

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : LEGAL PROFESSION ACT 2008 (WA)

CITATION : LEGAL PROFESSION COMPLAINTS
COMMITTEE and BOWER [2017] WASAT 47 (S)

MEMBER : JUSTICE J C CURTHOYS (PRESIDENT)
MS M CONNOR (MEMBER)
MR M HARFORD (SENIOR SESSIONAL
MEMBER)

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 5 MAY 2017

FILE NO/S : VR 31 of 2016

BETWEEN : LEGAL PROFESSION COMPLAINTS
COMMITTEE
Applicant

AND

RONALD WILLIAM BOWER
Respondent

Catchwords:

Professional misconduct - Delay - Misleading the Court - Misleading the client -
Inappropriate charging - Failure to keep client informed

Legislation:

District Court Rules 2005 (WA), r 45
*Legal Profession Act 2008 (WA), s 403, s 408, s 438(2), s 438(3), s 438(4),
s 439, Pt 13*
State Administrative Tribunal Act 2004 (WA), s 87(1), s 87(2)

Result:

Report on findings of professional misconduct made to Supreme Court of Western Australia (Full Bench) with recommendation that practitioner's name be removed from roll of persons admitted to legal profession under *Legal Profession Act 2008* (WA)

Practitioner's local practising certificate suspended 14 days from date of this order until determination of Supreme Court (Full Bench)

Practitioner pay applicant's costs of proceedings in terms of disbursements

Summary of Tribunal's decision:

These reasons for decision determined the appropriate penalty for a legal practitioner and principal of a legal firm who engaged in professional misconduct within the meaning of s 403 and s 408 of the *Legal Profession Act 2008* (WA) in relation to the practitioner's handling of the files of two clients during proceedings in the District Court of Western Australia.

The practitioner's misleading conduct was of such a nature as to lead the Tribunal to determine that the appropriate penalty in the circumstances of this case was to make and transmit a report on the finding to the Supreme Court (Full Bench) with a recommendation that the practitioner's name be removed from the Roll of Practitioners.

The practitioner's 11th hour remorse exhibited a worrying appreciation of the seriousness of his conduct.

Despite the references provided on the practitioner's behalf, they were not sufficient to outweigh a penalty that reflected the seriousness of the practitioner's conduct.

The Tribunal also determined that the practitioner's practising certificate should be suspended pending the determination of the Supreme Court (Full Bench).

Lastly, the Tribunal ordered the practitioner to pay the costs of the disbursements incurred by the Legal Profession Complaints Committee in bringing the proceedings.

Category: B

Representation:

Counsel:

Applicant : Ms PE Cahill SC and Mr N Pope

Respondent : Mr G McIntyre SC and Mr R Cywicki

Solicitors:

Applicant : Legal Profession Complaints Committee
Respondent : N/A

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

A Solicitor v Council of the Law Society of NSW [2004] HCA 1;
(2004) 216 CLR 253
Barristers' Board v Darveniza [2000] QCA 253; (2000) 112 A Crim R 438
Barwick v Council of the Law Society of NSW [2004] NSWCA 32
BRJ v Council of New South Wales Bar Association [2016] NSWSC 146
Chamberlain v Law Society of the Australian Capital Territory
(1993) 118 ALR 54
Council of the Law Society (NSW) v A Solicitor [2002] NSWCA 62
Craig v The Medical Board of South Australia [2001] SASC 169
Law Society of New South Wales v Foreman (1994) 34 NSWLR 408
Law Society of New South Wales v Walsh [1997] NSWCA 185
Legal Practitioners Complaints Committee v Thorpe [2008] WASC 9
Legal Profession Complaints Committee and A Legal Practitioner
[2013] WASAT 37 (S)
Legal Profession Complaints Committee and Amsden [2014] WASAT 57 (S)
Legal Profession Complaints Committee and Barber [2015] WASAT 99
Legal Profession Complaints Committee and in de Braekt [2013] WASAT 124
Legal Profession Complaints Committee and Leask [2010] WASAT 133
Legal Profession Complaints Committee v Brickhill [2013] WASC 369
Legal Profession Complaints Committee v Detata [2012] WASCA 2014
Legal Profession Complaints Committee v Lashansky [2007] WASC 211
Legal Profession Complaints Committee v Love [2014] WASC 389
Legal Profession Complaints Committee v Masten [2011] WASC 71
Legal Profession Complaints Committee v O'Halloran [2013] WASC 430
Legal Profession Complaints Committee v Pepe [2009] WASC 39
Legal Profession Complaints Committee v Segler [2014] WASC 159
Legal Professional Complaints Committee and Bower [2017] WASAT 47
Medical Board of Western Australia and Roberman [2005] WASAT 81 (S)
New South Wales Bar Association v Cummins [2001] NSWCA 284;
(2001) 52 NSWLR 279
New South Wales Bar Association v Evatt (1968) 117 CLR 177

New South Wales Bar Association v Hamman [1999] NSWCA 404
Paridis v Settlement Agents Supervisory Board [2007] WASCA 97;
(2007) 33 WAR 361
Quinn v Law Institute of Victoria [2007] VSCA 122
Re A Practitioner (1984) 36 SASR 590
Re Maraj (a Legal Practitioner) (1995) 15 WAR 12
Singh v Legal Services Commissioner [2013] QCA 384
Smith v New South Wales Bar Association [2014] WASAT 112 (S);
[1992] HCA 36; (1992) 176 CLR 256
Stirling v Legal Services Commissioner [2013] VSCA 374
The Council of the Qld Law Society v Wright [2001] QCA 58
Veterinary Practitioners Board of NSW v Johnson [2010] NSWADT 308
Veterinary Surgeons Investigating Committee v Howe (No 2)
[2003] NSWADT 159
Western Australian Planning Commission v Questdale Holdings Pty Ltd
[2016] WASCA 32

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 In *Legal Professional Complaints Committee and Bower* [2017] WASAT 47 (*Bower*), the Tribunal determined that Ronald William Bower, a legal practitioner and the principal of a legal firm, Corser & Corser, engaged in professional misconduct within the meaning of s 403 and s 408 of the *Legal Profession Act 2008* (WA) (LP Act) in relation to the practitioner's handling of the files of two clients during proceedings in the District Court of Western Australia. This decision determines the appropriate penalty.

2 The Tribunal determines that the appropriate professional disciplinary consequence of Mr Bower's professional misconduct in the circumstances of this case is to make and transmit a report on the finding to the Supreme Court (Full Bench) with a recommendation that Mr Bower's name be removed from the Roll of Practitioners.

3 The Tribunal also determines that Mr Bower's practising certificate should be suspended pending the determination of the Supreme Court (Full Bench).

4 Finally, the Tribunal orders Mr Bower pay costs in terms of the disbursements incurred by the Legal Profession Complaints Committee (Committee) in the proceeding in the amount of \$46,325.10.

The findings against Mr Bower

5 The Tribunal found that Mr Bower engaged in professional misconduct in the following circumstances.

1. [I]n about April 2011, Mr Ronald William Bower caused an affidavit to be prepared, sworn and filed in District Court of Western Australia proceedings CIV 256 of 2010 in circumstances where:
 - (a) Mr Ronald William Bower knew the affidavit to be false and misleading in material respects; and
 - (b) Mr Ronald William Bower intended that the District Court of Western Australia be misled by the affidavit.
2. [I]n about August 2010, Mr Ronald William Bower deliberately permitted an email sent to a client, Mr Mahendra Pal, about the status and progress of the proceedings to remain uncorrected in circumstances where:

- (a) Mr Ronald William Bower knew the email to be false and misleading in material respects; and
 - (b) Mr Ronald William Bower intended that Mr Mahendra Pal be misled about the true status and progress of the proceedings;
3. [B]etween about November 2010 and May 2011, Mr Ronald William Bower sent emails to Mr Mahendra Pal about the status and progress of the proceedings in circumstances where:
 - (a) Mr Ronald William Bower knew the emails to be false and misleading in material respects; and
 - (b) Mr Ronald William Bower intended to mislead Mr Mahendra Pal about the true status and progress of the proceedings.
4. [B]etween about May 2010 and April 2011 ... Mr Ronald William Bower failed to take reasonable steps, as the principal of the law firm retained by Mr Mahendra Pal, in respect of the proceedings to ensure that the proceedings were progressed without undue delay.
5. [B]etween about June 2010 and November 2011, Mr Ronald William Bower failed to take reasonable steps, as the principal of the law firm retained by Mr Mahendra Pal, in respect of the proceedings to ensure that:
 - (i) Mr Mahendra Pal was given timely, accurate and complete information about the significant developments and progress in the proceedings;
 - (ii) Mr Mahendra Pal was informed:
 - (a) that a representative of the law firm did not appear at a directions hearing held in the proceedings on 30 July 2010 and that consequently the court had made a costs order against Mr Mahendra Pal;
 - (b) whether there was any basis for Mr Mahendra Pal to apply to the court to have that costs order set aside or varied;
 - (c) that the law firm had not complied with the directions made by the court for the filing of pleadings;
 - (d) that the proceedings had become inactive on about 20 November 2010 and why; and

- (e) of the consequences of the proceedings having become inactive.
6. [I]n about July 2011, Mr Ronald William Bower engaged in professional misconduct within the meaning of s 403 and s 438 of the Legal Profession Act 2008 (WA) by issuing an invoice to Mr Mahendra Pal which included fees charged for work undertaken in applying to the District Court of Western Australia pursuant to r 45 of the *District Court Rules 2005* (WA) to, in effect, order that the proceedings were no longer inactive in circumstances where the proceedings had become inactive because of undue delay by the law firm retained by Mr Mahendra Pal in respect of the proceedings, of which Mr Ronald William Bower was the principal.
7. [I]n about May 2011, Mr Ronald William Bower caused to be filed in the District Court of Western Australia, two affidavits in proceedings CIV 2534 of 2009 which were false and misleading in material respects in circumstances where:
- (a) Mr Ronald William Bower knew the affidavits to be false or misleading in material respects; and
 - (b) Mr Ronald William Bower intended that the District Court of Western Australia be misled by the affidavits.
8. [I]n about May 2011, Mr Ronald William Bower, swore an affidavit and caused it to be filed in District Court of Western Australia proceedings CIV 2534 of 2009 in circumstances where:
- (a) Mr Ronald William Bower knew the affidavit to be false and misleading in material respects; and
 - (b) Mr Ronald William Bower intended that the District Court of Western Australia be misled by the affidavit.

The parties' submissions

- 6 In its submissions filed on 31 March 2017, the Committee sought the following orders:
- 1. [P]ursuant to s 438(2)(a) and s 438(4) of the Act, that the Tribunal make and transmit a report to the Supreme Court (full bench) with recommendation that the name of the respondent (practitioner) be removed from the Roll of Practitioners;
 - 2. [A] consequential order pursuant to s 438(3)(a) of the Act that within 30 days of the Tribunal delivering its decision on penalty,

that the practitioner's local practising certificate be suspended pending the determination of the Supreme Court (full bench); and

3. [A]n order pursuant to s 87(2) of the State Administrative Tribunal Act 2004 (WA) that the practitioner pay the Committee's costs in a sum to be fixed, such costs to be paid to the Legal Practice Board within 21 days or as otherwise agreed between the practitioner and the Legal Practice Board.

7 In his submissions filed 13 April 2017, Mr Bower submitted that in relation to the misleading emails, the lack of diligence and the charging of fees, a global fine was appropriate. He further submitted that a penalty short of suspension or striking off was appropriate for misleading the court.

8 Mr Bower submitted that:

[T]he Tribunal should conclude, in the special circumstances which apply to the practitioner, that the practitioner is not unfit to remain in practice and that he can be trusted to deal fairly with the system in which he practices if the Tribunal chooses a form of penalty which enables him to continue to do so.

Legal framework and principles

9 The purposes of Pt 13 of the LP Act are, relevantly:

- (a) to provide for the discipline of the legal profession in this jurisdiction, in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally; and
- (b) to promote and enforce the professional standards, competence and honesty of the legal profession.

10 Sections 438(2) to 438(4) of the LP Act provide:

- (2) If, after it has completed a hearing in relation to a referral under this Part in respect of an Australian legal practitioner, the State Administrative Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal 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.

- (3) If the State Administrative Tribunal transmits a report in respect of a legal practitioner to the Supreme Court (full bench) under subsection (2)(a), the Tribunal may, pending the determination of the Supreme Court (full bench), make the following orders -
 - (a) an order that the Australian legal practitioner's local practising certificate be suspended for a specified period;
 - (b) an order that specified conditions be imposed on an Australian legal practitioner's local practising certificate restricting the entitlement of an Australian legal practitioner to practise for a specified period.
- (4) Where appropriate, a report forwarded under subsection (2)(a) may include either or both of the following -
 - (a) a record of the evidence taken at the hearing;
 - (b) a recommendation that the name of the practitioner be removed from the local roll.

11 Section 439 of the LP Act provides:

The State Administrative Tribunal may, under section 438(2)(b), make any one or more of the following orders -

- (a) an order that the practitioner's local practising certificate be suspended for a specified period or cancelled;
- (b) an order that a local practising certificate not be granted to the practitioner before the end of a specified period;
- (c) an order that -
 - (i) specified conditions be imposed on the practitioner's practising certificate granted or to be granted under this Act; and
 - (ii) the conditions be imposed for a specified time; and
 - (iii) specifies the time (if any) after which the practitioner may apply to the Tribunal for the conditions to be amended or removed;
- (d) an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner.

Disciplinary sanctions - general principles

12 The jurisdiction of the Tribunal is protective rather than punitive, and such protection runs to both the public and the profession (*Re Maraj (a*

Legal Practitioner) (1995) 15 WAR 12 at 25); *Legal Profession Complaints Committee v Love* [2014] WASC 389 (*Love*) at [19]; *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 (*Foreman*) at 440G-441A-B; *Legal Profession Complaints Committee and in de Braekt* [2013] WASAT 124 (*in de Braekt*) at [24]-[26]; *New South Wales Bar Association v Hamman* [1999] NSWCA 404 (*Hamman*) at [21] and at [77]).

13 The appropriate sanction is to be considered at the time of the making of the sanction and not by reference to the date of the unprofessional acts (*Legal Profession Complaints Committee and A Legal Practitioner* [2013] WASAT 37 (S) (*A Legal Practitioner (S)*) at [23]; *Legal Profession Complaints Committee v Segler* [2014] WASC 159 at [7]; *A Solicitor v Council of the Law Society of NSW* [2004] HCA 1; (2004) 216 CLR 253 (*A Solicitor [2004] NSW*) at [15]; *Love* at [16]).

14 It is the practitioner's conduct that attracts any sanction (*A Legal Practitioner (S)* at [24]; *Smith v New South Wales Bar Association* [2014] WASAT 112 (S); [1992] HCA 36; (1992) 176 CLR 256 at 267-268 and 271-272; *A Solicitor [2004] NSW*).

15 As the Tribunal explained in *A Legal Practitioner (S)* at [24]:

[I]n determining the appropriate penalty, care needs to be taken that the penalty reflects the matters with which the practitioner is charged and not other conduct including the defence of the action by the practitioner which is ultimately held to be unsuccessful: *Smith v New South Wales Bar Association* [1992] HCA 36; (1992) 176 CLR 256 (*Smith*) at 267 - 268 and 271 - 272[.]

Twelve matters for consideration

16 In determining an appropriate sanction, twelve matters may require consideration. Those matters are interrelated and are not mutually exclusive. The list of matters is not exhaustive. The twelve matters are:

- 1) Any need to protect the public against further misconduct by the practitioner (*Legal Profession Complaints Committee and Amsden* [2014] WASAT 57 (S) (*Amsden (S)*) at [8]; *Foreman* at 440C; *Hamman* at [77]).
- 2) The need to protect the public through general deterrence of other practitioners from similar conduct (*Veterinary*

Practitioners Board of NSW v Johnson [2010] NSWADT 308 (*Johnson*) at [103]; *Hamman* at [77]).

- 3) The need to protect the public and maintain public confidence in the profession by reinforcing high professional standards and denouncing transgressions and thereby articulating the high standards expected of the profession (*Amsden (S)*) at [8]; *Foreman* at 444F; and *Hamman* at [77] and [79]), such that, even where there may be no need to deter a practitioner from repeating the conduct, the conduct is of such a nature that the Tribunal should give an emphatic indication of its disapproval (*Craig v The Medical Board of South Australia* [2001] SASC 169 at [64]; *Johnson* at [103]).
- 4) In the case of conduct involving misleading conduct, including dishonesty, whether the public and fellow practitioners can place reliance on the word of the practitioner (*Johnson* at [109]; *Foreman* at 445B - 445G).
- 5) Whether the practitioner has breached any:
 - a) Act;
 - b) Regulations;
 - c) Guidelines or Code of Conduct, issued by the relevant professional body; and
 - d) whether the practitioner has done so knowingly.
- 6) Whether the practitioner's conduct demonstrated incompetence, and if so, to what level.
- 7) Whether or not the incident was isolated such that the Tribunal can be satisfied of his or her worthiness or reliability for the future (*Foreman* at 442E - 442G; *New South Wales Bar Association v Evatt* (1968) 117 CLR 177 at 183; *Council of the Law Society (NSW) v A Solicitor* [2002] NSWCA 62 at [80]; *Chamberlain v Law Society of the Australian Capital Territory* (1993) 118 ALR 54 at 62 and 63).

- 8) The practitioner's disciplinary history (*Legal Profession Complaints Committee v O'Halloran* [2013] WASC 430 at [93]);
- 9) Whether or not the practitioner understands the error of his ways, including an assessment of any remorse and insight (or a lack thereof) shown by the practitioner, since a practitioner who fails to understand the significance and consequences of misconduct is a risk to the community (*Law Society of New South Wales v Walsh* [1997] NSWCA 185 per Beazley JJA (*Walsh*); *Legal Profession Complaints Committee v Lashansky* [2007] WASC 211 (*Lashansky*) at [31]-[52] and (second) at [35]; *Amsden (S)* at [8]; *Foreman* at 444E; *Love* at [9]).
- 10) The desirability of making available to the public any special skills possessed by the practitioner.
- 11) The practitioner's personal circumstances at the time of the conduct and at the time of imposing the sanction. However, the weight given to personal circumstances cannot override the fundamental obligation of the Tribunal to provide appropriate protection of the public interest in the honesty and integrity of legal practitioners and in the maintenance of proper standards of legal practice (*Love* at [59]); *Paridis v Settlement Agents Supervisory Board* [2007] WASCA 97; (2007) 33 WAR 361 (*Paridis*) at [30(5)]).
- 12) The Tribunal may consider any other matters relevant to the practitioner's fitness to practise and other matters which may be regarded as aggravating the conduct or mitigating its seriousness (*A Legal Practitioner (S)* at [25]). In general, mitigating factors such as no previous misconduct or service to the profession are of considerably less significance than in the criminal process because the jurisdiction is protective not punitive (*Walsh*).

General matters relating to sanctions

17 Where there is a choice of sanctions, the Tribunal will choose that sanction which maximises the protection of the public (*Quinn v Law Institute of Victoria* [2007] VSCA 122 at [31]).

18 The dominant purpose of the disciplinary regulation of the legal profession is the protection of the public by the maintenance of proper standards within the profession. Hence, the impact which an appropriate penalty would have upon a practitioner guilty of misconduct, and personal hardship to a practitioner, are necessarily secondary considerations (see *Legal Profession Complaints Committee v Detata* [2012] WASCA 2014 at [47]; *Legal Profession Complaints Committee v Masten* [2011] WASC 71 at [29]; and *Legal Profession Complaints Committee and Leask* [2010] WASAT 133 at [54]).

19 There are circumstances in which a 'global' approach to sanction, rather than the imposition of separate sanction for each unprofessional act, may be more appropriate in vocational disciplinary proceedings namely, where the facts of the case are so inextricably woven as to make it difficult to meet a clear standard of prescription (*A Legal Practitioner (S)* at [5]; *Stirling v Legal Services Commissioner* [2013] VSCA 374 at [72]-[75]).

20 All of the above matters are to be considered in the context of the Tribunal's findings as to penalty, that is, how serious was the conduct and the agent's explanation for the conduct (*Paridis* at [30(1)]-[30(2)]).

Removal from the Roll

21 The jurisdiction of the Tribunal to remove a practitioner from the Roll is exercised not for the purpose of punishing the practitioner concerned, but for the protection of the public and the reputation and standards of the legal profession: *Legal Practitioners Complaints Committee v Thorpe* [2008] WASC 9 at [43].

22 Where an order for removal from the Roll is contemplated, the ultimate question is whether the material demonstrates that the practitioner is not a fit and proper person to remain a legal practitioner: *A Solicitor [2004] NSW* at [15].

23 A practitioner is not a fit and proper person to be a registered practitioner and should be removed from the register where the unprofessional conduct is so serious that the practitioner is permanently or indefinitely unfit to practise (*Veterinary Surgeons Investigating*

Committee v Howe (No 2) [2003] NSWADT 159 at [27]; *Barristers' Board v Darveniza* [2000] QCA 253; (2000) 112 A Crim R 438 at [38]; *Love* at [17]-[18]; *A Legal Practitioner (S)* at [21]-[25]; *Legal Profession Complaints Committee v Brickhill* [2013] WASC 369 at [19]-[20] (Thomas JA, McMurdo P and White J agreeing); *New South Wales Bar Association v Cummins* [2001] NSWCA 284; (2001) 52 NSWLR 279 at [26]-[28]); *Love* at [17]-[18]).

24 Although serious dishonesty is an obvious example of where removal from the Roll is appropriate (*Love* at [18]), removal is not necessarily confined to circumstances involving findings of dishonesty.

25 In *Lashansky* at [36], the Full Court stated:

... Hope JA observed, [in *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736] the ignorance which the practitioner displayed was not ignorance of some esoteric or difficult corner of the law, but was an ignorance of general principles applicable to common activities of a solicitor (at 741). Hope JA concluded that '[s]uch an unawareness of and lack of care about the most elementary propositions of law concerning the responsibility he had taken on and the standards required of solicitors are themselves sufficient to justify the protection of the public by his removal from the roll' (at 743, Reynolds JA agreeing, and see Hutley JA at 759).

26 The practical effect of an order striking a practitioner off the roll is that if a practitioner wishes to resume practice he/she must persuade the Full Court that he/she is truly reformed and that he/she is a fit and proper person to resume practice.

Suspension

27 Suspension is a less serious result and differs from removal from the Roll because suspension is for a specified limited period and the practitioner has a preserved right to resume practice without any further onus upon them to prove that they are a fit and proper person to practice (*A Legal Practitioner (S)* at [26]; *Legal Profession Complaints Committee v Pepe* [2009] WASC 39 at [12])

28 The proper use of suspension is in cases where the 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/she lacks the qualities of character which are the necessary attributes of a person entrusted with the responsibilities of a practitioner (*A Legal Practitioner (S)* at [26]; *Re A Practitioner* (1984) 36 SASR 590 at 593 per King CJ). That is, suspension is suitable where the Tribunal is satisfied that, upon

completion of the period of suspension, the practitioner will be fit to resume practice (*A Legal Practitioner (S)* at [27]).

- 29 The practical effect of an order suspending a practitioner's registration is that at the end of the period of suspension, the practitioner is entitled to resume practice without having to prove to the Full Court that he/she is a fit and proper person.

The seriousness of Mr Bower's conduct

- 30 As the Committee's submissions correctly note:

...

3. The quality most likely to result in striking off is conduct which undermines the trustworthiness of the practitioner, or which suggests a lack of integrity or that the practitioner cannot be trusted to deal fairly within the system in which he or she practises: *LPCC v Brickhill* [2013] WASC 369 at [21].
4. The Court has generally taken a very serious approach to cases in which a practitioner's conduct has involved dishonesty. *LPCC v Masten* [2011] WASC 71 at [19]; *LPCC v Brickhill* [2013] WASC 369 at [21]. Honesty, fairness and integrity are essential prerequisites to the right to practise law. The willingness to engage in dishonest behaviour is of central relevance to an assessment of a practitioner's fitness to practise *Legal Practitioner Complaints Committee v McKerlie* [2007] WASC 119 at [8]; *The Council of the New South Wales Bar Association v Sahade* [2007] NSWCA 145 at [58].
5. It is 'a matter of the utmost seriousness' for a practitioner to intentionally mislead a court: *LPCC v Segler* [2014] WASC 159 at [11], [12] *LPCC v Waters* [2015] WASC 141 at [8]. The administration of justice and public confidence in the system depends upon the assumption and expectation that practitioners will conduct themselves before the Court with honesty and candour. Not all instances of professional misconduct involving deliberate misleading of a court will necessarily result in striking off. Nevertheless, a finding that a practitioner has intentionally misled a court raises serious questions as to the practitioner's fitness to practise and must attract a substantial penalty *Vogt v Legal Practitioner's Complaints Committee* [2009] WASC 202 at [70].
6. In *Coe v New South Wales Bar Association* [2000] NSWCA 13 the New South Wales Court of Appeal affirmed a decision to strike off a practitioner in respect of a single proved charge that in proceedings in the Family Court of Australia, in which the barrister

was a party, the barrister swore an affidavit which he knew to be false in a material particular. Mason P said at [10]:

If (which I doubt) there are exceptional cases where a practitioner who knowingly swears a false affidavit that is filed in court could be regarded as fit to practise, this is not one of them.

31 However, as Mr Bower submitted

...

3. It is emphasized on behalf of the practitioner, as acknowledged in the submission on behalf of the Committee, that not all instances of professional misconduct involving intentionally misleading a court will necessarily result in striking the practitioner off the Roll of Practitioners.
4. As the Court of Appeal said in *Vogt -v- Legal Practitioners Complaints Committee* [2009] WASCA 202 at [60] (speaking of suspension, but equally applicable to a strike off recommendation)

Whether a penalty of suspension is appropriate must always depend upon the facts of the particular case. There can be no hard and fast rules, even in cases where a practitioner is found intentionally to have misled a court.

32 Mr Bower's submissions as to the seriousness of the conduct were similar to those of the Committee except with a greater emphasis on those cases where it was held that striking off was not the appropriate penalty. He submitted:

...

12. It is to be noted, in relation to the three findings of misleading the Court, that it was said by the Court of Appeal in relations to such a finding, in *Vogt -v- Legal Practitioners Complaints Committee* [2009] WASCA 202 at [70] that:

it is a matter of the utmost seriousness for a practitioner intentionally to mislead a court. The effective administration of the justice system and public confidence in the system depends upon the absolute and unconditional discharge by practitioners of their duty of honesty and candour to the court. It is a duty so fundamental that factors such as relative inexperience and lack of supervision do not weigh so heavily in mitigation as they might in other situations. A deliberate departure from the duty must attract a substantial penalty. We consider that in the circumstances of this case the penalty of three months suspension imposed by the Tribunal was appropriate

13. The disposition in the Vogt case, of course, reflected the circumstances of the particular case. The Court of Appeal noted, at [62], that -

A number of factors were put in mitigation to this court, as they were to the Tribunal. It was submitted that the practitioner was relatively inexperienced at the time of the conduct, having then been admitted for only some six years; the conduct was of a one-off nature and was now some four years old; the appellant had an unblemished record both before and after the conduct; the appellant had been inadequately supervised and had left the firm in 2007 to start his own legal practice, which had procedures in place designed to ensure that deadlines did not pass unnoticed; there was character evidence that in the four years since the conduct the appellant had demonstrated a meticulous understanding of the duties of a practitioner in the preparation of documents so there was no reason to infer any likely repetition of the conduct; and that suspension would deprive the public of the appellant's substantial pro bono work as well depriving his own clients of his services.

14. The Tribunal must, therefore, carefully consider the circumstances in which the practitioner engaged in the conduct found to have misled the Court and the matters particular to the practitioner which suggest the appropriate penalty to serve the public interest of protection of the public and the maintenance of the reputation and standards of the legal profession: *Legal Profession Complaints Committee -v- Brickhill* [2013] WASC 369 at [18] *Re Maraj (a legal practitioner)* (1995) 15 WAR 12, 25 (Malcolm CJ, Kennedy and Franklyn JJ agreeing); *Ziems v Prothonotary of the Supreme Court of New South Wales* [1957] HCA 46; (1957) 97 CLR 279, 286 (Dixon CJ, McTiernan, Fullagar and Kitto JJ agreeing); *Legal Profession Complaints Committee v Masten* [2011] WASC 71 [16] (Martin CJ, Murray and EM Heenan JJ); *Legal Profession Complaints Committee v Brennan* [2010] WASC 198 [10] (Martin CJ, Murray and Hall JJ agreeing); *Legal Profession Complaints Committee v Fitzpatrick* [2011] WASC 320 [43] (Martin CJ, EM Heenan and Jenkins JJ).
15. As the Full Bench of the Supreme Court said in *Legal Profession Complaints Committee -v- Brickhill* [2013] WASC 369 at [21] -

Integrity and honesty are essential characteristics expected of a practitioner, and therefore, the court has generally taken a very serious approach when dealing with dishonesty by a practitioner: *Brennan* [15]; *Legal Profession Complaints Committee v Bachmann* [2011] WASC 309 [47] (Martin CJ, EM Heenan and Jenkins JJ); *Legal Practitioners Complaints Committee v Palumbo* [2005] WASCA 129 [22] [23] (Steytler P, Wheeler and McLure JJA agreeing); *Kyle v Legal*

Practitioners Complaints Committee [1999] WASCA 115; (1999) 21 WAR 56 [69] (Parker J); *Re Maraj* (25) (Malcolm CJ, Kennedy and Franklyn JJ agreeing). In *Barristers' Board v Darveniza*, Thomas JA observed that:

[T]he quality most likely to result in striking off is conduct which undermines the trustworthiness of the practitioner, or which suggests a lack of integrity or that the practitioner cannot be trusted to deal fairly within the system which he or she practices [33].

33 The Tribunal also refers to its decision in *Legal Profession Complaints Committee and Barber* [2015] WASAT 99 at [26]-[27].

The findings against Mr Bower

34 The findings made by this Tribunal about Mr Bower included serious findings of dishonesty, in that he:

- 1) knowingly swore and caused to be filed an affidavit containing false or misleading evidence with the intention of misleading the District Court: *Bower* at [506] and [513(8)];
- 2) caused three affidavits to be prepared, sworn (by another) and filed that he knew contained false and misleading evidence and with the intention of misleading the District Court: *Bower* at [499], [505], [513(1)] and [513(7)];
- 3) sent email communications to a client between November 2010 and May 2011 which he knew to be false and misleading and with the intention to mislead the client: *Bower* at [501] and [513(3)]; and
- 4) deliberately permitted an email sent to the client to remain uncorrected when the practitioner knew the email to be false and misleading and intended that the client be misled by the email: *Bower* at [500] and [513(2)].

35 Mr Bower's conduct in misleading the Court on oath is extremely serious conduct by any measure. His conduct in misleading the client, although less serious by reason of the fact that it was not on oath and the client, rather than the Court, was misled is also extremely serious.

36 Mr Bower's conduct in misleading the Court and his client over a prolonged period establishes that he cannot be trusted to deal fairly within the system in which he practices.

Analysis of factors

Factor 1 Is there a need to protect the public against further misconduct by Mr Bower?

37 Mr Bower's conduct is such that there is a clear need to protect the public against further misconduct by Mr Bower. His conduct was extremely serious and involved both the misleading of the Court and his client. The fact that his conduct was not isolated, as discussed below, emphasises the need to protect the public.

Factor 2 Is there a need to protect the public through general deterrence of other practitioners?

38 The integrity of practitioners is an essential part of our legal system. A penalty for Mr Bower's conduct must emphasise to other practitioners the need to be scrupulously honest with courts and tribunals. It is also important that practitioners understand their obligations to their client.

Factor 3 Is there a need to protect the public by reinforcing high professional standards and denouncing transgressions?

39 As noted above the integrity of practitioners is an essential part of our legal system. The need for practitioners to be honest in all circumstances must be emphasised. Any penalty must reflect the seriousness of Mr Bower's conduct.

Factor 4 Dishonesty

40 Mr Bower's conduct in misleading the Court and his client was clearly and deliberately dishonest.

Factor 5 Breach of an Act, Regulations, Guidelines or Code of Conduct

41 Neither party made submissions as to this factor.

Factor 6 Incompetence

42 The Tribunal's finding in *Bower* establishes that Mr Bower failed to take reasonable steps, as the principal of the law firm retained by a client, in respect of the proceedings to ensure that the proceedings were

progressed without undue delay. The fact that Mr Bower allowed the client's file to be so delayed is evidence of incompetence.

Factor 7 Was the incident isolated?

43 The events which have given rise to the total matters considered in this matter extended between August 2010 and November 2011. Mr Bower submitted that the three affidavits which were found to mislead the Court were sworn on 18 April 2011, 26 May 2011 and 27 May 2011, that is, within a relatively small time frame. The Tribunal does not accept that the affidavits were sworn within a relatively small time frame. They were sworn over a period of five weeks. In the context of his very serious conduct in misleading the Court, that period provided ample time for Mr Bower to reflect on his conduct and step back from it.

44 Mr Bower's misleading conduct, involving both his client and the Court extended for over a year.

45 Mr Bower sent a number of misleading emails to his client and swore and filed a misleading affidavit and caused three other misleading affidavits to be filed.

46 The misleading affidavits were filed in two separate matters. Mr Bower's deception continued in his dealings with the Committee and with the giving of evidence before this Tribunal.

47 As the Committee noted in the Settlers House Pty Ltd matter in *Bower*, the practitioner's motivation of self-interest was apparent from Mr Bower's memorandum to Mr Savas dated 29 March 2011 in which Mr Bower referred to the possibility of writing a large cheque to the opposing party, refunding fees to the client and notifying Law Mutual: *Bower* at [442] and [450]-[451]

48 Mr Bower's conduct was engaged in for reasons of self-interest, to attempt to conceal his and his firm's defaults from his clients (*Bower* at [333]), and to mislead the Court so as to avoid the consequence of his own defaults being sheeted home to him.

49 Mr Bower's conduct cannot be regarded as short term or isolated. It was a calculated course of conduct over an extensive period. He was acting entirely in his own interests throughout the period.

Factor 8 Mr Bower's disciplinary history

50 Mr Bower does not have any relevant disciplinary history. However, that is of limited significance in a case such as this, where the fundamental consideration is that the practitioner has been found, through a calculated course of conduct, to have deliberately and dishonestly misled and deceived the Court and his client.

Factor 9 Whether or not Mr Bower understands the error of his ways, including an assessment of any remorse and insight (or a lack thereof) shown by Mr Bower

51 Mr Bower submitted that:

...

20. The practitioner, in his affidavit filed with these submissions, makes clear his appreciation of the seriousness of the misconduct in which he has been found to have been engaged, and his regret at the impact of such conduct on public trust in the legal profession. His withdrawal from voluntary associations with which he has been associated, deposed to in his affidavit, reflects his appreciation that his conduct has made him unworthy of continuing participation in such associations.

21. The practitioner makes clear in his affidavit that he now accepts the view which the Tribunal and the Committee have taken of his conduct and that the way in which he sought to portray his conduct in his defence of the complaints did not withstand an objective assessment.

52 As the Committee correctly submitted, the practitioner's conduct of the defence and the veracity and candour of his or her testimony will often be the best evidence as to whether these mitigating circumstances are to be accepted: *Barwick v Council of the Law Society of NSW* [2004] NSWCA 32 at [108].

53 A practitioner's denial of the charges and the consequent need for the regulator to prosecute the charges to conclusion will deny the practitioner the mitigating benefit of immediate remorse and cooperation: *The Council of the Qld Law Society v Wright* [2001] QCA 58 at [43]-[46].

54 However, sincere remorse, even at a late stage is relevant to mitigation. The question is whether Mr Bower's recent expressions of remorse in his affidavit is to be given weight.

55 In *Singh v Legal Services Commissioner* [2013] QCA 384 at [22] McMurdo P noted, in the circumstances of that case:

The most significant aspect of the further evidence upon which the appellant seeks to rely is his recently discovered remorse and insight into the seriousness of his commission in 2003 of the offence of attempting to pervert the course of justice. The most rational inference from this evidence is that this recent discovery follows upon his receipt of strong and prudent legal advice that such remorse and insight provide an essential base for a submission that, if his name is restored to the roll of legal practitioners in Queensland, the public will not need protection from him. Such 11th hour remorse and insight can be given only limited weight in determining whether he is now a fit and proper person to be a legal practitioner and whether the public need protection from him.

56 Mr Bower's expressions of remorse come very late in the day - after he had been found by the Tribunal to have engaged in professional misconduct. Those expressions of remorse are completely inconsistent with the manner in which he responded to the Committee and in which he conducted his defence. Mr Bower's 11th hour remorse can only be given limited weight.

57 Mr Bower did not demonstrate any insight, remorse or cooperation until after the adverse findings against him. The Committee was obliged to prosecute the charges to final determination by the Tribunal. Mr Bower denied throughout the serious charges of dishonest conduct made against him.

Factor 10 Are there any special skills possessed by Mr Bower?

58 Mr Bower does not possess any special skills that affect any penalty to be imposed on him.

Factor 11 Mr Bower's personal circumstances

59 Mr Bower is 62 years old. His wife is a midwife and he has two children who are employed at Corser & Corser.

60 Although Mr Bower does not depose to the fact, it is evident that the loss of income from his profession will have a significant effect on him and his wife.

61 However, because the purpose of penalties under the LP Act is the protection of the public, the weight given to personal circumstances cannot override the fundamental obligation of the Tribunal to provide appropriate protection of the public interest in the honesty and integrity of

legal practitioners and in the maintenance of proper standards of legal practice (*Love* at [59]).

62 In his affidavit, Mr Bower referred to the fact that he feels unable to maintain his membership of and committee work for the Law Society and feels unable to continue with his membership of the Rotary Club of Applecross and committee work with the Seventh Day Adventist Church of which he is an elder. Although these matters may impact on Mr Bower they are not relevant to an assessment of penalty.

Factor 12 Are there any other matters related to Mr Bower's fitness to practise?

a) The conduct related to an employed solicitor with mental health issues:

63 It is a significantly aggravating factor in this case that a solicitor employed by Mr Bower swore three misleading affidavits. As Mr Bower well knew at the time those affidavits were sworn by Mr Savas, Mr Savas was suffering from symptoms of bi polar disorder. Mr Bower knew of Mr Savas' symptoms not least because of his letter of 30 March 2011 to a psychiatrist: *Bower* at [289]. Mr Bower had effectively instructed Mr Savas as to part of the contents of the misleading affidavits, including those parts that were relevantly misleading: *Bower* at [440]-[442]. Mr Bower thus placed Mr Savas in an invidious position. Even if Mr Savas was not suffering from bi polar disorder like symptoms, it is likely that it would have required significant courage to stand up to Mr Bower, his employer.

b) Mr Bower's mental health:

64 Mr Bower submitted that:

...

19. In addition, as Dr Woodall, the Consultant Psychiatrist, whom the practitioner has been seeing since 10 February 2006, regarding the Major Depressive Disorder with which he is suffering, opines, in the report filed with these submissions, the practitioner's 'Depressive Disorder would have had an impact on his supervision of the work of employees and of lapses in his normal careful observation of professional standards'.

65 Dr Woodall's report relevantly stated that he first saw Mr Bower on 10 February 2006. Mr Bower's condition stabilised and no further specialist review was felt necessary after 16 February 2007.

66 Dr Woodall saw Mr Bower again on 13 February 2012. Dr Woodall notes Mr Bower's report of over work and stress leading to anxiety. This anxiety lead to a tendency to procrastination and indecisiveness.

67 Mr Bower's procrastination may have led to the position where the files fell behind schedule but it does not explain his attempts to cover up the delays. By way of comparative example: see *BRJ v Council of New South Wales Bar Association* [2016] NSWSC 146 at [57]. Mr Bower's conduct in misleading his client and the Court was entirely calculated and deliberate. It was not a result of procrastination.

68 In any event, as this Tribunal stated in *A Legal Practitioner (S)* at [39]:

It is in the nature of the work of a legal practitioner that a practitioner will be busy and very often under stress. That could hardly be regarded as a basis to excuse the practitioner's professional obligations.

69 Dr Woodall noted that Mr Bower continued treatment and his level of function improved although complete remission of symptoms was not obtained. However, as the Full Court stated in *Love* at [63]:

A diagnosis of depression does not, in itself, automatically excuse or mitigate professional misconduct. Apart from anything else, it cannot be assumed that the suffering of any mental illness, including depression, is a cause of any professional misconduct, particularly conduct involving dishonesty. Further, the protective function of these proceedings must be borne in mind, particularly where, as here, the professional misconduct involves dishonesty.

70 There is no evidence from Dr Woodall to establish any relationship between Mr Bower's depressive illness and his misleading conduct.

The references and Mr Bower's affidavit referred to his pro bono work

71 The Tribunal accepts that Mr Bower has undertaken pro bono work and contributed to the community by his community and committee work. However, that cannot outweigh the seriousness of Mr Bower's conduct.

The value of references

72 In *Lawyers' Professional Responsibility* (6th ed, 2017) Professor G E Dal Pont wrote at pages 777-778:

For testimonials to assume any weight, they must be based on a detailed understanding of the conduct that occurred, and informed by a full appreciation of the lawyer's methods, not by opinions based upon a view

from days past (*Re Melvey* (1966) 85 WN (Ft 1) (NSW) 289 at 298 (CA). Cf *Prothonotary of the Supreme Court of New South Wales v P* [2003] NSWCA 320 at [14], per Young CJ in Eq (who remarked that '[i]t was pleasing to see that in contrast with many cases of this type each of the character referees appears to have been made fully aware, of all the relevant facts and circumstances of the opponent's offence'). Testimonials that disregard known facts, or downplay the seriousness of the misconduct, indicate a diminished capacity to give convincing evidence of good character (*Re Bridgman* [1934] St R Qd 1 at 7 per Blair CJ; *Re Nelson* (1991) 106 ACTR 1 at 24 per Higgins and Foster JJ) and so attract little weight. Nor is evidence from a non-legally qualified deponent of great value, for 'it is one thing to speak well of a man whom the deponent has met in social or business circles; it is another to speak of him as to his professional dealings' (*Re Melvey* (1966) 85 WN (Ft 1) (NSW) 289 at 298 (CA)). Third parties' opinions cannot, in any event, be substituted for the opinion of the tribunal or court (*Re Bridgman* [1934] St R Qd 1 at 7 per Blair CJ).

Evidence of the lawyer's good reputation and integrity carries greatest weight where the breach is a minor and isolated one, here presenting a compelling case that the lawyer's character as revealed by the breach is entirely out of character (*Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 at 444 per Mahoney JA).

The position is otherwise where the breach is more serious, and especially where it involves repeated dishonesty (*Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 at 448-449 per Mahoney JA. The cases most commonly concerned fraudulent trust account misappropriations: see, for example, *Re a Practitioner* (1984) 36 SASR 590 at 592 per King CJ, at 593 per Jacobs J; *Re Nelson* (1991) 106 ACTR 1 at 24 per Higgins and Foster JJ) here, character evidence carries far less weight because a serious breach, and breaches that are repeated, are difficult to explain as other than indicative of a lack of integrity[.]

73 The Tribunal adopts Professor Dal Pont's writing as a correct statement of the law relating to testimonials/references.

74 Mr Bower has provided references from 30 people all of whom are aware of the findings against him. Almost all of the references are from present or former legal practitioners. All of the references refer to his good character and conclude that his actions in relation to the matters the subject of the findings in *Bower* are out of character.

75 The Tribunal has taken the references into account. However, Mr Bower's breaches are serious and character evidence carries far less weight because a serious breach, and breaches that are repeated, as here, are difficult to explain as other than indicative of a lack of integrity

Aberration

76 Mr Bower submitted that:

...

24. The above factors support a conclusion that the misconduct which has been found to have occurred, and the dishonesty, in particular, comprise an aberration in the practitioner's usual character of a kind which is unlikely to be repeated: see *Vogt -v- Legal Practitioners Complaints Committee* [2009] WASCA 202, at [62].

77 The Tribunal does not accept that Mr Bower's conduct was an aberration. The conduct was not isolated, as discussed above. It was sustained over a period of over a year. It was calculated to serve Mr Bower's self-interests.

What is an appropriate penalty?

78 The Tribunal is not satisfied that a period of suspension is appropriate. The Tribunal has concluded that the practitioner will not be fit to resume practice upon completion of any period of suspension,

79 The Tribunal is satisfied that Mr Bower is not a fit and proper person to be a legal practitioner. Fitness to practice law requires Mr Bower to command the personal confidence of his or her clients, fellow practitioners and judges. Mr Bower's conduct shows that he cannot command that confidence.

80 The character and conduct of Mr Bower is inconsistent with the privileges of further practice. Mr Bower's conduct establishes that he lacks the integrity and honesty which are essential characteristics expected of a practitioner. The Tribunal has determined that Mr Bower is permanently unfit to practice and that the Tribunal should recommend to a Full Bench of the Supreme Court of Western Australia that his name be removed from the Roll of Practitioners.

Mr Bower's other conduct the subject of the application

81 In addition to the findings of misleading conduct, the Tribunal found that:

- 1) Mr Bower failed to take reasonable steps as the principal of the law firm retained by his client in respect of the proceedings to ensure that the proceedings were progressed without undue delay;

- 2) Mr Bower failed to take reasonable steps as the principal of the law firm retained by his client in respect of the proceedings to ensure that:
 - a) the client was given timely, accurate and complete information about the significant developments and progress in the proceedings; and
 - b) the client was informed:
 - i) that a representative of the law firm did not appear at a directions hearing held in the proceedings on 30 July 2010 and that consequently the Court had made a costs order against the client;
 - ii) whether there was any basis for the client to apply to the Court to have that costs order set aside or varied;
 - iii) that the law firm had not complied with the directions made by the Court for the filing of pleadings;
 - iv) that the proceedings had become inactive on or about 20 November 2010 and why; and
 - v) of the consequences of the proceedings having become inactive; and
- 3) Mr Bower issued an invoice to the client which included fees charged for work undertaken in applying to the District Court pursuant to r 45 of the *District Court Rules 2005* (WA) to, in effect, order that the proceedings were no longer inactive in circumstances where the proceedings had become inactive because of undue delay by the law firm retained by the client in respect of the proceedings, of which Mr Bower was the principal.

82 Mr Bower submitted that a penalty by way of a fine would be appropriate for the other conduct.

83 Any fine for this conduct would be subsumed in an order for striking off.

84 The misleading conduct, the failure to inform the client and the inappropriate charging are all relevant. Although the delay is a separate issue, it is nevertheless factually intertwined with the other findings.

85 Given the gravity of the dishonesty findings against the practitioner and the close factual relationship to the other misconduct findings, this is a situation in which it is both convenient and preferable to impose a global penalty: *A Legal Practitioner (S)* at [18]-[19].

Interim order for suspension

86 The Tribunal accepts the Committee's contention that Mr Bower is not fit to remain on the Roll of Practitioners and that a report should be transmitted to the Full Bench. It is appropriate for Mr Bower to be suspended from practice pursuant to s 438(3)(a) of the LP Act pending the Full Bench's determination of the question of strike off: *in de Braekt* at [49].

Costs

87 Section 87(1) and s 87(2) of the *State Administrative Tribunal Act 2004* (WA) provide:

Unless otherwise specified in this Act, the enabling Act, or an order of the Tribunal under this section, parties bear their own costs in a proceeding of the Tribunal.

Unless otherwise specified in the enabling Act, the Tribunal may make an order for the payment by a party of all or any of the costs of another party or of a person required to produce a document or other material on the application of the party under section 35.

88 In *Western Australian Planning Commission v Questdale Holdings Pty Ltd* [2016] WASCA 32, Murphy JA (Martin CJ and Corboy J agreeing) stated:

46 The effect of s 87(1) of the SAT Act is, relevantly, that each party in proceedings before the Tribunal is to bear its own costs, unless the Tribunal otherwise orders.

...

51 Section 87(2) is to be construed in the context that the legal rationale for an order for costs is not to punish the person against whom the order is made, but to compensate or reimburse the person in whose favour it is made. That rationale is evident in s 87(3) of the SAT Act. Accordingly, even in a statutory context where the presumptive position is that no costs will be ordered, generally

speaking, the question is whether, in the particular circumstances of the case, it is fair and reasonable that a party should be reimbursed for the costs it incurred. The onus is on the party seeking an order in its favour.

89 In *Medical Board of Western Australia and Roberman* [2005] WASAT 81 (S) (*Roberman (S)*) at [30], the Tribunal stated:

Section 87(2) gives the Tribunal the discretion to order the payment by a party of all or any of the costs of another party. Where a regulatory authority successfully brings a complaint of conduct which, if proved, justifies disciplinary action by the Tribunal, there will usually be a strong case for the exercise of that discretion in favour of the regulatory body. That is because such bodies perform a function which promotes the public interest, and usually with limited resources. The financial burden of bringing disciplinary action if the body had no capacity to recover some or all of its costs may be such as to provide a disincentive to bring disciplinary action, or when brought, to ensure that the allegations against the practitioner concerned are properly and thoroughly presented. It is in the public interest that such bodies have an expectation that, if the allegations are made out, the offending professional will meet or at least contribute to the costs incurred in bringing the application. The question of an award of costs is, of course, a matter of discretion to be exercised in the circumstances of each case.

90 Although the decision in *Roberman (S)* does not limit the discretion of the Tribunal in awarding costs, the public obligations of the Committee to prosecute practitioners who breach the LP Act is an important factor to be considered.

91 Mr Bower does not challenge the awarding of costs against him or the quantum.

92 In the particular circumstances of this case, where many of the costs were incurred by reason of Mr Bower's lack of insight and his persistence in denying the nature of his conduct in communications with the Committee and his conduct before this Tribunal, it is fair and reasonable that the Committee should be reimbursed for the costs it incurred.

93 The Tribunal has considered the Committee's schedule of costs and is satisfied that they are reasonable. In particular, it was appropriate to brief senior counsel. The Committee has not sought recovery of the time and expense of its solicitors in pursuing the application.

94 Accordingly, Mr Bower should pay the Committee's costs of \$46,325.10.

95 The Tribunal's order is that Mr Bower pay the Committee's costs by 6 June 2017. It is a matter between the Committee and Mr Bower as to whether he should be given time to pay.

Orders

1. Pursuant to s 438(4)(b) of the *Legal Profession Act 2008* (WA) the Tribunal makes and transmits a report on the findings of professional misconduct to the Supreme Court of Western Australia (Full Bench) with a recommendation that the practitioner's name be removed from the roll of persons admitted to the legal profession under the *Legal Profession Act 2008* (WA).
2. Pursuant to s 438(3)(a) of the *Legal Profession Act 2008* (WA), the respondent's local practising certificate is suspended 14 days from the date of this order until the determination of the Supreme Court (Full Bench).
3. 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 in the amount of \$46,325.10 by 6 June 2017.

I certify that this and the preceding [95] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUSTICE J C CURTHOYS, PRESIDENT