and in de Braekt*** [2012] WASAT 58 (S) at [51] and its practising in relation to the assessment of costs was summarised at [53] of that decision.

82 There is no reason why, in the circumstances of this case, the Tribunal should depart from its usual practice in relation to costs. The amount of costs in terms of disbursements sought by the Committee is reasonable and appropriate in the circumstances of the case. The order for costs sought by the Committee was not opposed by the practitioner. The practitioner should be ordered to pay the Committee's costs of these proceedings assessed in the sum of \$27,861.20 within four weeks.

Conclusion

83 The Tribunal makes and transmits a report on the findings of professional misconduct to the Supreme Court (full bench) with a recommendation that the practitioner's name be removed from the Roll of Practitioners. The report is to comprise these reasons and is to be transmitted with a copy of the exhibits and the transcript of the hearing.

84 The practitioner is to pay the Committee's costs of the proceedings in terms of disbursements in the amount of \$27,861.20 within four weeks of the date of this decision.

Orders

1. Pursuant to s 438(2)(a) of the *Legal Profession Act 2008* (WA), a report be transmitted to the Supreme Court (full bench) on the Tribunal's findings that the practitioner, Paul John O'Halloran, is guilty of professional misconduct, with a recommendation, pursuant to s 438(4)(b) of the *Legal Profession Act 2008*, that the name of the practitioner be removed from the roll of persons admitted to the legal profession under the *Legal Profession Act 2008*. The report comprises the Tribunal's reasons and is to be transmitted with a copy of the exhibits and transcript of the hearing on 10 May 2013.
2. Pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA), the respondent must pay to the applicant its costs of the proceeding in terms of disbursements assessed in the amount of \$27,861.20 by 2 August 2013.

I certify that this and the preceding [84] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUDGE D R PARRY, DEPUTY PRESIDENT