JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
STREAM	**:**	VOCATIONAL REGULATION
ACT	**:**	LEGAL PRACTICE ACT 2003 (WA)
CITATION	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE and MIJATOVIC [2007] WASAT 111 (S)
MEMBER	**:**	JUSTICE M L BARKER (PRESIDENT) MR C EDMONDS SC (SENIOR SESSIONAL MEMBER) MS B HOLLAND (SESSIONAL MEMBER)
HEARD	**:**	4 JULY 2007
DELIVERED	**:**	23 MAY 2007
SUPPLEMENTARY DECISION	**:**	18 JULY 2007
FILE NO/S	**:**	VR 58 of 2006 VR 59 of 2006 VR 60 of 2006
BETWEEN	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE Applicant AND TOMAS MIJATOVIC Respondent

Catchwords:

Professions - Legal practice - Unprofessional conduct - Costs agreement - Overcharging - Conflict of interests - Reference to Supreme Court (full bench) with recommendation that practitioner's name be struck off the roll of practitioners - Suspension pending determination by Supreme Court (full bench)

Legislation:

Legal Practice Act 2003 (WA), s 185(2), s 185(3), s 250A, s 250A(1), s 250A(2)
Legal Practitioners Act 1893 (WA), s 29A(2)
State Administrative Tribunal Act 2004 (WA), s 3(1), s 5, s 11(1), s 11(4), s 11(8), s 87(2), s 108(3), s 140
State Administrative Tribunal Regulations 2004 (WA), reg 4, Sch 1

Result:

Transmittal of report to Supreme Court (full bench) with recommendation that the name of practitioner be struck off the roll of practitioners
Suspension pending determination of Supreme Court (full bench)
Costs awarded against practitioner

Category: B

Representation:

Counsel:

Applicant	:	Mr G H Murphy SC and Ms G Roberts
Respondent	:	Mr T Lampropoulos

Solicitors:

Applicant	:	Legal Practitioners Complaints Committee
Respondent	:	Self-represented

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

Archer v Howell (No 2) (1993) 10 WAR 33
Barwick v Council of the Law Society of New South Wales [2004] NSWCA 32; (2004) Aust Torts Reports 81 - 730

Jackson (previously known as Subramaniam) v Legal Practitioners Admission Board [2006] NSWSC 1338
Legal Practitioners Complaints Committee v de Alwis [2006] WASCA 198
Smith v New South Wales Bar Association (1992) 176 CLR 256
Stanoevski v Law Society of New South Wales (LSD) [2007] NSWADTAP 25

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 On 23 May 2007 the Tribunal delivered findings, with its reasons for decision, in these proceedings: see [2007] WASAT 111. The Tribunal found Tomas Mijatovic, a legal practitioner, guilty on three counts of professional misconduct, namely: failing to ensure that the client's interests were properly protected and improperly and calculatedly advancing his own interests in respect of costs; gross overcharging; and improper communication with a court during proceedings.

2 On 4 July 2007 the Tribunal ordered that a report concerning these findings be transmitted to the Supreme Court (full bench) for its consideration. The Tribunal recommended that the practitioner's name be struck off the roll of practitioners.

3 The Tribunal also ordered that the practitioner be suspended from practice pending consideration of the matters by the Supreme Court (full bench). This suspension was delayed for a period of two weeks to enable the practitioner to organise his professional affairs.

4 Costs of the proceedings were agreed between the parties and ordered to be paid by the practitioner.

Tribunal's penalty decision

5 On 23 May 2007 the Tribunal, as originally constituted by the President, delivered its reasons for decision ([2007] WASAT 111), finding Tomas Mijatovic (the practitioner) guilty on three counts of professional misconduct.

6 On 4 July 2007 the Tribunal, as reconstituted by the President so as to include the President and two members of the Tribunal as formerly constituted, heard submissions on penalty. At the conclusion of that hearing and following a short adjournment the Tribunal made the following penalty decisions and orders:

> 1. A report be transmitted to the Supreme Court (full bench) in respect of VR 58 of 2006 and VR 59 of 2006 under s 29A(2) of the *Legal Practitioners Act 1893* and in respect of VR 60 of 2006 under s 185(2) of the *Legal Practice Act 2003* with a recommendation that the practitioner be struck off the roll of practitioners. The report is to be comprised of the reasons for decision

in [2007] WASAT 111, this Order, and the reasons for decision concerning this Order. The Tribunal will also forward the transcript and exhibits from the proceedings in VR 58 of 2006, VR 59 of 2006 and VR 60 of 2006 with its report, together with the submissions of the parties on penalty.

2. Pending the determination of the Supreme Court (full bench), the practitioner be suspended from practice under s 29A(2)(a)(i) of the *Legal Practitioners Act 1893* and s 185(3)(a) of the *Legal Practice Act 2003*, which suspension will take effect at the close of business on 18 July 2007.

3. Pursuant to s 87(2) of the *State Administrative Tribunal Act 2004*, the practitioner pay the Committee's costs fixed in the amount of $71,071.58 to the Legal Practice Board on or before 4 January 2008.

7 These are the reasons for the Tribunal's penalty decisions. The abbreviations, descriptions and references to paragraph numbers used here are from the Tribunal's reasons for decision in [2007] WASAT 111.

Reconstitution of Tribunal

8 Section 250A(2) of the *Legal Practice Act 2003* (WA) (LP Act) provides that the Tribunal "is not to exercise its powers under section 185(2)(a), or order the suspension of a legal practitioner from practice, unless the Tribunal is constituted so as to include the President."

9 Section 185(2)(a) of the LP Act refers to the power of the Tribunal to:

"(a) make and transmit a report on the finding to the Supreme Court (full bench)"

10 Under s 11(1) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act), when exercising its jurisdiction the Tribunal is to be constituted by a Tribunal member or members specified by the President.

11 Section 11(4) sets out constitution rules for when a matter is brought by a "vocational regulatory body". The Legal Practitioners Complaints Committee (the Committee) is such a body: see SAT Act, s 3(1) definition and the *State Administrative Tribunal Regulations 2004* (WA), reg 4 and Sch 1 reference to the LP Act.

12 Section 250A of the LP Act, however, makes special provision concerning the constitution of the Tribunal for the purposes of exercising jurisdiction conferred by or under the LP Act. By reason of the inconsistency between them, s 250A of the LP Act prevails over s 11(4) of the SAT Act: s 5 SAT Act.

13 However, s 11(1) of the SAT Act is not inconsistent with the provisions of the LP Act and the President retains the power to constitute the Tribunal with the appropriate members of the Tribunal who meet the descriptions set out in s 250A of the LP Act. The President also has and retains the power to alter the constitution of the Tribunal under s 11(8) of the SAT Act, as further discussed below.

14 In this case the President initially constituted the Tribunal to hear and determine the application of the Committee in the proceedings against the practitioner consistently with the requirements of s 250A(1)(b) of the LP Act. The Hon Robert Viol, Supplementary Deputy President of the Tribunal appointed under s 140 of the SAT Act was the presiding member.

15 After the Tribunal as initially constituted made its findings, the President reconstituted the Tribunal to include the President, and not the Supplementary Deputy President, in the event the Tribunal may need to consider exercising its powers under s 185(2)(a) - that is, to make and transmit a report on the findings to the Supreme Court (full bench), or order the suspension of the practitioner from practice.

16 The President's powers to constitute and reconstitute a Tribunal in these circumstances follow the express powers to do so set out in the LP Act and the SAT Act, and the requirement in the LP Act that the penalty or disciplinary powers referred to in s 250A(2) of the LP Act not be exercised by the Tribunal unless the Tribunal is constituted so as to include the President. The SAT Act by s 11(8) gives the President the express power to alter the constitution of the Tribunal.

17 The intent of Parliament that the President be able to constitute and reconstitute the Tribunal reflects the recommendation of the *Taskforce Report on the Establishment of the State Administrative Tribunal* (2002) Ch 5, p 153, par [91] that the Tribunal should have such flexibility.

18 If, in proceedings under the LP Act, the position were otherwise, then every time the Committee lodges an application under the LP Act and advises the Tribunal that it will ask the Tribunal to exercise its powers under s 185(2)(a) of the LP Act if the Tribunal makes the findings against

the practitioner that the Committee seeks, the President would be obliged to sit. The Committee would thereby in effect assume the responsibility of constituting the Tribunal, not the President.

19 Rather, Parliament has, in relation to proceedings under the LP Act - and in recognition of the Supreme Court's historical inherent jurisdiction to oversight the conduct of legal practitioners, on the basis they are officers of the Court - required that the President of the Tribunal (who under the SAT Act s 108(3) must be a judge of the Supreme Court) should sit on the Tribunal which exercises the powers of the Tribunal under s 185(2)(a) of the LP Act.

20 Consequently, nothing in the LP Act or the SAT Act requires the President to sit on the Tribunal that makes the findings in every case arising under the LP Act. The only requirement is that the Tribunal is not to exercise the relevant referral power or order the suspension of a practitioner unless the Tribunal is constituted so as to include the President.

21 Similarly, if a Tribunal is initially constituted by the President to hear a matter arising under the LP Act in a way that does not include the President, but in light of the particular findings made the President considers the findings may need to be the subject of a report transmitted to the Supreme Court (full bench) under s 185(2)(a) of the LP Act, then the President necessarily retains the power under s 11(8) of the SAT Act to alter the constitution of the Tribunal in order to decide whether the report power should be exercised. A practitioner is not entitled to insist that the Tribunal as initially constituted must determine penalty; and is thereby limited in the array of penalty powers that may be exercised.

The legal principles

22 There was no dispute between the parties that the primary object of disciplinary proceedings is the protection of the public, including by the maintenance of proper professional standards. The punishment of the practitioner is a secondary consideration, although it does act as a deterrent both as concerns the individual and generally within the profession.

23 In dealing with "sentencing" principles generally, Mr Lampropoulos, counsel for the practitioner, maintained in his written submissions that: "A practitioner is sentenced on the basis of the charges formally alleged in the complaints and proved", citing ***Smith v New South Wales Bar Association*** (1992) 176 CLR 256 and ***Archer v Howell (No 2)*** (1993) 10

WAR 33. Counsel developed this submission in his oral address. He said in effect that in determining an appropriate remedy the Tribunal was, as in criminal proceedings, confined to its findings on the specific complaints and could not take into account other findings not directly encompassed by these charges. It followed that findings ("incidental findings") for instance as to the manner in which the practitioner conducted his defence, the openness and truthfulness of his oral evidence under oath and the reliability of his written records, and whether he sought to take advantage of the vulnerability of the client, and so on might be relevant to credit but could not be used in relation to penalty.

24 Referring to this submission, Mr Murphy SC, counsel for the Committee, was concerned to ensure that his submissions concerning findings on the practitioner's credibility generally were not "elevated" to separate instances of misconduct and the practitioner's penalty based upon them.

25 Mr Murphy SC's reservation may be accepted. However, we think that Mr Lampropoulos' submission puts the matter rather too restrictively. The issue has been considered by a number of courts, particularly in New South Wales.

26 In ***Smith v NSW Bar Association*** the Court of Appeal had made and acted upon a finding that the practitioner was guilty of professional misconduct on a matter (giving false evidence to the Court of Appeal) which had not been included in the complaint. The High Court of Australia found that this denied the practitioner procedural fairness, which required that such allegation be specifically identified and that he have an opportunity of being heard in relation to it.

27 In ***Barwick v Council of the Law Society of New South Wales*** [2004] NSWCA 32; (2004) Aust Torts Reports 81 - 730, Ipp JA (with whom Tobias JA and Stein AJA agreed) after citing passages from ***Smith v NSW Bar Association*** referred to a number of New South Wales judgments which had considered that decision. These were to the effect that the High Court's decision did not in principle preclude consideration in penalty proceedings of earlier findings of factual matters and as to the honesty of the evidence given by the practitioner where those findings were not directly the subject of the charge. This was on the proviso that the practitioner had notice of that possibility, at least to the extent it was a "live issue" at the hearing, and had the opportunity to deal with it. Justice of Appeal Ipp set out at [108] and [109] his conclusions as follows:

> "The relevant time for determining the fitness of a practitioner to practise is the time of the determination by the disciplinary body seized with the question …. The misconduct charged will have taken place before the decision is made; there will inevitably be a gap between the date of the misconduct and the date of the determination. It will not be unusual for the practitioner concerned to submit that circumstances have changed since the misconduct charged; arguments as to remorse, reform, character change and subsequent good deeds are not uncommon. 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.
>
> It is often self-evident that the tribunal or court determining fitness to practise might find that the practitioner has lied in the disciplinary proceedings before it. It is also often self-evident that such a finding, if made, might influence the tribunal or court in deciding what order should be made in regard to the practitioner's right to practise. When the practitioner knows that there is a risk of such a finding being made and used by the disciplinary body concerned in determining what final order [is] to be made, and has adequate opportunity to deal with this prospect, there would be no procedural unfairness were the disciplinary body so to act on the finding. This would be the case even though the practitioner may not have been charged with specific misconduct relating to the conduct the subject of the finding. The act of charging the practitioner would be an unnecessary formality."

28 These principles have subsequently been applied in ***Stanoevski v Law Society of New South Wales (LSD)*** [2007] NSWADTAP 25 (penalty); ***Jackson (previously known as Subramaniam) v Legal Practitioners Admission Board*** [2006] NSWSC 1338 (admission to practice). In Western Australia the Court of Appeal has had regard to the practitioner's conduct of his defence in appeal proceedings as demonstrating (additionally) his unfitness to practise: ***Legal Practitioners Complaints Committee v de Alwis*** [2006] WASCA 198 at [111].

29 We are mindful that the statutory scheme in New South Wales is different from that in Western Australia, including that the Tribunal there has power itself to strike the name of the practitioner off the roll. Moreover, cases on professional misconduct will inevitably involve

different and individual fact situations and by reference to those facts the need to balance the protection of the public, the maintenance of professional standards and fairness to the practitioner whose reputation and livelihood may be at risk in the proceedings. These authorities do appear to us however to permit this Tribunal, subject to the requirements of notice and opportunity, to consider incidental findings both generally in relation to penalty and specifically in relation to whether the practitioner has reformed his ways or is likely to re-offend. We proceed on that basis.

The parties' submissions with respect to the complaints

30 The parties addressed certain aspects of each of the three complaints relevant to penalty. These submissions were, in outline, as follows.

31 The practitioner submitted in relation to VR 60, the "Communication Complaint", that the practitioner had obtained no advantage from his letter to the Registrar, and that the failure to provide a copy to the other party was remedied "fairly quickly". (As found, a little less than three hours after the letter was faxed to the Registrar.) It was said that the practitioner was a first offender in this respect and that a reprimand would be adequate.

32 The Committee drew attention to the fact that the Tribunal, in finding that the practitioner had improperly communicated with the Registrar, had said that the letter contained serious allegations of actual and perceived bias by the Registrar and unfair and prejudicial conduct by him. The writing of the letter in those terms without notice was found to be particularly serious. In his oral submissions, Mr Murphy SC suggested that the practitioner's conduct in this respect was an instance of his general lack of appreciation of his professional responsibilities.

33 The practitioner submitted in relation to VR 59, the "Overcharging Complaint", that whilst the Tribunal had found that the amount charged was grossly excessive such as to constitute unprofessional conduct, the matter was rectified immediately after the taxation by the Registrar, and the client was thereupon reimbursed the amount of the overcharge. It was said that the practitioner was again a first offender in this respect and that a fine would be adequate.

34 The Committee submitted that, as found, the amount allowed by the Registrar ($5,500) was a reasonable fee for the practitioner's services, and this represented some 23.6% only of the amount he had charged his client ($22,000). Moreover, the Tribunal has found that in so overcharging the client, the practitioner had sought to take advantage of her vulnerability.

Specifically with respect to the October function at Miss Maud, the Tribunal has determined that the practitioner's claim for his costs on that day was dishonest, and he had kept up this pretence throughout the proceedings.

35 The practitioner submitted in relation to VR 58, the "Conflict Complaint", that whilst the Tribunal would be concerned to prevent a recurrence of the matters found, the practitioner would be prepared to give certain undertakings in relation to his future practice concerning costs agreements. These included not using an agreement with terms similar to the second costs agreement, complying with the client's rights to itemisation and taxation and not seeking to amend or vary a costs agreement in any significant way without first ensuring that the client has obtained or been given the opportunity to obtain independent advice. It was submitted that it would be appropriate to impose a fine and a reprimand in relation to this matter. In his oral submissions in support, Mr Lampropoulos for the practitioner said that this offer of undertakings revealed that the practitioner had demonstrated some insight into the nature of his conduct the subject of the complaints and (implicitly) that this suggested he would be unlikely to re-offend.

36 The Committee referred to the findings in relation to the practitioner's preparation of and entry into the second costs agreement. These included that the practitioner had breached his fiduciary, statutory and professional responsibilities in the most fundamental respects. He had dishonestly concealed from his client the terms of the agreement and had made no disclosure of the important and highly disadvantageous terms concerning the fixing of a lump sum for his costs, the delay in delivering a bill and the waiver and barring of her rights to itemisation and taxation and to any claim against the practitioner. He had failed to advise her of the significant diminution of her rights under the first costs agreement and provided no basis under which she might determine the reasonableness of the lump sum for costs and how this compared with the agreed hourly rate. He had also delayed in providing an itemisation of his account. In so acting the practitioner had improperly and calculatedly advanced his own interests in conflict with and to the detriment of the client's interests. Such conduct was all the more reprehensible by reason that the client was vulnerable beyond the usual position of a lay client, as she was not experienced in dealing with lawyers and trusted and relied on the practitioner. The Tribunal has expressed the view that such conduct would be regarded as disgraceful by practitioners of good repute and competence.

37 The Committee also drew attention to some findings on the practitioner's credibility generally (subject to the qualification mentioned by Mr Murphy SC). These included that:

(1) The practitioner's records were unreliable as a number of documents or entries in them were made a considerable time after they were dated and purport to record matters that did not occur.

(2) The practitioner was an unsatisfactory witness under cross-examination, in that he repeatedly avoided giving a direct answer to a direct question, some of his answers were incredible, he gave contradictory answers and in important respects his evidence was not consistent.

(3) The practitioner was not honest in part of his evidence given to the Tribunal under cross-examination in relation to the second costs agreement being prejudicial to his client, and as to the period of his absence in Queensland.

(4) To further his own ends, the practitioner had deliberately and callously caused the client anguish by purporting to continue to act for her, including in relation to an appeal, when by his own correspondence he had acknowledged his instructions were at an end and when he had invented the instructions to appeal.

(5) The practitioner had shown a continuing failure to appreciate his professional responsibilities from the time of the events in question, through the hearing and up to his closing submissions.

38 In his oral address, Mr Murphy SC for the Committee developed this last submission. He argued that the practitioner throughout had shown no remorse as to his conduct and "not the least glimmer" of insight or understanding of his professional and ethical responsibilities. This was reflected for example in the practitioner's closing submissions in which, as the Tribunal had noted in its reasons, the practitioner had maintained that in achieving the settlement he did, he ought to have been "commended not chastised". In his submissions also, the practitioner had referred to the deterioration of his relations with his client brought about, he had said, when his client had achieved a settlement of a lump sum and had become infected with "gold fever".

39 In the Committee's submission, having regard to these findings of the Tribunal, the appropriate penalty was that the matter should be referred to the Supreme Court (full bench) with a recommendation that the practitioner's name be struck off the roll and that in the interim he should be suspended from practice. It also sought an order for its costs.

The Tribunal's determination on penalty

40 It is appropriate to consider all three complaints together as they arise out of the same background circumstances.

41 We recognise that an order striking the name of the practitioner from the roll is the most severe order which can be made. However, having regard to the terms of the charges upon which the practitioner was found guilty, and the findings on specific matters alleged and directly arising from them, we think, subject to a consideration of the practitioner's personal circumstances and the likelihood of a re-occurrence (below), the appropriate order is that sought by the Committee. This is for the following reasons.

42 The Conflict Complaint involved a charge that the practitioner had improperly and calculatedly advanced his own interests in respect of costs by entering into the second costs agreement and delaying providing an itemised bill of costs. It is evident that the terms of that agreement were highly disadvantageous to the client (par [158], par [159]). Moreover, the "particulars" of the charge (by the Committee's Statement of Issues, Facts and Contentions) included that the practitioner had knowingly concealed the terms and effect of the second costs agreement at the time it was produced by him for the client to sign. That is, as found, the practitioner procured his client to sign that document in circumstances which hid from her the fact that she was entering into a new costs agreement in such terms. The practitioner procured the client's execution of the withdrawal authority without providing her a proper opportunity of reading this nor explaining it to her (par [195]).

43 The Overcharging Complaint included a specific allegation (articulated during the hearing) that the practitioner had knowingly and dishonestly charged for work at the October function at which no professional services were provided and that he had kept up that pretence throughout the proceedings. The background was that the practitioner had initially claimed substantial fees on that occasion for what he recorded as and claimed in oral evidence were professional services provided. This was in circumstances when, in truth, he knew that he had not provided any such services and had no entitlement to such fees. He persisted with these

claims during the taxation, and at the hearing before the Tribunal, relying on fabricated records and supported by his oral testimony. That complaint also involved allegations made by the Committee during the hearing that insofar as the practitioner sought to rely upon his records as evidencing work undertaken in the period prior to the first costs agreement and in the period after February 2003, those records were unsafe and unreliable. With respect to the last mentioned period, the Committee's case as reflected in the evidence of its witnesses (by their witness statements), was that the practitioner's claim to having received instructions to appeal was an invention.

44 The Tribunal, as it said, was reasonably satisfied that each of these serious allegations had been proved in accordance with the civil standard, that is, on the balance of probabilities, the Tribunal being actually persuaded as to their occurrence on the basis of what the Tribunal regarded as reasonably clear and cogent evidence.

45 The Tribunal regards this conduct of the practitioner as violating in fundamental respects the trust which a lay client necessarily places in a solicitor. It is this relationship of trust which so much of the law governing fiduciaries and the Professional Conduct Rules seek, in the client's interests, to promote (to ensure the client gets the full benefit of the lawyer's services) and to protect, to ensure that no advantage is taken of the relationship. Strict observance of these standards was particularly important in the present case where the client, because of her limitations in communicating in English and her inexperience with solicitors, trusted and was dependent upon the practitioner.

46 We are fortified in our view as to the appropriate penalty, having regard to incidental findings made as to the circumstances and context of the practitioner's conduct, the subject of the charges, including findings made with respect to the practitioner's conduct at the hearing. These findings are relevant both to the nature of the penalty and as to whether the practitioner may re-offend.

47 In this context, we refer to the specific findings on credibility referred to in the Committee's submissions. In addition we mention the following.

48 In relation to the Conflict Complaint, the practitioner induced his client to enter into the second costs agreement in order that he might effect his purpose of deducting a lump sum for his costs, unrelated to the actual services he had performed, and of precluding her by provisions for

waiver and barring of her rights from taking legal steps to challenge what he had done (Reasons par [180], par [182], par [194(2)]). When confronted with the complaint, the practitioner claimed that the client had earlier been notified of his fees of $22,000 (documents dated 9 October and 30 December 2002) and had orally agreed to such. The Tribunal has found that the 9 October document was not created until about February 2003 and that the statements in the practitioner's letter dated 27 February 2003 that the document was provided on 10 October 2002 were self-serving and false (par [129]). As to the 30 December Statement, this was put before the client and signed by her without her reading or understanding its nature and contents or it being explained to her and no copy was provided until February 2003 (par [145], par [153]). Further the Tribunal has found no such oral agreement as to costs was ever made and documents suggesting otherwise were not made at the time and were not true records of the events recorded (par [153]).

49 With respect to the Overcharging Complaint, after being pressed by his client and then the Committee, the practitioner produced an itemised account purporting to show work justifying an account of $22,000. During the taxation and before the Tribunal, the practitioner produced records purporting to show work carried out supporting (and substantially exceeding) this sum. This included during the periods prior to his first meeting with the client, at the October function and in respect of instructions received after 27 February 2003. The Tribunal has found that the records for the October function were not made at the time and are a fabrication of what took place (par [417]); that documents evidencing instructions given after 27 February 2003 were false (par [432]); and that documents with respect to the first period exhibit disturbing features and are unsafe and unreliable (par [363], par [365] - par [387]). As regards the practitioner's records and evidence supporting his costs generally, the Tribunal has found the records and evidence to be unreliable (par [70], par [456]). To the extent the practitioner sought to distance himself from his costs notification of 12 August 2002, the Tribunal did not believe his evidence (par [123]). To the extent the practitioner claimed that he did not receive correspondence from the client and her new solicitors in early 2003 and that he had been away in Queensland for the period claimed, the Tribunal did not believe that evidence (par [211], par [214], par [217], par [221]). The Tribunal did not regard the practitioner's explanation as to why he did not call the client's son to give evidence in support of his claims as the true reason (par [360] - par [361]).

50 As mentioned, the practitioner's conduct was perpetuated in circumstances where, as the Tribunal has found, his client had difficulty in

reading and communicating in English and trusted and relied upon the practitioner generally in relation to her affairs and specifically in relation to their contractual relationship (par [115], par [251], par [471]). In this respect also, the Tribunal rejected the practitioner's evidence that the client was fluent in English (par [50]) and that she was an experienced business woman (par [51], par [55]).

51 These findings, especially those concerning the unsatisfactory nature of the practitioner's evidence, both documentary and oral, as well as the specific instances of dishonesty, cause us grave concern as to whether the practitioner is a person who can be expected to promote the maintenance of proper professional standards and who can command the confidence and respect of the Court, his fellow practitioners and lay clients.

52 As to the likelihood that the practitioner may re-offend, for the reasons which follow we are far from satisfied that he has understood and appreciated the nature of his misconduct and can be viewed as having reformed his attitudes and practices.

53 Counsel for the practitioner argued that, as reflected in the undertakings he is prepared to give (outlined above) and by his decision made at the time the complaint was initially made in 2003 to not use in his costs agreements the terms of the second costs agreement, the practitioner has demonstrated some insight into the nature of his conduct the subject of the complaints.

54 We should say at the outset that these undertakings give slender support to that submission. The undertakings merely reflect a practitioner's ordinary professional and ethical duties. That is, the practitioner is only offering to do what would otherwise be required of him by reason of his professional and ethical responsibilities.

55 But in any event, the manner in which the practitioner has conducted his defence of the complaints supports the Committee's argument, and our own view, that not only has the practitioner not shown any remorse or contrition for his conduct, he continues to fail to appreciate how gravely wrong it was. During the misconduct hearing he disputed any wrongdoing in relation to the matters the subject of the complaints. In his oral submissions addressing these, he said in effect that it was only the delayed provision of an itemised account which had any foundation. As to the other subjects of the complaints he maintained that he had acted honourably and professionally, to the client's considerable advantage and that he was proud of what he had done (T: 156, 6.11.06). In his final

submissions he expressed some surprise that the Committee would even pursue the client's complaint given the settlement he had achieved for her (par [180]).

56 Further, the practitioner made no admissions of any significance to the factual matters supporting the complaints. This necessitated the Committee calling his elderly client and her partner and friend to give evidence. For the client having to relive the events was, as the Tribunal found, a painful experience, made worse by the aggressive manner in which the practitioner cross-examined her (par [57], par [177], par [464] - par [466]). In relation to the Conflict Complaint, given the highly prejudicial terms of the second costs agreement and the practitioner's late recognition that he could not lawfully contract out of his obligations with respect to the itemisation and taxation of his costs, an admission in this respect and an apology to his client might have been expected. Nothing of the sort was forthcoming but rather a denial that the agreement was prejudicial and a further denial that the agreement operated to deny the client rights of itemisation and taxation (par [166]). The practitioner's defence to the Overcharging Complaint included challenging the Registrar's lengthy reasons on numerous grounds and effectively revisiting many of the individual charges. With respect to the Communication Complaint, the practitioner was not prepared even to recognise an element of wrongdoing on his part in sending the letter to the Registrar without first copying it to the other party. He claimed to have complied with the relevant guidelines. In this complaint, as with the others, the practitioner took every point by way of defence which required that they each be heard and dealt with by the Tribunal.

57 Even after all the evidence had been tendered and the Committee's closing submissions provided to the practitioner, the practitioner by his closing submissions did not show any appreciation of his serious wrongdoing. (par [69], par [231] - par [244], par [457], par [484] - par [494]).

58 The practitioner's conduct in these respects necessitated a lengthy hearing (seven days) and in consequence lengthy reasons from the Tribunal.

59 Although the practitioner had the legal right to require the Committee to prove every aspect of the allegations made against him, it does not follow that the Tribunal is precluded from taking these matters into consideration in relation to penalty and in determining whether he has accepted responsibility for his conduct and can confidently be expected to

act differently in the future. In our view, disciplinary proceedings are not to be equated with ordinary civil proceedings between individuals; nor, with respect to Mr Lampropoulos' submissions in that regard, with sentencing principles in criminal proceedings. The object of disciplinary proceedings is to ensure that the public may have confidence and trust in the legal profession and, ultimately, given the profession's role in that respect, in the integrity of the legal system. In relation to penalty, that necessitates a consideration of the practitioner's credibility and character and suitability to continue in practice.

60 In relation to considerations of procedural fairness and whether the matters the subject of the incidental findings were "alive" at the hearing and whether the practitioner had an opportunity to deal with them, we mention the following. In the case before the Tribunal there was a direct conflict of evidence on the principal issues between the client and her partner and her friend called by the Committee, and the practitioner. It was apparent that much of that conflict would only be resolved by the Tribunal accepting the evidence of either the Committee's witnesses or of the practitioner and rejecting the other (par [47]). (Although that did not of itself necessitate a finding of dishonesty - ***Smith v NSW Bar Association***). On a number of occasions throughout the hearing Senior Counsel for the Committee challenged the practitioner as to the veracity of his evidence, asking whether he had not just made his answer up, reminding him that he was on oath, and seeking an acknowledgement from him that he understood the serious nature of the allegations made. To the extent the practitioner sought to rely upon his records, Senior Counsel for the Committee cross-examined him as to whether these were in fact made after the dates recorded and were genuine records. For his part, the practitioner claimed the client's evidence was untruthful and unreliable. In relation to the client's claim of a part payment of his costs of $250, he said of her "She's lying as usual" (T: 77, 30.11.06). (The client had earlier said that the practitioner was lying in denying she had made the payment).

61 Moreover, many of the findings made in relation to the practitioner's conduct and credibility arose from defences he had raised and pursued rather than from allegations of the Committee. For example, his reliance upon the cost notification documents and the oral agreement as to costs, the claim that each item of cost charged was supported by his records, the claim that he had received instructions from the client's son and in relation to an appeal, his submission and evidence that the client was fluent in English and a business woman, and so on. Clearly the Tribunal was required to make findings on these matters for the purposes of

determining whether the charges were made out. It was careful with respect to the practitioner's evidence and records to identify allegations and make findings involving actual dishonesty (par [338]). Moreover, in relation to "incidental" findings such as the vulnerability of the client and the anguish caused to her by the practitioner's conduct, these would seem to be relevant to the "ultimate finding of fact whether the practitioner's conduct, to a substantial degree, fell short of the standard of professional conduct observed or approved by members of the profession of good repute and competence".

62 For these reasons, we think it was reasonably "self evident" both that the Tribunal would make incidental findings including in relation to the practitioner's evidence and records (as the Committee urged in its closing submissions, provided in advance of the practitioner's closing submissions); and that such would or might be taken into account by this Tribunal on the subject of penalty. These matters also demonstrate that the practitioner had the opportunity to meet and deal with such allegations.

63 By reason of its views as to the fitness of the practitioner to practise, the Tribunal considered that he should be suspended from practice pending the consideration of the Supreme Court (full bench) but that he have 14 days to put his affairs in order before the suspension takes effect.

The practitioner's personal circumstances

64 In his written submissions, Mr Lampropoulos for the practitioner drew attention to some aspects of the practitioner's present professional and personal circumstances. As to the former, these include that he has been in practice for some 14 years and has not (relevantly) been the subject of any other finding of misconduct; that references from two clients attested to his effectiveness and cost efficiency in small debt recoveries; that his existing clients would be disadvantaged by his being struck off or suspended; that he has provided some voluntary legal advice services and been on several legal committees, and that he has been active in football administration and the Western Australian Serbian community.

65 We have considered each of these matters. However, in the light of the matters examined above, we are not convinced by them, or the undertakings offered, that the practitioner's conduct can be regarded as isolated and unlikely ever to be repeated. We do not think these circumstances can be attributed much weight as against ensuring that members of the public are not subjected to unprofessional conduct of the type under consideration. We have, however, delayed the effect of the suspension order to give the practitioner some time to organise his

professional affairs before the suspension pending the Supreme Court (full bench) consideration of this final penalty takes effect.

66 We mention that Mr Lampropoulos has, quite properly, indicated that there are some aspects of the Tribunal's reasons for decision in [2007] WASAT 111 which are the subject of an appeal. It may be that this consideration affected the extent to which the practitioner could accept responsibility for his conduct and express remorse in relation to it. We would have thought, notwithstanding this, that there were aspects of his conduct in these complaints, whether or not the subject of appeal, which he might have acknowledged and expressed regret for. Ultimately however, the fact of an appeal is not something which can affect our determination.

67 As to his personal circumstances, the practitioner has said he is responsible for his wife and young family and an elderly parent. He has a substantial mortgage and no other qualifications or income producing skills.

68 It seems inevitable that the practitioner's interim suspension and possible striking off will cause considerable financial and emotional hardship for the practitioner and his family. It is difficult not to feel a measure of sympathy for the practitioner in these circumstances. However, it seems to us that this is the inevitable outcome of his conduct for which he must take responsibility. In order to maintain the public's confidence and faith in the legal profession, for ourselves, we do not think that the practitioner can be permitted to continue to practise. Ultimately, whether the practitioner's name should be struck off the roll is a matter for decision by the Supreme Court (full bench).

69 It has not been suggested that a penalty involving the imposition of conditions governing the practitioner's method of practice would be sufficient; and for ourselves we do not think in the light of the findings outlined above that the imposition of such conditions would be an appropriate and effective penalty.

Costs

70 The practitioner's submissions in relation to costs were directed to the quantum of the Committee's costs and the time allowed for payment. Following some comments of the President, the parties were able to agree on suitable orders in that respect and that part of our order has been made by consent.

Orders

71 For these reasons, the Tribunal on 4 July 2007 made the orders above set out.

I certify that this and the preceding [71] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUSTICE M L BARKER, PRESIDENT