

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : VOCATIONAL REGULATION

ACT : LEGAL PROFESSION ACT 2008 (WA)

CITATION : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE and SEGLER [2009] WASAT 205

MEMBER : JUSTICE J A CHANEY (PRESIDENT)
JUDGE J PRITCHARD (DEPUTY PRESIDENT)
MR J MANSVELD (MEMBER)

HEARD : 7 AUGUST 2009

DELIVERED : 21 OCTOBER 2009

FILE NO/S : VR 210 of 2008

BETWEEN : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE
Applicant

AND

MARTIN LEE SEGLER
Respondent

Catchwords:

Legal practitioners - Transitional provisions - Professional misconduct -
Unsatisfactory professional conduct - Encouraging client to breach the law
- Part 13 *Legal Profession Act 2008* (WA)

Legislation:

Builders' Registration Act 1939 (WA), s 4, s 4(1), s 4(1)(aa), s 4(1)(b),
s 13(1)(d), s 13(2), s 14, s 14(2)

Civil Procedure of Western Australia, [3976.5]
Criminal Code Sentencing Act 1995 (WA), s 10
District Court of Western Australia Act 1969 (WA), s 82
Interpretation Act 1984 (WA), s 37, s 37(1), s 37(1)(d), s 37(1)(f), s 37(2)
Law Society of Western Australia Professional Conduct Rules (WA), r 13.1
Legal Practice Act 2003 (WA), s 3, s 185(1)
Legal Profession Act 1893 (WA)
Legal Profession Act 2008 (WA), Div 2 Pt 19, Pt 13, s 402, s 403, s 403(a),
s 403(b), s 403(1)(a), s 403(1)(b), s 438(2), s 439, s 440, s 441, s 598,
s 606(2)(b), s 607, s 622, s 622(2), s 622(s2(3)and s2(4)), s 637
Rules of the Supreme Court 1971, Order 56, r 3(2), r 5(2)
State Administrative Tribunal Act 2004 (WA), s 32(2), s 167(4)(c)
Supreme Court Act 1935 (WA), s 60(1)(c)
Supreme Court (Court of Appeal) Rules 2005 (WA), r 3, r 44
The Laws of Australia, [5.9.30]

Books

GE Dal Pont, *Lawyers' Professional Responsibility* (3rd ed, 2006)
DC Pearce & RS Geddes, *Statutory Interpretation in Australia* (6th ed, 2006)

Result:

Practitioner guilty of professional misconduct and unsatisfactory professional conduct

Category: B

Representation:

Counsel:

Applicant : Mr M Herron and Ms P Le Miere
Respondent : Self-represented

Solicitors:

Applicant : Law Complaints Officer
Respondent : Self-represented

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

Briginshaw v Briginshaw (1938) 60 CLR 336

Browne v Dunn (1893) 6 R 67

D'Alessandro v Legal Practitioners Complaints Committee (1995) 15 WAR 198

Dowsett v TK Nominees Pty Ltd (2003) 218 CLR 1

Legal Practitioners Complaint Committee and Trowell [2009] WASAT 42

Legal Practitioners Complaints Committee and McCormack [2009] WASAT 4

Legal Practitioners Complaints Committee and Vogt [2009] WASAT 125

Quigley (A Practitioner) v The Legal Practitioners Complaints Committee
[2003] WASCA 228

The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)
[2008] WASC 239

Vallelonga and Builders' Registration Board [2005] WASAT 327

Vallelonga v The Builders' Registration Board of Western Australia
[2006] WADC 206

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 The Legal Practitioners Complaints Committee contended that Mr Martin Lee Segler had advised a client that he could carry out building projects despite being unregistered as a builder, and prior to the grant of a stay of a decision and orders of the District Court in an appeal against the client's deregistration. The Committee contended that Mr Segler thereby encouraged his client to breach s 4 of the *Builders' Registration Act 1939* (WA). The Legal Practitioners Complaints Committee also contended that upon being asked by the Committee to provide his response to a complaint against him in relation to that conduct, Mr Segler gave a response that was deliberately misleading. The evidence on which the Legal Practitioners Complaints Committee relied was a letter from Mr Segler to the Legal Practitioners Complaints Committee in which he stated that the circumstances relating to the complaint against him had been referred to the Corruption and Crime Commission, when in fact no such complaint had been made. The Legal Practitioners Complaints Committee submitted that these two instances of conduct amounted to unsatisfactory conduct pursuant to the *Legal Practice Act 2003* (WA) and/or professional misconduct and unsatisfactory professional conduct pursuant to the *Legal Profession Act 2008* (WA).

2 The conduct the subject of the allegations occurred between 2006 and 2007. The Tribunal first looked at the applicable statutory regime. Having regard to s 607(2) of the *Legal Profession Act 2008* (WA), the Tribunal found that the *Legal Profession Act 2008* applied to the conduct. The appropriate course was for the Committee's application to be dealt with as a complaint alleging conduct in contravention of that Act. Therefore, the issues for the Tribunal were whether Mr Segler's conduct constituted a contravention of s 402 and s 403 of the *Legal Profession Act 2008*.

3 The Tribunal considered the application of s 403 and found that s 403(a) and s 403(b) were discrete examples of professional misconduct. The Tribunal found that Mr Segler ought to have known that his advice would lead his client to act in such a way that he would breach the *Builders' Registration Act 1939* (WA). The Tribunal was of the view that Mr Segler's conduct in relation to this first ground of the Legal Practitioners Complaints Committee's application amounted to professional misconduct as defined in s 403(a) of the *Legal Profession Act 2008* (WA).

4 In relation to the second ground of the Legal Practitioners Complaints Committee's application, the Tribunal found Mr Segler had deliberately misled the Committee. The Tribunal found that this conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner, and hence found Mr Segler guilty of unsatisfactory professional conduct pursuant to s 402 of the *Legal Profession Act 2008* (WA).

The application to the Tribunal

5 The Legal Practitioners Complaints Committee (LPCC) seeks an order that the Tribunal make a finding that a legal practitioner, Mr Martin Lee Segler, is guilty of unsatisfactory conduct pursuant to s 185(1) of the *Legal Practice Act 2003* (WA) (2003 Act) and/or guilty of professional misconduct and of unsatisfactory professional conduct pursuant to s 403 and s 402 respectively of the *Legal Profession Act 2008* (WA) (2008 Act). By its application dated 9 December 2008, which was amended with the Tribunal's leave on 7 August 2009 (LPCC's application), the LPCC pleads two instances of this conduct. The LPCC contends that Mr Segler was:

- 1) between on or about 9 November 2006 and on or about 27 June 2008, guilty of unsatisfactory conduct by unprofessional conduct pursuant to the [2003 Act] and/or professional misconduct pursuant to the [2008 Act] in the course of acting for Antonio Armando Vallelonga (client) in that he advised Mr Vallelonga to carry out building projects at a time when Mr Segler knew that Mr Vallelonga was unregistered as a builder and in the knowledge that by so advising his client, he was encouraging his client to breach s 4 of the *Builders' Registration Act 1939* (WA) (BR Act); and
- 2) on or about 3 April 2007, guilty of unsatisfactory conduct by unprofessional conduct pursuant to the 2003 Act and/or unsatisfactory professional conduct pursuant to the 2008 Act in that, upon being asked by the applicant to provide his response to a complaint against him in relation to the abovementioned matter, he gave a response which was deliberately misleading and designed to avoid giving a complete explanation at that time.

Proceedings before the Tribunal on 7 August 2009

6 It is appropriate at the outset to say something about the circumstances in which the hearing before the Tribunal proceeded on 7 August 2009. On 26 February 2009, the President of the Tribunal ordered by consent that:

1. The respondent is to file and serve its response with particulars in respect of each of the assertions of the applicants by no later than 6 March 2009.
2. The applicant is to prepare, file and serve its book of documents to be relied upon at hearing by no later than 20 March 2009.
3. The respondent is to prepare, file and serve its book of documents to be relied upon at hearing by no later than 27 March 2009.
4. The parties are to file and serve any witness statements they respectively rely upon on or before 9 April 2009.
5. The matter is listed for a final hearing to commence at 10 am on 23 April 2009 for a duration of one day.

7 On 15 April 2009, one week before the matter was to be heard, Mr Segler wrote to the Tribunal advising that Mr Vallelonga, whom he intended to call to give evidence, was overseas. He sought an adjournment of the hearing until after Mr Vallelonga's return in mid-May. No witness statement for Mr Vallelonga had been filed notwithstanding that Mr Vallelonga had not left Perth until after 9 April 2009 (when witness statements were to have been filed).

8 A directions hearing was listed and the Tribunal acceded to Mr Segler's application for an adjournment. The timetable for directions was varied, with witness statements to be filed by 20 May 2009, and the matter was listed for hearing on 27 May 2009.

9 On 26 May 2009, the Tribunal received a facsimile from a Daniel Vallelonga who we understood to be Mr Vallelonga's son. He advised that Mr Vallelonga had a severe case of the flu and was under doctor's orders to remain at home for five days. On that basis, Mr Segler again sought an adjournment when the matter came on for hearing on 27 May 2009. The LPCC did not actively oppose the adjournment and, with some reluctance, the Tribunal acceded to the request for adjournment and made orders that:

1. The hearing is adjourned to 10 am on 7 August 2009 with a duration of one day.

2. The time for compliance with orders 3 and 4 made 26 February 2009 is further extended to 30 June 2009.
3. By 30 June 2009, the respondent is to notify the applicant as to whether he requires Mr Wilkinson or Mr Mannes for cross-examination.
4. The costs of today are reserved.

10 Notwithstanding those directions, by 7 August 2009 Mr Segler had failed to file and serve any book of documents or any witness statements upon which he sought to rely. He had also failed to notify the applicant as to whether he required the applicant's witnesses for cross-examination. Further, at the commencement of the hearing on 7 August 2009, Mr Segler failed to attend in person before the Tribunal. He ultimately appeared by telephone at which point he advised that he was unwell, fearing that he had contracted swine flu. Mr Segler explained that on 6 August 2009, members of his family had been positively confirmed as having swine flu. Mr Segler advised the Tribunal that his symptoms were mild and that he had not attended a doctor, but that upon telephoning his doctor's surgery, he had been advised to stay at home. Mr Segler therefore submitted it was inappropriate that he appear before the Tribunal on 7 August 2009.

11 Mr Segler advised us that he wished to call Mr Vallelonga as a witness in the proceedings but that he had advised Mr Vallelonga on 6 August 2009 that he was unwell. The Executive Officer of the Tribunal received a facsimile from Mr Vallelonga dated 6 August 2009 in which Mr Vallelonga advised that he did not intend to appear at the hearing as he was concerned about contracting an illness from Mr Segler.

12 Mr Segler did not formally apply for an adjournment of the hearing. Furthermore, he did not suggest that he was so ill as to be unable to proceed with the hearing at all.

13 As for his failure to comply with the orders made by the Tribunal with respect to the filing of documents and witness statements, Mr Segler claimed that the documents he required had not been located until the previous week. Mr Segler claimed that his assistant had been on leave prior to that time and upon her return from leave, she located the documents which had been stored in archives, and provided them to him. That explanation was inconsistent with the explanation Mr Segler had provided on 27 May 2009 for his failure to comply with the Tribunal's orders. On that occasion, Mr Segler informed the Tribunal that he did not

retain any files and needed to obtain relevant documents from Mr Vallelonga.

14 Counsel for the applicant expressed his concern about Mr Segler's failure to comply with the Tribunal's orders with respect to the filing of documents and witness statements and at Mr Segler's apparent intention to proceed to a hearing without providing witness statements with respect to his own evidence and that of Mr Vallelonga. The applicant's counsel also submitted that Mr Segler had failed to provide any medical evidence to support his claim that he was ill. It was submitted that Mr Segler had appeared in the Masters Chambers in the Supreme Court, and was seen having lunch with other persons, in the days immediately preceding the hearing on 7 August 2009, without any apparent indication of ill health.

15 Given the prior adjournments of the hearing, Mr Segler's failure to comply with orders made by the Tribunal for the filing of documents and witness statements, the absence of any evidence that Mr Segler was suffering from any medical condition which precluded his attending before the Tribunal and in the absence of any claim by Mr Segler that he was unable to proceed with the hearing as a result of ill health, we determined that the hearing should proceed on 7 August 2009 and that Mr Segler and Mr Vallelonga could appear and give evidence by telephone. The applicant did not object to the hearing proceeding in this way or to Mr Segler and Mr Vallelonga giving their evidence, notwithstanding Mr Segler's failure to comply with the Tribunal's order to provide witness statements.

16 We note that the applicant took steps to arrange for the delivery to Mr Segler, at his home, of documents relevant to the proceedings, prior to the commencement of the hearing.

Applicable statutory regime

17 Before turning to consider the evidence, it is convenient to address the applicable statutory regime. The LPCC's application was filed on 9 December 2008. It sought that the Tribunal make a finding that Mr Segler is guilty of unsatisfactory conduct pursuant to s 185(1) of the 2003 Act. Under s 185(1) of the 2003 Act, the Tribunal had jurisdiction to make a finding that a legal practitioner was guilty of 'unsatisfactory conduct'. That term was relevantly defined in s 3 of that Act to include:

- (a) unprofessional conduct on the part of a legal practitioner, whether occurring before or after admission as a legal practitioner;

...

- (e) conduct occurring in connection with legal practice that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.

18 The 2003 Act was repealed by s 598 of the 2008 Act which commenced operation on 1 March 2009 (commencement day).

19 As we have already noted, during the hearing on 7 August 2009, the LPCC sought and was given leave to amend its application so that it now pleads in addition, or in the alternative, that Mr Segler is guilty of unsatisfactory conduct pursuant to s 185(1) of the 2003 Act or of 'professional misconduct' and 'unsatisfactory professional conduct' pursuant to s 403 and s 402 respectively of the 2008 Act. 'Professional misconduct' is defined in s 403(1) of the 2008 Act as follows:

'professional misconduct' includes -

- (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
- (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

20 'Unsatisfactory professional conduct' is defined in s 402 of the 2008 Act as follows:

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

21 Division 2 of Pt 19 of the 2008 Act contains transitional provisions relating to the repeal of the 2003 Act. Section 622 of the 2008 Act provides:

- (1) Part 13 applies in relation to conduct of Australian lawyers, former Australian lawyers, Australian legal practitioners and former Australian legal practitioners whether the conduct occurred before or after the commencement day.

- (2) Part 13 applies to conduct consisting of a contravention of the [Legal Practice Act 1893 (WA)] or the 2003 Act or the rules in force under those Acts before the commencement of this section as if the conduct consisted of a contravention of this Act or the legal profession rules.

22 Part 13 of the 2008 Act deals with complaints and disciplinary matters, including the investigation of complaints by the LPCC, the referral of disciplinary matters to the Tribunal by the LPCC, and the jurisdiction of the Tribunal to make a finding that a practitioner has engaged in unsatisfactory professional conduct or professional misconduct.

23 Section 622(2) suggests that conduct which took place prior to the commencement day and which would have amounted to a contravention of the 2003 Act by unsatisfactory conduct can now be dealt with as a contravention of the 2008 Act.

24 However, s 607 of the 2008 Act deals specifically with those cases in which action has been taken by the LPCC (amongst others), whether before or after the commencement day. That section provides:

- (1) This section applies to an action taken, however described, by -
- (a) the Board ... ; or
 - (b) the Complaints Committee or the Law Complaints Officer in relation to a person whether the action is taken before or after the commencement day.
- (2) The action, and any rights or entitlements the person has in relation to that action, continue to have effect under this Act subject to -
- (a) any conditions stated in a document by which the action was taken in relation to the person, or in a notice given to the person about the action; and
 - (b) this Act.
- (3) To the extent of any inconsistency among provisions applying to the action, this Act prevails.
- (4) In subsections (2) and (3) -
- (a) ...
 - (b) If the action, right or entitlement involves an application for review to the State Administrative Tribunal or a proceeding before the Tribunal started before the

commencement day - without limiting the power of the State Administrative Tribunal, the Tribunal may direct how that action, right, entitlement or proceeding should be continued; or

- (c) Otherwise - a regulation made under s 637 may provide for the way the action, right or entitlement is to continue under this Act.

25 The operation of s 607, and its interaction with s 622, of the 2008 Act is not entirely clear. The interaction of s 607 and s 622 of the 2008 Act was considered by the Tribunal in *Legal Practitioners Complaints Committee and Vogt* [2009] WASAT 125. The Tribunal there observed:

57 The 2008 Act commenced operation on 1 March 2009 and, by s 598, repealed the [2003 Act]. Section 37(1)(d) of the *Interpretation Act 1984 (WA)* (Interpretation Act) provides that where a written law repeals an enactment, the repeal does not:

... unless the contrary intention appears - affect any duty, obligation, liability, or burden of proof imposed, created or incurred prior to the repeal.

58 Section 37(1)(f) of the Interpretation Act provides that where a written law repeals an enactment, the repeal does not:

... unless the contrary intention appears - affect any ... legal proceeding or remedy in respect of any right, interest, title, power, privilege, status, capacity, duty, obligation, liability, burden of proof, penalty or forfeiture, and any such ... legal proceeding or remedy may be instituted, continued or enforced, and any such penalty or forfeiture may be imposed and enforced as if the written law had not been passed or made.

59 As the LPCC submitted, it follows from s 37(1)(d) and s 37(1)(f) of the Interpretation Act that the application is to be dealt with under the [2003 Act] unless 'the contrary intention appears' in the 2008 Act.

60 Section 607(1) and 606(2)(b) of the 2008 Act provide, in effect, that an action taken by the LPCC in relation to a person either before or after 1 March 2009, and any rights or entitlements that the person has in relation to the action, continue to have effect under the 2008 Act, subject to the 2008 Act.

61 The effect of s 622(1) and s 622(2) of the 2008 Act is that if a practitioner, prior to 1 March 2009, engaged in conduct that constituted unsatisfactory conduct under the [2003 Act], Pt 13 of the 2008 Act applies to that conduct as if the conduct consisted of

unsatisfactory professional conduct or professional misconduct under the 2008 Act. However, the 2008 Act does not evince an intention to exclude the operation of s 37(1)(d) and s 37(1)(f) of the Interpretation Act.

62 The result is that the application falls to be determined under the [2003 Act]. However, as the Tribunal has found that the practitioner is guilty of unsatisfactory conduct under the [2003 Act], it also finds that the practitioner's conduct constitutes professional misconduct under the 2008 Act, in order to facilitate dealing with the contravention under Pt 13 of the 2008 Act. While the term 'professional misconduct' in the 2008 Act is defined in an inclusive manner only, there is a sense in the LPCC's submission that 'conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence should be treated as 'professional misconduct' under the 2008 Act.' For reasons set out earlier, the practitioner is therefore guilty of professional misconduct within the meaning of the 2008 Act.

26 We take a slightly different view of the operation of s 607 and s 622 of the 2008 Act. Before explaining that view, we set out s 37 of the Interpretation Act in full for ease of reference:

- (1) Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears -
 - (a) revive anything not in force or existing at the time at which the repeal takes effect;
 - (b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;
 - (c) affect any right, interest, title, power or privilege created, acquired, accrued, established or exercisable or any status or capacity existing prior to the repeal;
 - (d) affect any duty, obligation, liability, or burden of proof imposed, created, or incurred prior to the repeal;
 - (e) subject to section 11 of The Criminal Code and section 10 of the *Sentencing Act 1995*, affect any penalty or forfeiture incurred or liable to be incurred in respect of an offence committed against that enactment;
 - (f) affect any investigation, legal proceeding or remedy in respect of any such right, interest, title, power, privilege, status, capacity, duty, obligation, liability, burden of proof, penalty or forfeiture,

and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, and any such penalty or forfeiture may be imposed and enforced as if the repealing written law had not been passed or made.

- (2) The inclusion in the repealing provisions of an enactment of any express saving with respect to the repeals effected thereby shall not be taken to prejudice the operation of this section with respect to the effect of those repeals.

27 Ordinarily, the effect of s 37 of the Interpretation Act and in particular, s 37(1)(f) of that Act, would be that proceedings commenced against a person under an Act which is repealed would continue despite the repeal of that Act, and the rights and entitlements of the parties in relation to those proceedings, and (in the case of disciplinary or criminal proceedings) any penalty which could have been imposed in respect of those proceedings, would continue to apply.

28 The question here is whether either or both of s 607 or s 622 of the 2008 Act oust the operation of s 37(1) of the Interpretation Act. It is apparent from s 37(2) of the Interpretation Act that very clear words will be required to oust the operation of s 37(1) of that Act, because even the inclusion of an express savings provision will not prejudice the operation of the savings in s 37(1) of the Interpretation Act: *Dowsett v TK Nominees Pty Ltd* (2003) 218 CLR 1 (*Dowsett*) at 11 to 12 and 13 ([32] - [33] and [41] - [42]) (Gummow, Hayne and Heydon JJ). Indeed, in *Dowsett*, McHugh J (at 7 [13]) went so far as to suggest that s 37(2) of the Interpretation Act indicated 'that s 37(1) applies to *all* repeals in the absence of an express statement that it does not apply to the repeal'.

29 Section 622 of the 2008 Act is a provision of general application. It purports to apply to all conduct which would have constituted a contravention of the *Legal Profession Act 1893* (WA) (1893 Act) and the 2003 Act (irrespective of whether any action has been taken in respect of that conduct). That conduct is now to be treated as if it were a contravention of the 2008 Act. Section 622 of the 2008 Act does not contain an express statement that s 37(1) of the Interpretation Act does not apply in relation to conduct constituting a contravention of the 1893 Act or the 2003 Act which is now to be treated as a contravention of the 2008 Act. On the other hand, the express application to that conduct of Pt 13 of the 2008 Act - which includes provisions which prescribe the time within which a complaint must be brought, the procedure by which a complaint is to be determined, whether summarily or by the Tribunal, and

the orders which may be made in the event that unsatisfactory professional conduct or professional misconduct is established - appears at odds with the continuation of the rights, entitlements, legal proceedings and remedies which would have arisen under the 1893 Act or the 2003 Act. However, it is unnecessary to resolve this question about s 622 in this case because s 607 deals specifically with the present factual position.

30 Section 607 of the 2008 Act makes specific provision for those cases in which an action (however described) has been taken against a person either by the Board, or by the LPCC or the Law Complaints Officer (implicitly under the 1893 Act or the 2003 Act respectively). Section 607(2) of the 2008 Act preserves and continues the effect of any action, or any rights or entitlements a person has in relation to such an action. The inclusion of the express saving provision in s 607(2) does not, of itself, prejudice the application of the saving in s 37(1) of the Interpretation Act: see s 37(2) of the Interpretation Act. However, in our view, the terms of s 607(2) manifest an intention to partially exclude s 37(1) of the Interpretation Act. Section 607(2) does not continue the action commenced under the 1893 Act or the 2003 Act, and the rights and entitlements of parties in relation to that action, under and for the purposes of the 1893 Act or the 2003 Act. Instead, the action, and those rights and entitlements, are continued 'under this Act'. The intention of the Legislature appears to be that a complaint brought against a practitioner under the 2003 Act (for example) will continue to have effect under the 2008 Act, and should be continued as a complaint under the 2008 Act. The rights and entitlements of a practitioner and the LPCC under the 2003 Act in relation to such an action will continue to have effect, but in the event of any inconsistency with the provisions of the 2008 Act, the latter will prevail. Section 607(2) of the 2008 Act can thus co-exist with s 37(1) of the Interpretation Act, except if the circumstances in s 607(2)(a), s 607(2)(b) and s 607(3) arise. It is in this respect that s 607(2) and s 607(3) manifest an intention to partially exclude the operation of s 37(1) of the Interpretation Act. Otherwise, however, s 607(2) does not manifest any intention to exclude the savings in s 37(1) of the Interpretation Act.

31 If an action which was commenced under the 2003 Act prior to the commencement day is to 'continue to have effect under this Act', direction may be required from the Court or the Tribunal, as the case may be, as to how that is to be done. Section 607(4) permits the Court or Tribunal to provide that direction. In the present case, the Tribunal permitted an amendment of the LPCC's application to refer to the corresponding

disciplinary provisions under the 2008 Act which were said to have been breached by Mr Segler's conduct. As we have noted above, the effect of that amendment was that the LPCC's application alleged that Mr Segler's conduct constituted a contravention of the 2003 Act and/or the 2008 Act. In our view, having regard to s 607(2), the appropriate course is for the LPCC's application to be dealt with as a complaint alleging conduct in contravention of the 2008 Act.

32 Consequently, the issues for the Tribunal are whether the conduct of Mr Segler which is alleged in grounds 1 and 2 of the LPCC's application occurred, and if so, whether that conduct constitutes 'professional misconduct' and 'unsatisfactory professional conduct' pursuant to s 402 and s 403 of the 2008 Act. Neither party submitted that particular rights or entitlements under the 2003 Act applied in relation to that determination, in addition to the provisions of the 2008 Act.

Proceedings against Mr Vallelonga before the Builders' Registration Board

33 The evidence concerning Mr Segler's conduct upon which the LPCC relies in support of its application needs to be viewed in the context of the proceedings in which Mr Segler was acting for Mr Vallelonga. It is, therefore, necessary to briefly outline the history of those proceedings, which was not in dispute.

34 On 9 and 10 September 2003, the Builders' Registration Board (BRB) held an inquiry into allegations against Mr Vallelonga that he had fraudulently or alternatively, misleadingly, represented to the relevant local authority that he was to be the builder of a licensed construction on three sites in Midvale, Malaga and Maylands. The BRB reserved its decision on the inquiry. On 15 June 2005, the BRB delivered its reserved decision. It found Mr Vallelonga guilty in respect of the three matters. Submissions were made as to penalty on 16 June 2005. In its Notice of Decision dated 18 July 2005 (BRB's decision), the BRB found Mr Vallelonga guilty of fraudulent conduct as alleged in the notice of inquiry, and made orders including that Mr Vallelonga's registration as a builder be cancelled (BRB's orders). The BRB's orders also included an order that the cancellation of the registration of Mr Vallelonga be immediately annulled in a limited respect, namely to permit him to complete specified building projects.

35 In view of the cancellation of Mr Vallelonga's registration as a builder, the effect of s 4(1) of the *Builders' Registration Act 1939* (WA) (BR Act) was, amongst other things, that Mr Vallelonga was prohibited from entering into any contract to construct any building, or build any

building for another person in pursuance of any contract: s 4(1)(b) of the BR Act. Contravention of that prohibition constituted an offence with a maximum penalty of \$10,000 and a daily penalty of \$250 for a continuing offence: s 4(1aa) of the BR Act.

36 On 8 November 2005, Mr Segler filed an application on behalf of Mr Vallelonga to the Tribunal for a review of the BRB's decision to cancel Mr Vallelonga's registration as a builder. On the same date, Mr Segler filed an interim application in the Tribunal in which he sought a stay of the BRB's orders. On 22 November 2005, the Tribunal held that it did not have jurisdiction to determine those applications and that the proper course was for Mr Vallelonga to appeal to the District Court under s 14 of the BR Act as it stood before its amendment by the legislation establishing the Tribunal and its jurisdiction: *Vallelonga and Builders' Registration Board* [2005] WASAT 327.

37 On 23 November 2005, Mr Segler lodged a notice of appeal in the District Court on behalf of Mr Vallelonga against the BRB's decision. At the same time, Mr Segler filed an application for a stay of the BRB's orders. On 1 December 2005, his Honour Judge Martino ordered that until further order, the operation of the BRB's orders be stayed.

38 Following the BRB's decision and prior to the grant of the stay on 1 December 2005, the BRB discovered that Mr Vallelonga had continued to engage in building activities contrary to the BRB's orders. The BRB did not seek to prosecute Mr Vallelonga in respect of that conduct.

The appeal against the BRB's decision

39 Mr Vallelonga's appeal to the District Court was heard by Commissioner Power on 8 and 9 November 2006. The appeal was dismissed: *Vallelonga v The Builders' Registration Board of Western Australia* [2006] WADC 206. Commissioner Power also dismissed the interim order made by the Court on 1 December 2005 staying the operation of the BRB's orders. The effect of the orders made by the Commissioner was that the BRB's orders, and in particular, the order cancelling Mr Vallelonga's registration as a builder, once again became operative.

40 Mr Segler thereafter took steps to explore the rights of appeal or challenge available to Mr Vallelonga against the Commissioner's decision. Section 14(2) of the BR Act provided that the decision of the District Court on an appeal from a decision of the BRB was final.

41 On 1 December 2006, Mr Segler filed an appeal in the Court of Appeal on behalf of Mr Vallelonga against the decision of Commissioner Power. Mr Segler served a copy of the notice of appeal on the BRB under a cover letter dated 1 December 2006. In that letter, Mr Segler advised that his client's application to the Court of Appeal for a stay of the operation of the orders made by Commissioner Power was 'under preparation' and would be filed as soon as it had been settled by counsel. By letter dated 8 December 2006, Mr Mannes of the BRB wrote to Mr Segler and drew his attention to s 60(1)(c) of the *Supreme Court Act 1935* (WA) and s 14(2) of the BR Act, and requested that he obtain instructions to agree to dismiss the appeal. On 22 February 2007, Mr Segler filed a notice of discontinuance of that appeal.

42 Mr Segler gave evidence that he sought the advice of counsel as to whether it was possible to seek prerogative relief in respect of the decision of Commissioner Power. Mr Segler's evidence was that he received preliminary advice on 15 January 2007 and further advice on 27 February 2007, that no grounds existed for an application for prerogative relief.

43 Mr Segler thereafter took various steps in an attempt to have Mr Vallelonga's registration as a builder reinstated. On 1 May 2007, Mr Segler filed a notice of appeal in the District Court on behalf of Mr Vallelonga against the BRB's decision in relation to the penalty imposed. On 13 June 2007, Mr Segler filed a chamber summons for leave to appeal in respect of that appeal and for a stay of the operation of the BRB's order to cancel Mr Vallelonga's registration. It appears that that appeal was struck out as being incompetent.

44 On 29 June 2007, Mr Segler filed an application in the Tribunal for a review of the BRB's decision to cancel Mr Vallelonga's registration as a builder and for the reinstatement of Mr Vallelonga's registration as a builder. That application was dismissed by the Tribunal on 18 October 2007.

45 An application was subsequently made to the BRB to reinstate Mr Vallelonga's registration as a builder. On 27 February 2008, the BRB resolved to reinstate Mr Vallelonga's registration on the condition that he successfully complete further study. By letter dated 7 March 2008, the registrations manager of the BRB advised that upon the BRB's receipt of verification of Mr Vallelonga's successful completion of this further study, the status of Mr Vallelonga's registration could be amended.

46 Shortly after Commissioner Power's decision, it came to the attention of officers of the BRB that Mr Vallelonga was engaging in work as a builder, contrary to the BRB's orders. On 21 and 22 December 2006, the BRB ascertained that building work was being carried out by Mr Vallelonga at four sites in Wangara, Banksia Grove and in Wembley Downs.

The advice given by Mr Segler to Mr Vallelonga

47 The basis for the first ground of complaint against Mr Segler was a statement Mr Segler made in a letter dated 21 December 2006 to Mr Mannes, the Senior Legal Officer at the BRB. In that letter, Mr Segler stated that he had received advice that the appropriate means for challenging the decision of Commissioner Power was an application for a writ of certiorari. Mr Segler indicated that an application was to be prepared and he drew Mr Mannes' attention to 'order 56 r 5(2) [of the *Rules of the Supreme Court 1971*] and a reference to a stay of the proceedings in question as provided for therein'. Mr Segler went on to state:

I have advised my client and the parties with whom he is concerned that he ought to continue with his building projects pending the disposition of the further proposed application.

48 Two other documents put into evidence by the LPCC, the contents of which were not contested by Mr Segler, confirm that Mr Segler gave this advice to Mr Vallelonga. First, the LPCC relied upon a copy of a record of interview between Mr Mark Wilkinson and Mr Streeton, compliance officers with the BRB, and Mr Vallelonga, on 21 December 2006. In the course of that interview, the following exchange took place:

Mark Wilkinson: ... do you know of any dispensation you've got to allow you to build at this site?

Mr Vallelonga: Yes, according to what I've been advised by my solicitor, I can build until all the Courts have been extinguished.

Mark Wilkinson: So, that's the advice your solicitor has given you that you can continue building?

Mr Vallelonga: Yes.

Mark Wilkinson: On any site?

Mr Vallelonga: Any site.

Mark Wilkinson: Until the appeal process is completed?

Mr Vallelonga: Has been extinguished, yes.

49 A little later, the interview returned to the question of advice given by Mr Segler to Mr Vallelonga:

Mark Wilkinson: You said 'you as a registered builder'. Do you consider yourself at the moment a registered builder?

Mr Vallelonga: I do, yes.

Mark Wilkinson: Why is that?

Mr Vallelonga: Because I'm going to appeal your decision because it's incorrect.

Mark Wilkinson: So even though the District Court upheld the Board's decision, you still consider yourself a registered builder?

Mr Vallelonga: I've been advised to build as if there was nothing going on.

50 Also in evidence was a letter dated 30 April 2008 from Mr Segler to Mr Quilliam of the LPCC. In that letter, Mr Segler outlined the circumstances surrounding his advice to Mr Vallelonga concerning his building work in view of the decision of Commissioner Power. In that letter, Mr Segler told the LPCC:

The hearing of that application on 27 February 2008 [to the BRB, for the reinstatement of Mr Vallelonga's registration as a builder] followed 15 months of litigation related to [Mr Vallelonga's] several attempts to serve or appeal and/or obtain judicial review of a judgment by Commissioner Power in the District Court of Western Australia that dismissed his appeal as against the cancellation of his registration. In this respect, albeit unsuccessfully, further appeals were made to the Supreme and District Courts of Western Australia as well as the State Administrative Tribunal. The advices of an eastern state's Queen's Counsel and a Perth Barrister specialising in administrative law were also sought in respect of the possibility of obtaining both a Writ of Certiorari and a stay of the judgment further cancelling my client's registration as a builder.

In views expressed to me by those Counsel, I was given to understand that such a stay of that judgment was a probability rather than possibility should jurisdiction to further appeal be established at law.

...

[The] appeal to the District Court was finally heard by Commissioner Power on 8 and 9 November 2006, and quite obviously the stay ordered by his Honour Judge Martino remained effective until the Commissioner dismissed the appeal *ex tempore* late in the evening of 9 November 2006. ...

Neither Mr Vallelonga, nor I, accepted that the Commissioner had applied the appropriate legal principles to the determination of my client's appeal, as confirmed above, and all further avenues of appeal and/or review were pursued thereafter, including but not limited to further appeals filed in Supreme and District Courts, consideration of the issue of a Writ of Certiorari and another application to the State Administrative Tribunal. ...

Accordingly, I again advised Mr Vallelonga to continue his building projects in anticipation of a stay of the operation of the orders made by Commissioner Power. I trust that the Legal Practice Board is cognisant of the judicial authority by *Wilson v Church (No 2)* (1879) 12 Ch D 454 at 458; *McBride v Sandland (sic) (No 2)* (1918) 25 CLR 369 at 375 and *Scarborough v Lew's Junctions Stores Pty Ltd* [1963] VR 129 at 130.

By reference to that well settled line of authority, I have not, in twenty eight years of legal practice, and in the conduct of numerous appeals in various jurisdictions, ever been denied by any Court of competent jurisdiction a stay of execution of an order, in circumstances whereby an appeal that may later succeed would render it impossible to restore the appellant to his or her former position.

In that regard, my client's building business could have been irreparably damaged in that his most significant client, being the Department of Housing and Works, would have lost all confidence in him and awarded to other builders in competition with him, his then current contracts and further the contracts which but for that unfortunate Notice of Decision, would have been awarded to him.

My advice to [Mr Vallelonga] in those circumstances was to continue projects for the Department of Housing and Works until such time as all avenues to establish jurisdiction by which to pursue appropriate appeal and/or review had been exhausted. ...

... I make no apology for my professional advices to my client, which I regard to have been, at all material times, altogether appropriate.

51 Mr Segler gave evidence in these proceedings. In his evidence in chief he confirmed that the essence of his case was set out in his letter dated 30 April 2008 to Mr Quilliam of the LPCC.

52 Mr Segler's oral evidence concerning his advice to his client was consistent with the content of his letter dated 30 April 2008 to Mr Quilliam. Mr Segler's evidence included the following:

Between 9 and 10 November 2006 and 28 February 2007, I had advised Mr Vallelonga that in the event that an appeal or an application for certiorari could be made on his behalf, and could be tethered with applications for a stay of proceedings, and in the event that ... jurisdiction could be established, then an application for stay would be successful in my view, by reason of the authorities that I have referred to in my letter to [the LPCC of 30 April 2008].

...

It was my professional view at that time that Mr Vallelonga, as at 10 November 2006, still had opportunity to seek out legal recourse, and that recourse included a further stay of the proceedings. A previous stay of the proceedings, even whilst opposed by the Builders' Registration Board, had been successful...and in that application I had of course referred to the line of authority that I am referring to now. In my professional judgment, had I not advised Mr Vallelonga in respect of that line of authority then my advice could possibly have been negligent, and were it the case that Mr Vallelonga were able to have obtained a stay, which I had not told him about, and he had ceased his business activities because I had not apprised him of his legal avenues in full, then that would be an occasion where I would have to call upon my professional indemnity insurer and explain that I had made an error of judgment in not advising my client of all legal avenues open to him.

Mr Vallelonga was at all times aware that the provisions of s 4 of the *Builders' Registration Act* precluded him from building activity while he was not a registered builder, he knew that. He was advised by me that whilst he had recourse to our courts whereby he could seek a stay and that those avenues had not been exhausted, then it was open to him to continue to work on his building projects.

...

It was not until the 27th of February when I received Mr Quinlan's facsimile that I was obliged to advise Mr Vallelonga that I had exhausted all legal avenues, could not establish any jurisdictional basis for an appeal, and that I could not obtain for him a stay of execution of the orders.

53 Mr Segler made other similar statements in the course of his evidence, for example:

I advised him ... of his right to pursue his building activities while I exhausted all of his legal remedies.

54 In cross-examination, Mr Segler was taken to the answers provided by Mr Vallelonga to BRB investigators Mr Wilkinson and Mr Streeton on 21 December 2006. Mr Segler's evidence was that the advice he gave Mr Vallelonga was:

... [N]ot in those words. I explained to him as I said earlier, in November 2006, as soon as Commissioner Power delivered judgment that there were rights of review and in the event that an application could be maintained an application for a stay could be made. I explained to him that an application for a stay was separate to an appeal. The decision of Commissioner Power had discharged the stay I'd earlier obtained from Judge Martino. The decision by Judge Martino was some five months after the initial decision of the BRB to cancel registration. During that period, Mr Vallelonga had carried on building. Until I had exhausted all his legal remedies, a stay would be his remedy in relation to his right to build.

55 In cross-examination, Mr Segler was taken to the contents of his letter dated 21 December 2006 to Mr Mannes of the BRB. When asked what was the meaning of his statement in that letter that 'I have advised my client and the parties with whom he is concerned that he ought to continue with his building projects pending the disposition of a further proposed application', Mr Segler conceded that 'ought' meant 'that he should'.

Mr Vallelonga's evidence in relation to Mr Segler's advice

56 Mr Vallelonga gave evidence by telephone as part of Mr Segler's case. Part of Mr Vallelonga's evidence was to the effect that Mr Segler advised him that he could continue working as a builder pending the making of an application for a review of, or an appeal against, the decision of Commissioner Power and the grant of a stay on the orders made by Commissioner Power. For example, Mr Vallelonga said:

Mr Herron: Did he [Mr Segler] explain to you you needed to see if you could appeal or review the decision of Commissioner Power?

Mr Vallelonga: He said we have to see what we can do first.

Mr Herron: And did he explain to you you could also apply for another stay?

Mr Vallelonga: Another stay? Yes, from the Supreme Court.

Mr Herron: Right, and while he was doing that, did he tell you anything about what you could do in relation to your work as a builder?

Mr Vallelonga: No. He said that until, you know, I get the licence or a stay, I'm unregistered but, providing I get our application in then I can still build.

Mr Herron: So he advised you, while you could file an application you could continue working as a builder once the application was filed?

Mr Vallelonga: Once the application has been accepted, yes.

57 However, Mr Vallelonga also gave evidence that Mr Segler's advice was that until such time as a stay of the orders of Commissioner Power was granted, he could not engage in building work which was required to be undertaken by a registered builder. For example, Mr Vallelonga testified:

Mr Segler: After Commissioner Power affirmed the decision of the Builders' Registration Board, did I advise you again of what his decision meant as far as you were concerned?

Mr Vallelonga: It meant that I couldn't build.

Mr Segler: Did I advise you then what your choices were?

Mr Vallelonga: Yes, to carry on through legal processes to obtain a stay, and then, if I could, actually carry on building.

58 Similarly, in cross-examination, Mr Vallelonga gave the following evidence:

Mr Herron: Did you understand [that Commissioner Power's decision] had the effect of cancelling your builder's registration?

Mr Vallelonga: Yes, I did.

Mr Herron: What did Mr Segler advise you you could do about working as a builder?

Mr Vallelonga: Mr Segler said to me, first of all: we have to make applications to obtain a stay on the decision to a higher Court. And he proceeded to do that.

Mr Herron: In the meantime, what were you to do about working as a builder?

Mr Vallelonga: It is my decision, what I want to do. If we are successful in obtaining the stay, first of all, in the hearing, then you can carry on building.

59 In these respects, Mr Vallelonga's evidence was inconsistent with his own evidence. It was also inconsistent with the documentary evidence to which we have referred above.

60 In addition, Mr Vallelonga's evidence was inconsistent with the evidence given by Mr Segler. Mr Segler gave consistent evidence in relation to the advice he had given to Mr Vallelonga. His recollection of the advice he had given to Mr Vallelonga was also consistent with statements he made in correspondence written to the BRB in December 2006, and in his formal response to the LPCC on 30 April 2008.

61 Finally, Mr Vallelonga's evidence was inconsistent with the statement he made when interviewed by officers of the BRB on 21 December 2006. In cross-examination, Mr Vallelonga was taken to those passages (which are set out earlier in these reasons). Mr Vallelonga said that he could not recall saying the precise words attributed to him in that record of interview, although he conceded that he could have said what was attributed to him.

62 The statements made by Mr Vallelonga during his record of interview with officers of the BRB on 21 December 2006 were made shortly after Commissioner Power's decision was delivered. Those statements were, therefore, made shortly after Mr Vallelonga was provided with advice by Mr Selger in relation to the consequences of that decision and action which could be taken in respect of that decision. Mr Vallelonga's recollection on that occasion of the advice he had been given is likely to be more accurate than any recollection he may now have of that advice. Further, in giving his evidence before the Tribunal, Mr Vallelonga did not indicate that he was referring to written advice from Mr Segler to inform his recollection of what that advice was and he was not taken by Mr Segler to particular documents in connection with his evidence. It is not surprising that over two years after the event, Mr Vallelonga's recollection of precisely what advice he received may have deteriorated.

63 Accordingly, in so far as Mr Vallelonga's evidence at the hearing was to the effect that Mr Segler advised him that until such time as a stay of the orders of Commissioner Power was granted he could not engage in work as a builder, we do not place any reliance on that aspect of Mr Vallelonga's evidence.

The parties' submissions

64 The LPCC's submission is that Mr Segler is guilty of professional misconduct under the 2008 Act because he advised Mr Vallelonga that he ought to continue with his building projects, in the knowledge that Mr Vallelonga's registration as a builder had been cancelled by the BRB,

and when Mr Segler knew or ought to have known that in the absence of an order for a stay of the order giving effect to the cancellation of the registration, the carrying on of building or construction work while unregistered was illegal and in breach of s 4 of the BR Act. The LPCC submits that in providing this advice to Mr Vallelonga, Mr Segler encouraged Mr Vallelonga to act in breach of the BR Act, because Mr Segler:

- 1) acted for his client in the proceeding before the BRB;
- 2) was aware of the circumstances in which his client's registration had been cancelled;
- 3) had successfully applied for a stay of the orders having the effect of cancelling his client's registration;
- 4) was aware the registration remained cancelled unless a stay of the operation of the orders cancelling the registration was granted; and
- 5) had on various occasions in communications with the BRB acknowledged and referred to the need to seek a stay.

65 The LPCC submits that Mr Segler's conduct 'involves a substantial failure to reach or maintain a reasonable standard of competence and diligence occurring in connection with Mr Segler's practice of law which justifies a finding that Mr Segler is not a fit and proper person to engage in legal practice pursuant to s 403 of the 2008 Act'.

66 The LPCC also submitted that Mr Segler's advice to Mr Vallelonga constituted a breach of r 13.1 of the *Law Society of Western Australia Professional Conduct Rules (WA)* (Conduct Rules), which provides:

- 13.1 A practitioner must not advise a client to engage in conduct which the practitioner considers may be illegal except in good faith to test the validity or scope of the law. Before doing so the practitioner must:
- 1) inform the client of the likelihood of the conduct being found to be illegal and the consequences; and
 - 2) give the client complete freedom of choice whether or not to engage in that conduct.

67 Mr Segler denied that his conduct in the course of acting for Mr Vallelonga was unsatisfactory. We understood Mr Segler's case to have two elements. First, in his response dated 9 January 2009 to the LPCC's application, Mr Segler contended that his advice to Mr Vallelonga was well founded in law:

At all material times between 9 November 2006 and 5 January 2007 (when [Mr Vallelonga] ceased all performance of his building contracts), the respondent endeavoured by successive appeals and applications to several jurisdictions to secure an appropriate stay of execution of operation of orders that would otherwise have prematurely resulted in the demise of his client's business and further litigation as a consequence thereof.

The respondent's advices to [Mr Vallelonga] to continue building projects in anticipation of a stay of the operation of the orders made by Commissioner Power were well founded in law ...

68 Mr Segler did not resile from that contention at the hearing.

69 Secondly, in his submissions before us at the hearing, Mr Segler contended that his advice was not unsatisfactory because he was of the view that Mr Vallelonga would not be prosecuted by the BRB if he continued to work prior to the grant of a stay of the BRB's orders. Mr Segler accepted that where no stay was obtained following the decision of Commissioner Power, Mr Vallelonga's work was a breach of the BR Act. However, Mr Segler pointed out that Mr Vallelonga was not prosecuted in relation to that conduct. Mr Segler claimed he understood that although Mr Vallelonga was in breach of the BR Act, he would not be prosecuted if a stay was obtained subsequently. The basis for that view was that the same situation had arisen in 2005 and Mr Vallelonga was not prosecuted for his conduct prior to the grant of a stay. Mr Segler also claimed that it would have been negligent for him to have given advice which would effectively have ended Mr Vallelonga's business while Mr Vallelonga still had legal remedies which could be explored. Mr Segler claimed that it was 'not my role to advise him that he was obliged to discontinue his activities'.

70 In his closing submissions, Mr Segler sought to advance a third argument, namely that we should rely upon Mr Vallelonga's evidence that Mr Segler advised him that until such time as a stay of the orders of Commissioner Power was granted, he could not engage in work as a builder. Mr Segler submitted that that evidence supported a finding that Mr Vallelonga was at all times aware of the consequences of the decision of Commissioner Power and that any suggestion that Mr Segler had encouraged Mr Vallelonga to engage in illegal activity was not supported

by the evidence. Mr Segler made that submission notwithstanding the fact that Mr Vallelonga's evidence was inconsistent with his own evidence and with the documentary evidence on which Mr Segler relied.

71 Furthermore, Mr Segler did not run his case before the Tribunal in a manner consistent with this part of the evidence given by Mr Vallelonga at the hearing. Neither Mr Segler's response to the LPCC's application nor the particulars of that response contained any indication that Mr Segler had advised Mr Vallelonga that until such time as a stay was granted, he could not engage in work for which a registered builder was required. Mr Segler did not (contrary to the orders of the Tribunal) file any witness statement setting out Mr Vallelonga's evidence in chief, and Mr Segler did not seek in any way to challenge the accuracy of the record of interview between Mr Wilkinson, Mr Streeton, and Mr Vallelonga on 21 December 2006. Mr Wilkinson provided a statement to the Tribunal, which was accepted into evidence without objection or cross-examination. In that statement, Mr Wilkinson attested to the fact that when taking the record of interview, he took care to ensure that it was accurate because he was conscious that his notes might be used in future court proceedings and he might need to swear to the accuracy of them.

72 In his submissions, counsel for the LPCC drew attention to the fact that Mr Segler had failed to cross-examine Mr Wilkinson in relation to the accuracy of Mr Vallelonga's answers in his record of interview with Mr Wilkinson. However, counsel for the LPCC did not make any formal submission that Mr Segler had failed to comply with the principles outlined in *Browne v Dunn* (1893) 6 R 67 (HL; see also *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 at [1023] to [1041] or as to what consequence should flow from any such failure. It is not necessary for us to pursue this issue: the rules of evidence do not apply in the Tribunal (s 32(2) of the *State Administrative Tribunal Act 2004* (WA)), and we have, in any event, rejected Mr Vallelonga's evidence in so far as it is inconsistent with the evidence of Mr Segler himself, and with the evidence contained in the documents (including Mr Vallelonga's earlier admissions to Mr Wilkinson and Mr Streeton).

Conclusion in relation to ground 1 of the application

73 In approaching the evidence in relation to both ground 1 and ground 2 of the LPCC's application, we bear in mind that the LPCC bears the burden of proving on the balance of probabilities that Mr Segler engaged in professional misconduct or unsatisfactory professional conduct and that we must feel an 'actual persuasion' of the occurrence or existence of a

relevant fact in determining whether or not conduct of the kind alleged has been made out: *Briginshaw v Briginshaw* (1938) 60 CLR 336 (*Briginshaw*) at 361 to 362 (Dixon J). In considering whether the LPCC has established facts sufficient to meet this burden, we bear in mind that the allegations made against Mr Segler are serious and that the consequences for a practitioner of a finding of unsatisfactory professional conduct or professional misconduct may be very serious. However, as the Tribunal noted in *Legal Practitioners Complaint Committee and Trowell* [2009] WASAT 42 at [62]:

... [T]he significance of *Briginshaw* is that the seriousness of the matter and of its consequences does not affect the standard of proof but goes to the strength of the evidence necessary to establish a fact required to meet that standard. It does no more than reflect a conventional perception that members of society do not ordinarily engage in criminal or improper conduct: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 (Neat Holdings). ... As such, and given the consequences for an adverse determination, sufficiently clear and cogent evidence will be required before such a finding can be made.

74 Having regard to the evidence given by Mr Segler and to the documentary evidence to which we have referred above, we find that following the decision of Commissioner Power to dismiss Mr Vallelonga's appeal against the BRB's decision, and the Commissioner's orders dismissing the order granting a stay of the BRB's orders, Mr Segler advised Mr Vallelonga that he ought to continue to work as a builder while Mr Segler explored avenues of appeal against Commissioner Power's decision, and in advance of any application being made for a stay of Commissioner Power's orders.

75 Ground 1 of the LPCC's application contends that Mr Segler provided advice to Mr Vallelonga on or about 9 November 2006 and on or about 27 June 2008. It is appropriate to briefly mention the evidence advanced as part of Mr Segler's case which bore upon the period in which this advice was given, and which we did not understand to be disputed by the LPCC.

76 Mr Segler's evidence was that on 27 February 2007, he received the advice of counsel that there were no grounds for an appeal against, or an application for prerogative relief in respect of, the decision of Commissioner Power. He then wrote to Mr Mannes at the BRB and advised him that Mr Vallelonga had exhausted all rights to challenge the decision of Commissioner Power, save for an application to the District Court seeking an extension of time in which to appeal against

penalty. Mr Segler accepted that he gave advice to Mr Vallelonga between on or about 9 or 10 November 2006 and 28 February 2007 in relation to the possibility of making an application to appeal against, or for a Writ of Certiorari in respect of, the decision of Commissioner Power, and an accompanying application for a stay. We understood Mr Segler's evidence to be that once he received the advice of counsel that no grounds existed for an appeal or an application for prerogative relief, he ceased to provide the advice to Mr Vallelonga which is the subject of the LPCC's application.

77 Mr Vallelonga's evidence also touched on this issue. Mr Vallelonga's evidence was that he ceased building work on 5 January 2007 and that after that he did no further building work because Mr Segler's advice was that he had exhausted all avenues of appeal against Commissioner Power's decision.

78 We therefore find that the advice given by Mr Segler to Mr Vallelonga that he ought to continue to work as a builder while Mr Segler explored avenues of appeal against Commissioner Power's decision, and in advance of any application being made for a stay of Commissioner Power's orders, was given between on or about 9 November 2006 and 28 February 2007.

79 As we have noted above, Mr Segler contended that the advice he gave to Mr Vallelonga was sound in law. We do not accept that Mr Segler actually believed that to be so for the following reasons. First, the effect of the decision of Commissioner Power on the BRB's orders was made manifest by the order made by Commissioner Power to dismiss the order made on 1 December 2005 by Judge Martino staying the BRB's decision.

80 Secondly, it is a matter of rudimentary legal knowledge that a successful litigant is entitled to the benefit of a judgment, and to enforce that judgment. If the unsuccessful litigant appeals the decision, and wishes to prevent the enforcement of the judgment pending the appeal, he or she must seek a stay of the judgment of the Court below or a stay of execution: see *Civil Procedure Western Australia*, at [3976.5] and *The Laws of Australia* at [5.9.30]; see also *Supreme Court (Court of Appeal) Rules 2005* (WA) r 44 and r 3. Similarly, if a party seeks a writ of prohibition or of certiorari in relation to proceedings in, or a decision of, the District Court, the grant of an order nisi to show cause does not operate as a stay of the proceedings in the Court unless the Supreme Court orders a stay: see s 82 *District Court of Western Australia Act 1969* (WA)

and Order 56, r 3(2) of the *Rules of the Supreme Court 1971* (WA). A cursory glance at the authorities or legislation which we have cited would have confirmed this to be the case.

81 Thirdly, Mr Segler has been admitted for over 29 years, and according to his evidence, has practised in every court and tribunal in Western Australia, the Federal Court and the High Court, and has extensive appellate experience in jurisdictions including criminal and family law. In those circumstances, it would be remarkable if Mr Segler was not aware of the legal principles involved.

82 Fourthly, Mr Segler sought a stay of the BRB's orders while the BRB's decision was the subject of an appeal to the District Court. That suggests that he was clearly aware of the need to seek a stay to preclude the operation of the BRB's orders and to permit his client to continue to work as a builder. Furthermore, in his evidence, Mr Segler accepted that following the BRB's decision, he made an application for a stay on behalf of Mr Vallelonga to enable him to continue building and that he understood that unless Mr Vallelonga was granted a stay, he would be in breach of the BR Act if he continued building. In addition, in his correspondence with the BRB following Commissioner Power's decision, Mr Segler referred to his intention to seek a stay of Commissioner Power's orders.

83 Fifthly, it was expressly drawn to Mr Segler's attention that the effect of the decision and orders made by Commissioner Power was that the BRB's orders again became operative, with the result that the cancellation of Mr Vallelonga's registration as a builder became effective. On 14 November 2006, Ms Rebecca Page, a solicitor at the BRB wrote to Mr Segler and advised:

As a result of the appeal being dismissed, the Builders' Registration Board's notice of decision dated 18 July 2005 (attached for your client's information) is in effect ...

The register of builders was amended on 10 November 2006 to reflect the cancellation of your client's registration as a builder. Please inform your client that he is only permitted to carry out the building work identified in the notice of decision dated 18 July 2005. Any contracts your client may have entered into as a result of the District Court granting a stay of the Board's decision on 1 December 2005, must now be assigned to and performed by a registered builder.

84 Mr Mannes wrote to Mr Segler by facsimile on 3 January 2007 in response to Mr Segler's letter to him dated 21 December 2006 (which is

referred to above). Mr Mannes requested that the BRB be advised of the hearing of any application for an order nisi and for a stay of the orders made by Commissioner Power. Further, Mr Mannes stated:

The stay contemplated in Order 56 Rule 5(2) is not automatic and to the Board's knowledge has at today's date not been ordered. **Accordingly, your client does not hold registration and is not permitted to undertake or continue any work for which a registered builder is required.** If your client undertakes building work for which a registered builder is required (with the exception of those properties the Board in its original decision, permitted your client to complete), he will be investigated and may be prosecuted.

...

The Board is empowered by the *Builders' Registration Act* to investigate suspected breaches of that Act ... The Board is investigating suspected unregistered building activity by your client and will continue to do so in accordance with its policies and guidelines. (Original emphasis)

85 In all of the circumstances, the only inference reasonably open is that Mr Segler was well aware that as a result of Commissioner Power's orders, the cancellation of his client's registration as a builder became operative and that if his client worked as a builder, he would be in breach of s 4 of the BR Act.

86 The second basis for Mr Segler's denial that his advice to Mr Vallelonga constituted professional misconduct was that it was his view that Mr Vallelonga would not be prosecuted by the BRB if he continued to work prior to the grant of a stay. The basis for this view was that Mr Vallelonga had not been prosecuted while he worked as a builder prior to the grant of a stay of the BRB's orders by his Honour Judge Martino on 1 December 2005. It appears that Mr Segler considered that the BRB would exercise its prosecutorial discretion not to prosecute his client in respect of a breach of the BR Act if Mr Vallelonga worked as a builder following the decision of Commissioner Power and prior to the grant of any stay of the Commissioner's orders. However, in view of the express notice given to Mr Segler by the BRB to the effect that Mr Vallelonga was engaging in conduct which was illegal, there was no reasonable basis for Mr Segler's view that prosecution action would not be taken in this case.

87 In any event, a legal practitioner is not entitled to advise a client to act in an illegal manner simply because he or she believes that the client will not be prosecuted. Lawyers have a duty to foster respect for the law

and its administration. This duty arises as a result of their participation in the administration of justice and the legal system. It is inimical to the role and function of a legal practitioner that he or she advise or encourage a client to breach the law, regardless of whether the breach might be detected or prosecuted. Furthermore, if a lawyer becomes aware that a client is engaging in unlawful conduct:

... the appropriate response is to counsel the client against it and to eschew any involvement in that conduct, whether by assisting or being seen to be condone that activity. ... If a lawyer has reason to believe that a client will disregard the lawyer's advice and thereby contravene the law or some legal obligation to a third party, again he or she should counsel the client of the lawyer's responsibilities and, if the client persists, terminate instructions. (GE Dal Pont, *Lawyers' Professional Responsibility* (3rd ed, 2006) at 423 [19.10].)

89 This aspect of the duty of a legal practitioner underlies r 13.1 of the Conduct Rules.

90 In addition, underlying Mr Segler's advice to Mr Vallelonga was his view that a stay of the orders made by Commissioner Power would be obtained. That assumed that grounds existed for an appeal or a review of Commissioner Power's decision. That assumption was ultimately proved wrong. Further, Mr Segler apparently disregarded the fact that the BRB intended to oppose the grant of a stay. In a facsimile dated 16 January 2007 from Mr Mannes to Mr Segler, Mr Mannes indicated that the BRB had instructed him to oppose any stay application which might be made in relation to the orders made by Commissioner Power for reasons including that 'your client continued to engage in unregistered building activities following the District Court's decision and the cancellation of your client's registration in late 2006'. In his evidence, Mr Mannes confirmed that he had encouraged Mr Segler to make an application for a stay, although he advised Mr Segler that the BRB would oppose the grant of a stay.

91 The consequences for Mr Vallelonga if he continued to work as a builder while his registration as a builder was cancelled were serious. He faced prosecution under the BR Act, and if that prosecution was successful, a criminal conviction and the imposition of a penalty under the BR Act. Mr Segler's evidence confirmed that he was aware that the survival of Mr Vallelonga's business depended upon his being able to continue work as a builder. In those circumstances, it should have been apparent to Mr Segler that Mr Vallelonga would act in accordance with his advice. Indeed, as we have noted above, Mr Segler acknowledged that

when he advised Mr Vallelonga that he 'ought' to continue with his work as a builder pending an application for a stay, that that meant that Mr Vallelonga 'should' do so. We find that in these circumstances, by advising Mr Vallelonga as he did, Mr Segler effectively encouraged Mr Vallelonga to engage in illegal conduct.

92 We accept the LPCC's submission that Mr Segler's conduct in providing advice to Mr Vallelonga that he ought to continue building, in the circumstances outlined above, constituted a breach of cl 13.1 of the Conduct Rules. It is well established that the Conduct Rules may be regarded by the Tribunal as a guide to what is considered by the legal profession to be proper behaviour, and to this extent, they were regarded as relevant to determining whether a legal practitioner engaged in unprofessional conduct under the 1893 Act and the 2003 Act: *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198 at 214 (Ipp P, Pidgeon and Franklyn JJ agreeing at 201); *Quigley (A Practitioner) v The Legal Practitioners Complaints Committee* [2003] WASCA 228 at [17] (Parker J, Malcolm CJ and Anderson J agreeing at [1] and [2]) and *Legal Practitioners Complaints Committee and McCormack* [2009] WASAT 4 at [95].

93 In the same way, the Conduct Rules may be relevant to determining whether a legal practitioner engaged in professional misconduct or unsatisfactory professional conduct pursuant to the 2008 Act. However, the question whether the conduct of a practitioner constituted professional misconduct or unsatisfactory professional conduct will not necessarily be answered simply by determining if there was a breach of the Conduct Rules. The question remains whether the conduct of Mr Segler falls within the definition in s 402 or s 403 of the 2008 Act. In particular, conduct which constitutes a breach of the Conduct Rules may not necessarily be so serious as to meet the definition of 'professional misconduct' in s 403 of the 2008 Act.

94 Clause 13.1 of the Conduct Rules makes clear that advising a client to engage in conduct which a practitioner considers illegal is conduct which the legal profession would not regard as proper behaviour for a lawyer. A member of the public would be entitled to expect that a reasonably competent Australian legal practitioner would achieve a standard of competence which involves, amongst other things, compliance with the Conduct Rules.

95 In our view, Mr Segler's conduct fell short of the standard of competence that a member of the public is entitled to expect of a

reasonably competent Australian legal practitioner. It therefore constituted unsatisfactory professional conduct as defined in s 402 of the 2008 Act.

96 At [29] of his written submissions, and in his oral submissions, counsel for the LPCC submitted that Mr Segler's conduct 'involves a substantial failure to reach or maintain a reasonable standard of competence and diligence occurring in connection with Mr Segler's practice of law which justifies a finding that Mr Segler is not a fit and proper person to engage in legal practice pursuant to s 403 of the 2008 Act'. The construction of the definition of s 403 of the 2008 Act which was the basis for this submission was not addressed in argument but two possibilities exist. We read the LPCC's submission as contending that the conduct of Mr Segler constituted professional misconduct under s 403(1)(b) of the 2008 Act, in that it was an instance of conduct occurring in connection with the practice of law that would justify a finding that Mr Segler was not a fit and proper person to engage in legal practice. However, reference in the submission to the language of the definition of 'professional misconduct' in s 403(1)(a) of the 2008 Act might be viewed as premised on an understanding that (a) and (b) of that definition are to be read cumulatively. On that view, conduct which falls within (a) of the definition would be considered to amount to professional misconduct if it justifies a finding that a practitioner is not a fit and proper person to engage in legal practice. We do not read the definition in that way.

97 The use of the word 'includes' in the definition in s 403 of the 2008 Act suggests that (a) and (b) are intended to be examples of conduct which will constitute 'professional misconduct' and are not intended to be exhaustive of what constitutes 'professional misconduct': see DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) at 239 [6.56] and the cases cited therein. In that context, we view (a) and (b) as discrete examples of conduct which will constitute professional misconduct. In order to constitute 'professional misconduct', it is not necessary that the conduct both meets the description in (a) and justifies a finding that Mr Segler is not a fit and proper person to engage in legal practice under (b). Para (b) of the definition in s 403 of the 2008 Act clearly covers a far wider range of conduct than that described in (a) of that definition, including conduct which occurs otherwise than in connection with the practice of law. The essential characteristic of the range of conduct which is encompassed by s 403(1)(b), however, is that that conduct justifies a finding that a practitioner is not a fit and proper person to engage in legal practice. That is not an essential characteristic

of the conduct described in s 403(1)(a) of the 2008 Act. In other words, not all instances of 'professional misconduct' will involve the conclusion that a practitioner is not a fit and proper person to engage in legal practice.

98 The view we take of s 403(1) is also consistent with the fact that the orders which may be made by the Tribunal upon making a finding that a practitioner is guilty of professional misconduct are not confined to orders which would preclude the practitioner from legal practice: see s 438(2) and s 439, s 440 and s 441 of the 2008 Act.

99 There may, however, be instances of conduct which justifies a finding that a practitioner is not a fit and proper person to engage in legal practice for the purposes of the definition in s 403(1)(b) but where the factual context for that conduct involves a substantial failure to reach or maintain a reasonable standard of competence and diligence. That was the basis on which we understood the LPCC to put its case against Mr Segler.

100 In the present case, we are of the view that by giving the advice he did, in circumstances where it should have been clear to Mr Segler that Mr Vallelonga would act on the advice and thereby engage in illegal conduct with the risk of criminal prosecution as a result, Mr Segler's conduct involved a substantial failure to reach or maintain a reasonable standard of competence. The LPCC did not submit, and we do not find, that Mr Segler consciously urged his client to engage in illegal conduct. As we have found, however, Mr Segler effectively encouraged Mr Vallelonga to engage in illegal conduct. We consider that Mr Segler's conduct amounted to professional misconduct as defined in s 403(1)(a) of the 2008 Act.

101 Accordingly, we find Mr Segler guilty of professional misconduct pursuant to the 2008 Act in that between on or about 9 November 2006 and 28 February 2007, in the course of acting for Mr Vallelonga, Mr Segler advised Mr Vallelonga that he ought to carry out building projects at a time when Mr Segler knew that Mr Vallelonga was unregistered as a builder and in the knowledge that by so advising Mr Vallelonga, he was encouraging him to breach s 4 of the BR Act.

Evidence in relation to ground 2 of the application

102 In late January 2007, the BRB drew to the attention of the LPCC concerns it held about the advice provided by Mr Segler to Mr Vallelonga. On 8 March 2007, Mr Quilliam, a legal officer at the LPCC, wrote to

Mr Segler requesting his response to the allegation. Mr Segler responded by letter dated 3 April 2007, in which he made the following statement:

Regrettably, the subject matter of the complaint as reported to you has also been necessarily referred by me to both the Minister for Housing and Works within the state of Western Australia and the Corruption and Crime Commission.

Accordingly, and by reason of not least the constraints imposed by legislation related to that Commission, I have some difficulty in responding at this time to the extent of the allegations made ... I trust that you are cognisant of such constraints and appreciate that my representations to you ought not compromise or otherwise prejudice any investigation undertaken by or on behalf of the Commissioner.

103 Mr Segler admitted that the factual position was not as he had asserted it to be in his letter of 3 April 2007. In his evidence, Mr Segler gave the following explanation:

At the time I had drafted a letter to the Corruption and Crime Commission. The difficulty was that even though Mr Vallelonga had exhausted his avenues of recourse, a further application was made on his behalf to the State Administrative Tribunal in respect of the matter sometime in May or June of 2007 to see whether or not his licence could be reinstated by an order of the State Administrative Tribunal.

It was in the course of that application that someone else who appeared for the Builders' Registration Board said 'look, the better course of action would be to apply for reinstatement, and if you do that you might find that the new Board...might be sympathetic to his case'. I conveyed that to Mr Vallelonga. ... Mr Vallelonga told me to hold everything I was doing and focus on the application for reinstatement, which I did.

I appreciate I ought to have immediately raised that matter with the Complaints Committee but at the time I had a lot on my mind. Certainly, the changed instruction in relation to the Corruption and Crime Commission was not foremost in my mind. ... I was concerned to ensure we could get [Mr Vallelonga] back building as soon as possible.

104 In cross-examination, Mr Segler admitted that at the time that he wrote the letter dated 3 April 2007 to Mr Quilliam of the LPCC, he had not sent a letter to the Corruption and Crime Commission (CCC), notwithstanding his contrary assertion in that letter. Mr Segler accepted that the letter was wrong in its assertion that he had referred a complaint to the CCC. It was put to Mr Segler that this was deliberately misleading to the LPCC. Mr Segler's explanation was:

It wasn't intended to be. Deliberately misleading requires some mens rea intention ... it certainly wasn't my intention at that time, and that's because, I have already explained in my evidence the reason, what had happened in the interim I had taken Mr Vallelonga's instruction in relation to this aspect of possible corruption ... it concerned me, the entire proceedings by the Board and the conduct of them had concerned me; the communication of the decision of the Board had concerned me ...

So I sat him down, and I took his instruction, and I wrote that instruction down. Then I prepared a draft letter. ... Before I issued that letter, it was a letter that Mr Vallelonga would necessarily, of course, have to approve before I could issue it. ... I would not issue a letter to the Commissioner without having the...without a copy first being signed by our client. ... What had happened in the interim, as I indicated, was that I had appeared in the State Administrative Tribunal and was advised that Mr Vallelonga's best cause ... best recourse in this matter, was ... to reapply...to apply for reinstatement, not to apply to the SAT to review the cancellation order or SAT to review the penalty but rather, for...him to make an application direct to the Board for reinstatement that that may ... that he may find the new Board was sympathetic to him. I apprised Mr Vallelonga of that and he said don't do anything, don't then go and make a big issue to the Crime and Corruption Commission whilst I'm seeking ... [reinstatement] by a new Board.

105 Mr Vallelonga also gave evidence which touched on the second ground of the application against Mr Segler. Mr Vallelonga's evidence was that he wanted Mr Segler to report the conduct of persons within the BRB to the CCC for its investigation. Mr Vallelonga gave evidence that Mr Segler told him that he had made an application to the CCC. Mr Vallelonga also gave evidence that on the day of the hearing of the application to reinstate his licence, he told Mr Segler to hold all proceedings in relation to the CCC because it could jeopardise his chances of getting his licence back.

106 We note that the application to the SAT was made on 29 June 2007. That is, almost three months passed after Mr Segler wrote to the LPCC during which time he had not, and did not, refer a complaint about the conduct of officers of the BRB to the CCC, yet Mr Segler did not contact the LPCC to clarify the erroneous information provided in his letter of 3 April 2007. Further, nearly three months after his letter of 3 April 2007 to the LPCC, Mr Segler was instructed not to pursue a complaint to the CCC, yet he did not then contact the LPCC to clarify the position, or to respond to Mr Quilliam's letter of 8 March 2007.

107 By letter dated 21 February 2008, the LPCC again requested that Mr Segler provide his response in relation to the allegation made against

him by the BRB. Mr Segler responded by letter dated 30 April 2008. In that letter, Mr Segler addressed, amongst other things, his previous assertion that a complaint had been made to the CCC arising from the conduct the subject of the allegation against him to the LPCC, and stated:

I had previously explained to you that a complaint in respect of the circumstances relating to that cancellation was to be made to the Corruption and Crime Commission. By reason of developments in the litigation related to my client's appeals to Supreme and District Courts as well as the State Administrative Tribunal and then a perceived change of attitude by the Board's legal representatives to the cancellation of Mr Vallelonga's registration, I deemed it untimely to proceed with such a complaint until I had first exhausted all avenues of reinstatement of Mr Vallelonga's cancelled registration. At all material times in relation to this matter, I have adopted the view that any action on the part of my client that may prejudice or may otherwise compromise his livelihood as a builder was an inappropriate exercise of my professional judgment.

...

I have not attempted to pervert any administrative or judicial procedure in those respects. Whether other persons related to this matter have so acted will be an issue for the Corruption and Crime Commission to consider in due course.

108 That letter did nothing to correct the misleading information which Mr Segler gave to the LPCC in his letter of 3 April 2007. We note that the LPCC's application did not rely on Mr Segler's letter of 30 April 2008 as an instance of unsatisfactory professional conduct. Rather, the LPCC relied on the letter of 30 April 2008 to support its contention that Mr Segler's letter of 3 April 2007 was deliberately misleading. Mr Segler's letter of 30 April 2008 implied that a matter had been referred to the CCC, but that it had not been pursued. In cross-examination, Mr Segler accepted that his letter of 30 April 2008 was inaccurate in that a complaint to the CCC had not been made, yet Mr Segler's reference to the 'issue for the [CCC] to consider in due course' implied the contrary. Mr Segler's evidence was that 'whether there was an intention to do so in the future [that is, refer a matter to the CCC] would depend on my client's instructions'. In our view, that was a contrived explanation for the inaccuracy in Mr Segler's letter of 30 April 2008 and we do not accept it.

The parties' submissions in relation to ground 2

109 The LPCC submits that by his letter to the LPCC of 3 April 2007, Mr Segler deliberately misled the LPCC by stating that the subject matter of the complaint had been referred to the CCC, whereas in fact, no

complaint had been referred to the CCC. The LPCC points to the inconsistent explanation given by Mr Segler in his letter of 30 April 2008, namely that at the time of his earlier letter, a complaint 'was to be made' to the CCC. In addition, the LPCC points to [6] of Mr Segler's response in these proceedings which indicates that he 'deferred referral of matters' to the CCC. The LPCC submits that the only reasonable inference which is open is that Mr Segler misled the LPCC in order to avoid having to provide an explanation to the LPCC in response to the allegation made against him. The LPCC submits that such conduct, to a substantial degree, falls short of the standard of professional conduct observed or approved by members of the profession of good repute and competence.

110 Mr Segler conceded that there were aspects of his correspondence to the LPCC which were misleading, but he submitted that these ought to 'be construed in the total factual matrix'.

Conclusion in relation to ground 2

111 Mr Segler did not dispute that at the time he wrote his letter of 3 April 2007 to the LPCC, he had not, in fact, referred a complaint to the CCC on behalf of Mr Vallelonga. His assertion to the contrary in that letter was therefore misleading.

112 We reject Mr Segler's submission that at the time of writing his letter of 3 April 2007, he had no intention of misleading the LPCC for the following reasons: first, Mr Segler sought to rely on the untrue assertion that he had referred a complaint to the CCC as the justification for not responding to the LPCC in relation to the allegation made against him. Secondly, it was known to Mr Segler immediately after sending his letter of 3 April 2007 and for over 12 months thereafter (until he next wrote to the LPCC on 30 April 2008), that he had not in fact referred a matter to the CCC. Moreover, from 27 June 2007, Mr Segler was aware (following the receipt of his client's instructions) that no such referral to the CCC was to be made at all. Had Mr Segler not intended to mislead the LPCC, one would have expected that he would have sought to correct the erroneous information provided to the LPCC in his letter of 3 April 2007 at the earliest opportunity after that date, and at the very least, after 27 June 2007. He did not do so. Thirdly, in his letter to the LPCC of 30 April 2008, Mr Segler not only failed to correct the misleading information he had given the LPCC, but perpetuated that misinformation. All of this evidence strongly supports the inference that Mr Segler's response to the LPCC in his letter of 3 April 2007 was deliberately misleading.

113 In our view, Mr Segler's conduct in this respect fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. Accordingly, we find Mr Segler guilty of unsatisfactory professional conduct pursuant to s 402 of the 2008 Act in that on or about 3 April 2007, upon being asked by the LPCC to provide his response to a complaint against him, he gave a response which was deliberately misleading and designed to avoid giving a complete explanation at that time.

Further submissions as to penalty

114 In the course of the hearing, the parties did not make any submissions concerning the appropriate penalty which should be imposed should the tribunal find the allegations against Mr Segler to be established. In view of our findings, it is appropriate that the LPCC file and serve its submissions on penalty within 14 days of the date of the publication of these reasons, and that Mr Segler file and serve any submission in response on the question of penalty within 14 days of the LPCC's submissions. The Tribunal will then deal with the question of penalty on the papers, unless it considers it necessary to hear further from the parties.

Orders

1. There is a finding that between 9 November 2006 and 28 February 2007, Mr Segler was guilty of professional misconduct contrary to the *Legal Profession Act 2008* (WA) in that in the course of acting for Antonio Armando Vallelonga, Mr Segler advised Mr Vallelonga that he ought to carry out building projects at a time when Mr Segler knew that Mr Vallelonga was unregistered as a builder and in the knowledge that by so advising Mr Vallelonga, he was encouraging Mr Vallelonga to breach s 4 of the *Builders' Registration Act 1939* (WA).
2. There is a finding that on or about 3 April 2007, Mr Segler was guilty of unsatisfactory professional conduct contrary to s 402 of the *Legal Profession Act 2008* (WA) in that, upon being asked by the Legal Practitioners Complaints Committee to provide his response to a complaint against him, Mr Segler gave a

response which was deliberately misleading and designed to avoid giving a complete explanation at that time.

3. The Legal Practitioners Complaints Committee is to file and serve any submissions on penalty within 14 days of publication of these reasons.
4. Mr Segler is to file and serve any submissions on penalty within 14 days of the service of the Legal Practitioners Complaints Committee's submissions.
5. Subject to any further order of the Tribunal, the question of penalty is to be dealt with on the papers.

I certify that this and the preceding [114] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUSTICE J A CHANEY, PRESIDENT